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U.S. DEPARTMENT OF AGRICULTURE

DECISIONS OF COURTS IN CASES UNDER THE FEDERAL FOOD AND DRUGS ACT

COMPILED AND DIGESTED UNDER THE DIRECTION OF
MASTIN G. WHITE, *Solicitor*

BY

OTIS H. GATES
Attorney, Office of the Solicitor

UNITED STATES
GOVERNMENT PRINTING OFFICE
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CONTENTS

	Page
Table of cases	V
The Federal Food and Drugs Act and amendatory and supplemental enactments	1
Food and Drugs Act, June 30, 1906	1
Amendatory and supplemental provisions	6
Decisions of courts	11
Digest of court decisions	1345

TABLE OF CASES

	Page
Abbott Bros. Co., United States *v*	722
Abbott Bros. Co. *v.* United States	831
Alban, United States *v*	1014
Aletris Root, United States *v.* One Bale of	1212
Alsop Process Co. *v.* Wilson, Secretary of Agriculture	37
Alsop Process Co. *v.* Wilson, Secretary of Agriculture	54
Ambruster *v.* Mellon, Secretary of the Treasury, et al	1236
American Chicle Co., United States *v*	362
American Druggists' Syndicate, United States *v*	250
American Laboratories, United States *v*	641
American Maid Flour Mills, United States *v*	1286
Anderson & Co., A. O., *v.* United States	1053
Antikamnia Chemical Co., United States *v*	260
Antikamnia Chemical Co., United States *v*	552
Antikamnia Tablets, United States *v* 100 Packages of	178
Apples et al., United States *v.* 3,192 Boxes of	1199
Apples, United States *v.* 630 Baskets of	1205
Asafoetida, United States *v.* Five Boxes of	160
Asafoetida, United States *v.* Nine Boxes of	165
Athlophoros Co., United States *v.* The	732
Atlantic Macaroni Co., United States *v*	793
Auerbach & Sons, United States *v*	357
B. & M. External Remedy, United States *v*	1235
B. & M. External Remedy, United States *v.* Eleven Packages of	1059
"B. & M.", United States *v.* 17 Bottles, Large Size, and 65 Bottles, Small Size, More or Less, of an Article Labeled in Part	1287
Barnet Creamery Association, United States *v*	1149
Baumert et al., United States *v*	113
Bell & Co., United States *v*	828
Bethestda Mineral Spring Co., United States *v*	841
Bettman-Johnson Co., United States *v*	299
Bi-Carb-Sodarine, United States *v.* 165 Cases of	202
Blanke Tea & Coffee Co., United States *v.* C. F	432
Blanke Tea & Coffee Co., United States *v.* C. F	439
Blazek, United States *v*	1074
Boeckmann, United States *v*	88
Boeckel & Co. et al., United States *v.* R. C	637
Boise Valley Cooperative Creamery Co., United States *v*	1203
Bowers, United States *v*	763
Bowman's Abortion Remedy, United States *v.* 100 Boxes of	1187
Bradley *v.* United States	964
Bred Spred, United States *v.* 49½ Cases of	1204
Bred Spred, etc., et al., United States *v.* 15 Cases of	1236
Bred Spred, etc., et al., United States *v.* 10 Cases, More or Less	1262
Brina *v.* United States	104
Buffalo Cold Storage Co., United States *v*	103
Buffalo Lithia Water, United States *v.* Seven Cases of	573
Butter, United States *v.* Nine Barrels of	826
Calcium Acid Phosphate, United States *v.* 100 Barrels of	58
Callaway et al., Knapp et al. *v*	1276
Capon Springs Water, United States *v.* 94 Dozen, More or Less, Half-Gallon Bottles	1216
Catz American Co., Inc., United States *v*	1282
Centralia Dairy Co., United States *v*	1336
Champagne, United States *v.* 5 Cases of	503
Charles *v.* United States	189

	Page
Cherries, United States *v.* 897 Cases of Canned	1183
Cherries, United States *v.* 384 Cases of Canned	1176
Chichester Chemical Co., United States *v*	1115
Chichester Chemical Co. et al. *v.* United States	1258
Coal Tar Color, United States *v.* One Pound Can	1019
Coburn, District of Columbia *v*	120
Coca Cola, United States *v.* 40 Barrels and 20 Kegs of	239
Coca Cola, United States *v.* 40 Barrels and 20 Kegs of	606
Coca Cola Co., United States *v*	741
Colors, United States *v.* 37 One-Pound Packages of	1165
Confectionery, United States *v.* 307 Cases	353
Corn Meal, United States *v.* 58 Sacks and 70 Sacks	322
Corno Horse and Mule Feed, United States *v.* One Carload of	274
Crab Orchard Concentrated Mineral Water, United States *v.* 22 Bottles of	1055
Crab Orchard Mineral Water, United States *v.* 36 Bottles of	1011
Creme de Menthe, United States *v.* 4½ Cases of	1191
Crisp's Tung-Tone, et al., United States *v.* 9 Packages of	1268
Dade v. United States	465
Direct Sales Co., United States *v.*	866
District of Columbia *v.* Coburn	120
Dobry Manufacturing Co., United States *v.* John	1085
Drug Products, United States *v.* 141 Bottles of	931
Drugs, United States *v.* 8 Packages and Casks of	149
Duffy-Mott Co. *v.* United States	1078
Dunham Manufacturing Co., United States *v*	440
Eckman's Alterative, 7 Cases of, *v.* United States	707
Economy Special Hog Feed, United States *v.* 426 Bags of	1001
Egg Product, United States *v.* 443 Cans of Frozen	197
Egg Product, United States *v.* 443 Cans of Frozen	345
Egg Product, 443 Cans of Frozen, *v.* United States	416
Egg Product, United States *v.* One Barrel Desiccated	99
Eggs, United States *v.* 50 Cans of Preserved Whole	74
Eggs, United States *v.* 13 Crates of Frozen	531
Eggs, United States *v.* 13 Crates of Frozen	605
Eggs, United States *v.* 300 Cans of Frozen	283
Eggs, United States *v.* 3,000 Pounds of Frozen	198
Eggs, United States *v.* Two Barrels of Desiccated	232
Excelsior Baking Co., United States *v*	501
Finlayson et al., United States *v*	535
Flour, United States *v.* 420 Sacks of	96
Flour, United States *v.* 625 Sacks of	129
Flour, United States *v.* 350 Sacks of "Princess", and 50 Sacks of "Fancy Melba"	351
Frank et al., United States *v*	205
Frank et al. *v.* United States	329
French Silver Dragée Co., United States *v*	43
French Silver Dragée Co. *v.* United States	121
Fruit Puddine, United States *v.* 150 Cases of	557
Fulton Co., United States *v.* John J	1229
Galt & Co., Wm. M., *v.* United States	422
Gamanos et al., United States *v*	927
Gandara, United States *v*	984
Germack, United States *v*	1178
German American Specialty Co., United States *v*	459
Ghirardelli Co., United States *v.* D	397
Gidden, United States *v*	360
Gingerole Co., United States *v*	977
Glaser, Kohn & Co., United States *v*	601
Glaser, Kohn & Co. *v.* United States	651
Golden & Co., United States *v*	1033
Goode *v.* United States	698
Goodman, United States *v*	484

Page
Goodwin et al *v.* United States 1107
Goodwin et al *v.* United States 1130
Gorman & Co., United States *v* 1171
Grape Juice, United States *v.* 74 Cases of 144
Grape Juice, United States *v.* 74 (or 20) Cases of 256
Grenadine Syrup, United States *v.* 30 Cases Purporting to be 394
Griebler, United States *v* 29
Gumpert et al., United States *v.* S 182

Hall *v.* United States 978
Hall-Baker Grain Co., United States *v* 291
Hall-Baker Grain Co. *v.* United States 391
Haltiwanger-Taylor Drug Co., United States *v* 822
Harper, United States *v* 11
Harvey Co., United States *v.* G. F 754
Heide, United States *v* 325
Heimann, United States *v* 840
Heinle Specialty Co., United States *v.* Charles L 82
Henning & Co., William, *v.* United States 344
Hermance's Asthma and Hay Fever Medicine, United States *v.* 60 Bottles of Dr 1324
Hipolite Egg Co. *v.* United States 223
Hobart et al., United States *v* 171
Holland Gin, United States *v.* Five Cases of Hurdle Brand 549
Honey, United States *v.* Six Cases of 543
Hopkins, United States *v* 585
Hopkins & Co., United States *v.* J. L 366
Hopkins & Co., United States *v.* J. L 401
Houston, Secretary of Agriculture, Huyler's *v* 507
Houston, Secretary of Agriculture, Huyler's *v* 572
Hudson Manufacturing Co., United States *v* 462
Hudson Manufacturing Co. *v.* United States 344
Hudson Manufacturing Co. et al., United States *v* 420
Huyler's *v.* Houston, Secretary of Agriculture 507
Huyler's *v.* Houston, Secretary of Agriculture 572
Huyler's, United States *v* 455
Hyde, Secretary of Agriculture, et al., National Remedy Co. *v* 1230
Hyde, Secretary of Agriculture, et al., National Remedy Co. *v* 1272
Hygienic Health Food Co., United States *v* 259

Italian Importing Co., United States *v* 187
Italian Importing Co., United States *v* 922

Johnson, United States *v* 85
Johnson, United States *v* 267
Johnson et al., United States *v* 847
Jones, Savage *v* 376
Joslin-Schmidt Co., United States *v* 881

Kar-Ru Chemical Co., United States *v* 900
Kar-Ru Chemical Co. *v.* United States 970
Kellett, United States *v* 711
Kirkwood, Sligh *v* 634
Knapp et al *v.* Callaway et al 1276
Knowlton Danderine Company, United States *v* 89
Koca Nola Co., United States *v* 59
Koshland, United States *v* 777
Krumm, United States *v* 993

"Lee's Save The Baby", United States *v.* 23 1/12 Dozen Bottles, Etc., of 1240
Lehn & Fink, United States *v* 229
Lehn & Fink, United States *v* 411
Lexington Mill & Elevator Co., United States *v* 577
Lexington Mill & Elevator Co. *v.* United States 443
Libby, McNeill & Libby, United States *v* 442
Libby, McNeill & Libby *v.* United States 540
Liquid Extracts, United States *v.* 65 Casks of 47
London Dry Gin, United States *v.* 36 Bottles of 489
London Dry Gin, United States *v.* 36 Bottles of 570

Page

Long, United States *v*---- 989
Lorick & Lowrance, United States *v*---- 202
Lowenthal, United States *v*---- 626

Macaroni, United States *v*. 90 Boxes of---- 561
Macaroni, United States *v*. 175 Boxes of---- 426
Macaroni, United States *v*. 1,950 Boxes of---- 112
Macaroni, United States *v*. 267 Boxes of---- 630
McConnon & Co., United States *v*---- 496
McDermott et al. *v*. Wisconsin---- 473
McIlvaine Bros., United States *v*---- 1127
McLean Medicine Co., United States *v*. Dr. J. H---- 850
McLean Medicine Co., Dr. J. H., *v*. United States---- 907
Mapleine, United States *v*. 300 Cases of---- 39
Marmarelli et al., United States *v*---- 1122
Matusow, United States *v*---- 664
Mayfield et al., United States *v*---- 90
Mellon, Secretary of the Treasury, et al., Ambruster *v*---- 1236
Merchants Biscuit Co., United States *v*. The---- 1129
Mineral Water, United States *v*. 275 Cases of---- 920
Mohn Wine Co., United States *v*---- 316
Molasses, United States *v*. 779 Cases of---- 65
Monahos, United States *v*---- 935
Monotti-Larimer, United States *v*---- 1144
Morehouse, United States *v*---- 1210
Morgan et al., United States *v*---- 146
Morgan et al., United States *v*---- 335
Mulford's Wintergreens, United States *v*. Four Boxes of---- 592
Mustard Seed, United States *v*. 706 Bags of Alleged---- 938
Myers, United States *v*---- 1159

National Remedy Co. *v*. Hyde, Secretary of Agriculture, et al---- 1230
National Remedy Co. *v*. Hyde, Secretary of Agriculture, et al---- 1272
Natura Company, United States *v*---- 836
Nave-McCord Mercantile Co. *v*. United States---- 166
Newton Tea & Spice Co., United States *v*---- 950
Newton Tea & Spice Co. *v*. United States---- 1089
Nuts, United States *v*. 25 Bags of---- 677

Oats, United States *v*. 154 Sacks of---- 1039
Oil of Sweet Birch, etc., United States *v*. Two Cans of---- 963
Olives, United States *v*. Nine Barrels of---- 128
Olives, United States *v*. 10 Barrels of---- 125
Oranges, United States *v*. 462 Boxes of---- 816
Oranges, United States *v*. 315 Boxes of---- 1208
Oriental Dragée Company, United States *v*---- 35
Oysters, United States *v*. 408 Bushels of---- 718

Paraskevopolus, United States *v*---- 925
Peanuts, United States *v*. 350 Bags of Shell---- 685
Pepper, United States *v*. 75 Boxes of Alleged---- 340
Pepper, United States *v*. Six Barrels of Ground---- 817
Philadelphia Pickling Co., United States *v*---- 414
Philadelphia Pickling Co. *v*. United States---- 451
Piso Co., United States *v*---- 319
Pork and Beans, United States *v*. 1,367 Cases of---- 766
Potter, United States *v*---- 409
Pulmonol Chemical Co., United States *v*---- 806

Radam's Microbe Killer, United States *v*. 539 Boxes and 323 Cartons of Wm---- 511
Rawleigh Co., United States *v*. W. T---- 1322
Red Kidney Beans, United States *v*. 100 Cases of Canned---- 982
Richie Company, United States *v*. The---- 286
Rigney & Co., United States *v*---- 632
Rinchini, United States *v*---- 318
Rosebrock & Co., United States *v*. F. E---- 190
Russian Monopol Co., United States *v*---- 784

Page
St. Louis Coffee & Spice Mills, United States *v*---- 44
St. Louis Dairy Co., United States *v*---- 962
Salmon, United States *v.* 430 Cases of Canned---- 1035
Salmon, United States *v.* 1,459 Cases of Canned---- 995
Salmon, United States *v.* 1,974 Cases of Canned---- 1037
Salmon, United States *v.* 1,974 Cases of Canned---- 1108
Salmon, United States *v.* 1,195 Cases of Canned---- 1099
Salmon, United States *v.* 1,600 Cases of Canned---- 1105
Salmon, United States *v.* 200 Cases, More or Less, of Canned---- 1095
Salmon, United States *v.* 243 Cases of Canned---- 1131
Salmon, United States *v.* 2,995 Cases of Canned---- 1136
Salmon, United States *v.* 2,205 Cases of Canned---- 1133
Sardines, United States *v.* 1,000 Cases of---- 1113
Savage *v.* Jones---- 376
Savage *v.* Scovell---- 18
Scaduto, United States *v*---- 947
Scanlon, United States *v*---- 28
Schallinger Produce Co., United States *v*---- 623
Schider, United States *v*---- 875
Schraubstadter et al., United States *v*---- 237
Schraubstadter et al. *v.* United States---- 398
Schuch, United States *v*---- 209
Schurman et al., United States *v*---- 95
Scovell, Savage *v*---- 18
Scudder Syrup Co., United States *v*---- 461
Scully et al., United States *v*---- 460
Seacoast Canning Co., United States *v*---- 1209
Shawnee Milling Co. *v.* Temple, U. S. Dist. Atty., et al---- 106
Sherer-Gillett Co., United States *v*---- 1093
Shreveport Grain & Elevator Co., United States *v*---- 1239
Shreveport Grain & Elevator Co., United States *v*---- 1339
Shucart, United States *v*---- 693
Simon et al., United States *v*---- 728
Simpson, United States *v*---- 700
Simpson *v.* United States---- 832
Skarzynski & Co., United States *v.* A---- 860
Sligh *v.* Kirkwood---- 634
Smack, United States *v.* 24⅞ Gallons of---- 1181
Smith, United States *v*---- 1173
South Hero Creamery Association, United States *v*---- 1142
South Peacham Creamery Co., United States *v*---- 1147
South Peacham Creamery Co., United States *v*---- 1266
Sparkling White Seal, United States *v.* 9 Cases of---- 1023
Sprague et al., United States *v*---- 508
Spraul & Co., United States *v.* George---- 217
Steinhardt Bros. & Co. *v.* United States---- 327
Stephens Co., United States *v.* Dr. J. L---- 305
Stephens Co., Dr. J. L., *v.* United States---- 471
Stewart Sulphur Co., United States *v.* C. M. C---- 669
Sugar, United States *v.* 46 Packages and Bags of---- 168
Sweet Valley Wine Co., United States *v*---- 468
Swift & Co., United States *v*---- 717
Swift & Co., United States *v*---- 1146
Syrup, United States *v.* Certain Cans of---- 328
Syrup, United States *v.* 68 Cases of---- 62

Tabasco Flavor Catsup, United States *v.* 1038 Cases of---- 871
Taylor, United States *v*---- 839
Temple, U. S. Dist. Atty., et al., Shawnee Milling Co. *v*---- 106
Temple, U. S. Dist. Atty., et al., Updike Milling Co. *v*---- 106
Tepee Apples et al., United States *v.* 100 Cases of---- 20
Tetz et al., United States *v*---- 917
Texas Wonder, United States *v.* One Gross Packages of A---- 910
Texas Wonder, United States *v.* 60 Dozen Bottles of A---- 888
Thomson & Taylor Spice Co., United States *v*---- 390
Tolman & Co., United States *v.* John A---- 78
Tomato Catsup, United States *v.* 1,246 Cases of---- 943

	Page
Tomato Catsup, United States *v.* 720 Cases of	877
Tomato Catsup, United States *v.* 650 Cases of	31
Tomato Catsup, United States *v.* 200 Cases of Adulterated	583
Tomato Catsup, United States *v.* 275 Cases	141
Tomato Pulp, United States *v.* 5,060 Cans of	780
Tomato Pulp, United States *v.* 1,500 Cases of	892
Tomato Puree, United States *v.* 1,000 Cases of	704
Tomato Puree, United States *v.* 1,590 Cases of	914
Tomatoes, United States *v.* 154 Cases of	967
Tomatoes, United States *v.* 3,998 Cases of Canned	1213
Tratamiento Zendejas, United States *v.* 186 Bottles of	998
Trinidad Creamery Co., United States *v*	1152
Tuberclecide Co., United States *v*	729
Tucker, United States *v*	248
Tullibees, United States *v.* 186 Boxes of Whole Tullibees and 116 Boxes of Dressed	1342
Tuna Fish, United States *v.* 18 Cases of	1162
Tuna Fish, United States *v.* 620 Cases of Canned	1281
Union Dairy Co. *v.* United States	869
Union Pacific Tea Co., United States *v*	196
Updike Milling Co. *v.* Temple, U. S. Dist. Atty., et al	106
Vanilla Tonka and Compound, United States *v.* Three Barrels of	201
"Vapex", United States *v.* 11 Cartons of Drug Labeled in Part	1332
Vinegar, Ninety-five Barrels, More or Less, Apple Cider, *v.* United States	1079
Vinegar, United States *v.* 95 Barrels, More or Less, Alleged Apple Cider	1047
Vinegar, United States *v.* 95 Barrels, More or Less, Alleged Apple Cider	1118
Vinegar, United States *v.* 100 Barrels of	287
Vinegar, United States *v.* 1,300 Cases	899
Vinegar, United States *v.* 75 Barrels of	332
Vinegar, United States *v.* 65 Barrels of	1029
Vinegar, United States *v.* 10 Barrels of	254
Von Bremen, et al., United States *v*	193
Von Bremen, et al. *v.* United States	338
Washburn & Co., United States *v.* F. B	434
Washburn & Co., F. B., *v.* United States	654
Watson-Durand-Kasper Grocery Co., United States *v*	837
Wedell, United States *v*	771
Weeks, United States *v*	485
Weeks, United States *v*	519
Weeks, United States *v*	528
Weeks *v.* United States	613
Weeks *v.* United States	646
Weeks *v.* United States	650
Weeks *v.* United States	867
Wells, United States *v*	480
Wells Co., United States *v.* J. Lindsay	169
Westen Tea & Spice Co., United States *v.* Edward	69
Wheat Middlings, United States *v.* 200 Sacks of	1189
Whisky, United States *v.* 50 barrels of	22
Williams' Pink Pills, United States *v.* Eleven Gross Packages of Dr	680
Williams' Pink Pills, Eleven Gross Packages of Dr., *v.* United States	752
Wilson, In re	33
Wilson & Co., United States *v*	999
Wilson, Secretary of Agriculture, Alsop Process Co. *v*	37
Wilson, Secretary of Agriculture, Alsop Process Co. *v*	54
Wine, United States *v.* 60 Barrels of	658
Wisconsin, McDermott et al. *v*	473
Wood Manufacturing Co., United States *v.* W. B	1002
Wood Manufacturing Co., W. B., *v.* United States	1070
Wood Manufacturing Co., W. B., *v.* United States	1098
Wright et al., United States *v*	482

DECISIONS OF COURTS IN CASES UNDER THE FEDERAL FOOD AND DRUGS ACT

THE FEDERAL FOOD AND DRUGS ACT AND AMENDATORY AND SUPPLEMENTAL ENACTMENTS

THE FOOD AND DRUGS ACT, JUNE 30, 1906 [1]

AN ACT For preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be unlawful for any person to manufacture within any Territory or the District of Columbia any article of food or drug which is adulterated or misbranded, within the meaning of this Act; and any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor, and for each offense shall, upon conviction thereof, be fined not to exceed five hundred dollars or shall be sentenced to one year's imprisonment, or both such fine and imprisonment, in the discretion of the court, and for each subsequent offense and conviction thereof shall be fined not less than one thousand dollars or sentenced to one year's imprisonment, or both such fine and imprisonment, in the discretion of the court.

SEC. 2. That the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this Act, is hereby prohibited; and any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this Act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded foods or drugs, or export or offer to export same to any foreign country, shall be guilty of a misdemeanor, and for such offense be fined not exceeding

[1] Act of June 30, 1906, ch. 3915, 34 Stat. 768.

two hundred dollars for the first offense, and upon conviction for each subsequent offense not exceeding three hundred dollars or be imprisoned not exceeding one year, or both, in the discretion of the court: *Provided*, That no article shall be deemed misbranded or adulterated within the provisions of this Act when intended for export to any foreign country and prepared or packed according to the specifications or directions of the foreign purchaser when no substance is used in the preparation or packing thereof in conflict with the laws of the foreign country to which said article is intended to be shipped; but if said article shall be in fact sold or offered for sale for domestic use or consumption, then this proviso shall not exempt said article from the operation of any of the other provisions of this Act.

SEC. 3. That the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor [2] shall make uniform rules and regulations for carrying out the provisions of this Act, including the collection and examination of specimens of foods and drugs manufactured or offered for sale in the District of Columbia, or in any Territory of the United States, or which shall be offered for sale in unbroken packages in any State other than that in which they shall have been respectively manufactured or produced, or which shall be received from any foreign country, or intended for shipment to any foreign country, or which may be submitted for examination by the chief health, food, or drug officer of any State, Territory, or the District of Columbia, or at any domestic or foreign port through which such product is offered for interstate commerce, or for export or import between the United States and any foreign port or country.

SEC. 4.[3] That the examinations of specimens of foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of such Bureau, for the purpose of determining from such examinations whether such articles are adulterated or misbranded within the meaning of this Act; and if it shall appear from any such examination that any of such specimens is adulterated or misbranded within the meaning of this Act, the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such sample was obtained. Any party so notified shall be given an opportunity to be heard, under such rules and regulations as may be prescribed as aforesaid, and if it appears that any of the provisions of this Act have been violated by such party, then the Secretary of Agriculture shall at once certify the facts to the proper United States district attorney, with a copy of the results of the analysis or the examination of such article duly authenticated by the analyst or officer making such examination, under the oath of such officer. After judgment of the court, notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid.

SEC. 5. That it shall be the duty of each district attorney to whom the Secretary of Agriculture shall report any violation of this Act, or to whom any health or food or drug officer or agent of any State, Territory, or the District of Columbia shall present satisfactory evi-

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[2] See act Mar. 4, 1913, ch. 141, sec. 1, 37 Stat. 736.
[3] See provision of act Jan. 18, 1927, p. 8, *post*.

dence of any such violation, to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States, without delay, for the enforcement of the penalties as in such case herein provided.

SEC. 6. That the term "drug," as used in this Act, shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals. The term "food," as used herein, shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound.

SEC. 7. That for the purposes of this Act an article shall be deemed to be adulterated:

In case of drugs:

First. If, when a drug is sold under or by a name recognized in the United States Pharmacopœia or National Formulary, it differs from the standard of strength, quality, or purity, as determined by the test laid down in the United States Pharmacopœia or National Formulary official at the time of investigation: *Provided*, That no drug defined in the United States Pharmacopœia or National Formulary shall be deemed to be adulterated under this provision if the standard of strength, quality, or purity be plainly stated upon the bottle, box, or other container thereof although the standard may differ from that determined by the test laid down in the United States Pharmacopœia or National Formulary.

Second. If its strength or purity fall below the professed standard or quality under which it is sold.

In the case of confectionery:

If it contain terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt or spiritous liquor or compound or narcotic drug.

In the case of food:

First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

Second. If any substance has been substituted wholly or in part for the article.

Third. If any valuable constituent of the article has been wholly or in part abstracted.

Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health: *Provided*, That when in the preparation of food products for shipment they are preserved by any external application applied in such manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the covering of the package, the provisions of this Act shall be construed as applying only when said products are ready for consumption.

Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal

unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter.

SEC. 8.[4] That the term "misbranded," as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

That for the purposes of this Act an article shall also be deemed to be misbranded:

In case of drugs:

First. If it be an imitation of or offered for sale under the name of another article.

Second. If the contents of the package as originally put up shall have been removed, in whole or in part, and other contents shall have been placed in such package, or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein.

In the case of food:

First. If it be an imitation of or offered for sale under the distinctive name of another article.

Second. If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if it fail to bear a statement on the label of the quantity or proportion of any morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any of such substances contained therein.

Third. If in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package.

Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

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[4] See amendment, act of Aug. 23, 1912, p. 6, *post;* amendment, act of Mar. 3, 1913, p. 7, *post;* provision of act of July 24, 1919, p. 8, *post;* and amendment, act of July 8, 1930, p. 8, *post.*

Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word "compound," "imitation," or "blend," as the case may be, is plainly stated on the package in which it is offered for sale: *Provided*, That the term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only: *And provided further*, That nothing in this Act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except in so far as the provisions of this Act may require to secure freedom from adulteration or misbranding.

SEC. 9. That no dealer shall be prosecuted under the provisions of this Act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this Act, designating it. Said guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines and other penalties which would attach, in due course, to the dealer under the provisions of this Act.

SEC. 10. That any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this Act, and is being transported from one State, Territory, District, or insular possession to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, or if it be sold or offered for sale in the District of Columbia or the Territories, or insular possessions of the United States, or if it be imported from a foreign country for sale, or if it is intended for export to a foreign country, shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. And if such article is condemned as being adulterated or misbranded, or of a poisonous or deleterious character, within the meaning of this Act, the same shall be disposed of by destruction or sale, as the said court may direct, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States, but such goods shall not be sold in any jurisdiction contrary to the provisions of this Act or the laws of that jurisdiction: *Provided, however*, That upon the payment of the costs of such libel proceedings and the execution and delivery of a good and sufficient bond to the effect that such articles shall not be sold or otherwise disposed of contrary to the provisions of this Act, or the laws of any State, Territory, District, or insular possession, the court may by order direct that such articles be delivered to the owner thereof. The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States.

SEC. 11. The Secretary of the Treasury shall deliver to the Secretary of Agriculture, upon his request from time to time, samples of foods and drugs which are being imported into the United States or offered for import, giving notice thereof to the owner or consignee, who may appear before the Secretary of Agriculture, and have the right to introduce testimony, and if it appear from the examination of such samples that any article of food or drug offered to be imported into the United States is adulterated or misbranded within the meaning of this Act, or is otherwise dangerous to the health of the people of the United States, or is of a kind forbidden entry into, or forbidden to be sold or restricted in sale in the country in which it is made or from which it is exported, or is otherwise falsely labeled in any respect, the said article shall be refused admission, and the Secretary of the Treasury shall refuse delivery to the consignee and shall cause the destruction of any goods refused delivery which shall not be exported by the consignee within three months from the date of notice of such refusal under such regulations as the Secretary of the Treasury may prescribe: *Provided*, That the Secretary of the Treasury may deliver to the consignee such goods pending examination and decision in the matter on execution of a penal bond for the amount of the full invoice value of such goods, together with the duty thereon, and on refusal to return such goods for any cause to the custody of the Secretary of the Treasury, when demanded, for the purpose of excluding them from the country, or for any other purpose, said consignee shall forfeit the full amount of the bond: *And provided further*, That all charges for storage, cartage, and labor on goods which are refused admission or delivery shall be paid by the owner or consignee, and in default of such payment shall constitute a lien against any future importation made by such owner or consignee.

SEC. 12. That the term "Territory" as used in this Act shall include the insular possessions of the United States. The word "person" as used in this Act shall be construed to import both the plural and the singular, as the case demands, and shall include corporations. companies, societies and associations. When construing and enforcing the provisions of this Act, the act, omission, or failure of any officer, agent, or other person acting for or employed by any corporation, company, society, or association, within the scope of his employment or office, shall in every case be also deemed to be the act, omission, or failure of such corporation, company, society, or association as well as that of the person.

SEC. 13. That this Act shall be in force and effect from and after the first day of January, nineteen hundred and seven.

Approved June 30, 1906.

AMENDATORY AND SUPPLEMENTAL ENACTMENTS

AN ACT To amend section eight of the Food and Drugs Act approved June thirtieth, nineteen hundred and six.[6]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That that part of

[6] Act of Aug. 23, 1912, ch. 352, 37 Stat. 416, known as the "Sherley Amendment."

section eight of the Food and Drugs Act of June thirtieth, nineteen hundred and six, defining what shall be misbranding in the case of drugs, be, and the same is hereby, amended by adding thereto a third paragraph to read as follows:

"If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent."

So that the said part of said section eight shall read as follows:

"SEC. 8. That the term 'misbranded,' as used herein, shall apply to all drugs or articles of food or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

"That for the purposes of this Act an article shall also be deemed to be misbranded. In case of drugs:

"First. If it be an imitation of or offered for sale under the name of another article.

"Second. If the contents of the package as originally put up shall have been removed, in whole or in part, and other contents shall have been placed in such package, or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein.

"Third. If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent."

Approved, August 23, 1912.

AN ACT To amend section eight of an Act entitled "An Act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes," approved June thirtieth, nineteen hundred and six.[7]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section eight of an Act entitled "An Act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes," approved June thirtieth, nineteen hundred and six, be, and the same is hereby, amended by striking out the words "Third. If in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package," and inserting in lieu thereof the following:

[7] Act of Mar. 3, 1913, ch. 117, 37 Stat. 732, known as the "Gould Amendment."

"Third. If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count: *Provided, however,* That reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provisions of Section three of this Act."

SEC. 2. That this Act shall take effect and be in force from and after its passage: *Provided, however,* That no penalty of fine, imprisonment, or confiscation shall be enforced for any violation of its provisions as to domestic products prepared or foreign productions imported prior to eighteen months after its passage.

Approved, March 3, 1913.

That the word "package" where it occurs the second and last time in the act entitled "An act to amend section 8 of an act entitled, 'An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes,'" approved March 3, 1913, shall include and shall be construed to include wrapped meats inclosed in papers or other materials as prepared by the manufacturers thereof for sale.[8]

AN ACT To define butter and to provide a standard therefor.[9]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purposes of the Food and Drug Act of June 30, 1906 (Thirty-fourth Statutes at Large, page 768), "butter" shall be understood to mean the food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter, and containing not less than 80 per centum by weight of milk fat, all tolerances having been allowed for.

Approved, March 4, 1923.

Hereafter the examinations of specimens of foods, drugs, insecticides, paris greens, lead arsenates, and fungicides provided for by section 4 of the Food and Drugs Act of June 30, 1906, and by section 4 of the Insecticide Act of 1910, shall be made in the Food, Drug, and Insecticide Administration or in such other branches of the Department of Agriculture as the Secretary of Agriculture may direct.[10]

AN ACT To amend section 8 of the Act entitled "An Act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes," approved June 30, 1906, as amended.[11]

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[8] Act of July 24, 1919, ch. 26, 41 Stat. 234, 271, known as the "Kenyon Amendment."
[9] Act of Mar. 4, 1923, ch. 268, 42 Stat. 1500.
[10] Act Jan. 18, 1927, ch. 39, 44 Stat. 976, 1003.
[11] Act of July 8, 1930, ch. 874, 46 Stat. 1019, known as the "McNary-Mapes Amendment."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 8 of the Act of June 30, 1906, entitled "An Act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes," as amended, is amended by adding at the end thereof the following:

"Fifth. If it be canned food and falls below the standard of quality, condition, and/or fill of container, promulgated by the Secretary of Agriculture for such canned food and its package or label does not bear a plain and conspicuous statement prescribed by the Secretary of Agriculture indicating that such canned food falls below such standard. For the purposes of this paragraph the words canned food mean all food which is in hermetically sealed containers and is sterilized by heat, except meat and meat food products which are subject to the provisions of the Meat Inspection Act of March 4, 1907 (Thirty-fourth Statutes, page 1260), as amended, and except canned milk; the word class means and is limited to a generic product for which a standard is to be established and does not mean a grade, variety, or species of a generic product. The Secretary of Agriculture is authorized to determine, establish, and promulgate, from time to time, a reasonable standard of quality, condition, and/or fill of container for each class of canned food as will, in his judgment, promote honesty and fair dealing in the interest of the consumer; and he is authorized to alter or modify such standard from time to time as, in his judgment, honesty and fair dealing in the interest of the consumer may require. The Secretary of Agriculture is further authorized to prescribe and promulgate from time to time the form of statement which must appear in a plain and conspicuous manner on each package or label of canned food which falls below the standard promulgated by him, and which will indicate that such canned food falls below such standard, and he is authorized to alter or modify such form of statement, from time to time, as in his judgment may be necessary. In promulgating such standards and forms of statements and any alteration or modification thereof, the Secretary of Agriculture shall specify the date or dates when such standards shall become effective, or after which such statements shall be used, and shall give public notice not less than ninety days in advance of the date or dates on which such standards shall become effective or such statements shall be used. Nothing in this paragraph shall be construed to authorize the manufacture, sale, shipment, or transportation of adulterated or misbranded foods."

Approved, July 8, 1930.

AN ACT To amend the Act entitled "An Act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes", approved June 30, 1906, as amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes", approved June 30, 1906, as amended, is amended by adding after section 10 thereof the following new section:

SEC. 10A. The Secretary of Agriculture, upon application of any packer of any sea food sold in interstate commerce, may at his discretion designate supervisory inspectors to examine and inspect all premises, equipment, methods, materials, containers, and labels used by such applicants in the production of such food. If the food is found to conform to the requirements of this Act, the applicant shall be authorized, in accordance with regulations prescribed by the Secretary of Agriculture, to mark the food so as to indicate such conformity. Services to any applicant under this section shall be rendered only upon payment of fees to be fixed by regulations of the Secretary of Agriculture in such amount as to cover the cost of the supervisory inspection and examination, together with the reasonable costs of administration incurred by the Secretary of Agriculture in carrying out this section. Receipts from such fees shall be covered into the Treasury and shall be available to the Secretary of Agriculture for expenditures incurred in carrying out this section. Any person who forges, counterfeits, simulates, or falsely represents, or without proper authority uses any mark, stamp, tag, label, or other identification devices authorized by the provisions of this section or regulations thereunder, shall be guilty of a misdemeanor, and shall on conviction thereof be subject to imprisonment for not more than one year or a fine of not less than $1,000 nor more than $5,000, or both such imprisonment and fine.[11a]

Approved, June 22, 1934.

[11a] Act of June 22, 1934, ch. 712, 48 Stat. 1204.

DECISION OF COURTS

UNITED STATES v. HARPER

(Police Court, District of Columbia, Mar. 12, 1908)

Notice of Judgment No. 25 [12]

Information alleging violation of sections 1 and 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

KIMBALL, *Judge* (charge to the jury). I want to congratulate you upon your arrival at the last stage of this very long, but very interesting and important case. As was stated by Mr. Baker, the United States district attorney, it is the first case under the pure food law in any court in the country, and it is one that may, in its final results, test many questions that are raised by the law and necessary to its proper administration, which questions must be finally settled by the courts.

The act known as the pure food law was passed on the 30th of June, 1906, but did not go into effect, as far as this case is concerned, until the 1st of January, 1907, thus giving to manufacturers a chance of changing their labels and packages, if they found it necessary to do so, and giving opportunity to dealers to get rid of any drug that might come under the purview of the law. So that in this case, as you have noticed in the prayers, the date is given to you as from January 1, 1907, up to the date of the filing of this information.

The information as originally filed had four counts, but the Government had abandoned the second and third; and, therefore, in your deliberations you will take no account of the second and third counts, but will confine yourselves to the first and fourth.

The first count relates to the manufacture of a misbranded drug; the fourth count relates to the sale of such a misbranded drug.

There was no law on this subject before the passage of this act. So that up to the 1st day of January, 1907, this drug might have been legally branded as the Government claims it was branded after that date; but from the 1st day of January, 1907, the law of June 30, 1906, went into effect, and is effective upon all manufacturers coming within its purview.

The first section of this information charges that the defendant, Robert N. Harper, manufactured a drug which was misbranded; and to fully inform you as to what is meant by the law by "misbranded", I will state what the law requires, because the law uses the word "misbranding" and then defines it, and the court and jury are bound by the definition of misbranding as laid down in the law. The

[12] Notices of Judgment will hereinafter be referred to by the initial letters, N. J.

term applies to all drugs or articles of food, or articles which enter into the composition of food, "the package or label of which shall bear any statement, design, or device regarding such article or the ingredients or substances contained therein which shall be false or misleading in any particular."

You will notice how broad the law is in its definition. If it is found from the evidence that in any particular this drug known as "Harper's Cuforhedake" misstates or states falsely, then the law has been violated. It is not necessary that each one and all of them have been broken, but the law says "in any particular." So that if you find from the evidence that in any one point there has been a misbranding under the definition which I have read to you then you shall find a verdict of guilty.

I might say here that there are several items in this first count which, before entering upon the trial, Mr. Baker, on behalf of the Government, abandoned. So, in considering this, you will only take into account the items that I shall name, they being the only items on account of which Mr. Baker says the law was violated.

The first claim that he made is that said drug was not a cure for headache, nor a food for the brain, and I want to read in that connection, because the words "Cure" and "Brain Food" have been referred to by each one of the counsel who has appeared before you, the prayer that I have granted as to the meaning of those words:

> The jury are instructed that in determining the meaning of the words "brain-food", "cure", "poisonous", and "harmless", the definition of which has been called into question by this inquiry, they are to give such words their ordinary and customary meaning as understood by the general public and not a technical meaning as given by any expert witness.

This law was passed not to protect experts especially, not to protect scientific men who know the meaning and the value of drugs, but for the purpose of protecting ordinary citizens, like the jury and like counsel and others, who have learned during the hearing of this trial a great deal more about these things than they ever knew before in all their life.

In determining the meaning of the words used upon these cartons, bottles, and circulars, they are to be taken in the way that an ordinary, plain, common citizen, without scientific knowledge, would understand them if they were put before him.

And so with regard to this "Cuforhedake", you can take it to mean what an ordinary man would take it to mean—the meaning which it conveys to an ordinary person when he gets a remedy said to be a cure for headache. The first prayer as presented to me on the part of the Government touches that subject. I do not know that it is necessary for me to read it to you again. It has been read three times. If that word, spelled in the two different ways that it is spelled, would convey to the ordinary citizen the idea that it was a food for the brain as contradistinguished from the idea of a food for the whole body, then it is—and I so charge you in this first prayer—misleading, and therefore a violation of the law; and if you find that such a definition is what the ordinary citizen would apply to it, then you, under that first prayer, would be compelled to bring in a verdict of guilty, and you have the right, in considering that question, to take it in the connection in which it is placed.

You have the right to consider that it is on a medicine which it is claimed is a cure for headache, an ache which is supposed by most citizens to be from the brain, and the words brain food spelled in the two different ways you have had demonstrated to you so many times are used in connection with a cure which is said to cure the headache—an ache that is seated in the head. You have a right to consider all that. How would an ordinary citizen, in taking that up and seeing these words, understand it? What would he understand by the use of those words?

I have granted some other prayers where the subject of brain food is referred to.

Mr. Baker. If Your Honor please, when you read the other ones, will you spell out the words?

The Court. The jury are further instructed that if they find from the evidence that the use by the defendant of the name "branefude" as a part of the name of the defendant's preparation was not reasonably or fairly calculated to deceive or lead to the belief that the preparation was a food for the brain, then they shall find that the use by the defendant of the word "branefude" was not false or misleading. That is the question that I suggested to you a moment ago. How would the ordinary citizen, upon reading that, understand it? If it would mislead him or have a tendency to mislead him then the case is made out. If there is nothing in the term in the way which it is used that would mislead an ordinary citizen, then, of course, that, under the prayers that I have granted, is to be taken into consideration by you.

Mr. Baker. Would Your Honor read that first prayer now?

The Court. I will read, at the request of counsel, the first prayer:

If the jury find from the evidence beyond a reasonable doubt (and you gentlemen are old jurors and understand perfectly well what is meant by a reasonable doubt. I need not again charge you on that point, because you have had that charge over and over again. The doubt must be a reasonable one—one that a reasonable man would entertain from the evidence), that the defendant Robert N. Harper, on the 5th day of August 1907, or at any time between the 1st day of January 1907, and the date of the filing of this information, in the District of Columbia, did manufacture a certain liquid medicine or preparation, styled and designated "Harper's Cuforhedake Brain Food", or "Harper's Cuforhedake Brane Fude", and did place on the bottle, box, or circular thereof the following statements, designs, and devices, or any of them, viz, "Cuforhedake Brain Food" or "Cuforhedake Brane Fude", unless you further find from the evidence that there is a known and distinct kind of food that feeds and nourishes the brain as distinguished from a food that feeds and nourishes the whole body, and that the said drug or preparation is a food, and that it feeds and nourishes the brain particularly, as distinguished from a food that nourishes all parts of the body, then the jury are instructed as a matter of law that the words "Brain Food" and "Brane Fude"—if you find that "Brane Fude" means brain food—are false and misleading, and your verdict shall be guilty on the first count of the information; and if the jury further find that the defendant did sell or offer for sale to the said Stone & Poole, on the date or within the time mentioned and in the District of Columbia, the said drug in this prayer described, they shall find the defendant guilty on the fourth count of the information.

The next objection that is made in this information is "nor did said drug contain any poisonous ingredients of any kinds."

Gentlemen, the question raised is not whether it is a poison in the doses prescribed in the preparation. That is not the question before

you as jurors. You have nothing to do with the question of whether it is poisonous in the doses prescribed or in larger doses. The sole question raised here for you to consider is whether the said drug contains poisonous ingredients of any kind. If you find from the evidence, beyond a reasonable doubt, that it did contain poisonous ingredients, whether taken in the doses named, whether they would or would not be harmful—if you find that the drug contained a poisonous ingredient—then your verdict must be guilty, because that is the plain issue. Of course, that you must find beyond a reasonable doubt.

The next point is: "Nor was said drug a harmless relief." I do not need to say anything in particular upon that point. That has been fully argued by counsel, and I cannot go into the evidence. It is a question for you. Of course, if you find, beyond a reasonable doubt, any one of these points against the defendant, then your verdict must be guilty, whatever you may do with the others, because the law provides "in any particular." Now, I will say nothing further with regard to the "harmless relief" than to refer you to the evidence, which is in your own minds. I cannot tell you what the evidence is. You have the right to carefully consider it, and it is your duty to carefully consider all the evidence bearing upon the point, and to determine beyond a resonable doubt whether, in your judgment as jurors, the case has been made out by the Government beyond that reasonable doubt. If it has been made out that it is a harmful relief and not a harmless one, then of course your verdict must be guilty. If you do not so find upon that point, your verdict would be in favor of the defendant upon that point.

The next one is: "Nor did each ounce of said drug contain 30 percent of alcohol." I do not think I need to say anything upon that point. The evidence you know. You know the evidence of the two who analyzed it, and you know what they said. I will merely read the prayer that was granted on that subject.

If the jury shall find from the evidence that the defendant's preparation in question contained 30 percent of alcohol at the time of the manufacture and sale thereof, then they should find that he did not make a false or misleading statement as to the quantity or proportion of alcohol contained therein.

In this prayer the jury are instructed that under the law the defendant had the right to use in the manufacture of preparations common alcohol, which is considered to be a little more than 5 percent water and a little more than 94 percent pure alcohol; that is to say, alcohol composed of 94.9 percent pure alcohol and 5.1 percent water; and in determining whether the statements on his carton and label regarding the quantity or proportion of alcohol contained in his preparation were either true or false, the jury shall consider that 5.1 percent of the alcohol he used, if they shall find he used common alcohol, was composed of water.

I think that those two prayers contain all that I need say upon that question. You understand the evidence.

There is one other prayer on the subject of alcohol. I will read that:

If the jury shall find from the evidence that the statement on the carton and label of the defendant's preparation concerning the quantity or proportion of the alcohol contained in such preparation was a true statement of the maximum

or the average quantity or proportion of the alcohol contained in his preparation, such statement was in conformity with the law, and his carton and label was not misbranded so far as such statement was concerned.

These three prayers cover all that is necessary for me to say on that point.

I will read the other prayers granted, first taking up prayer no. 2 for the Government:

The jury are instructed as matter of law that if they find from the evidence beyond a reasonable doubt that the defendant, Robert N. Harper, on the 5th day of August, 1907, or at any time between the 1st day of January, 1907, and the filing of this information, in the District of Columbia, did manufacture a certain liquid medicine or preparation, styled and designated "Harper's Cuforhedake Brain Food" or "Harper's Cuforhedake Brane Fude", and did on the bottle, box, or circular thereof place the following statements, designs, and devices, or any one of them, "Cuforhedake Brane Fude", or "Cuforhedake Brain Food", "that said drug contained no poisonous ingredients of any kind", "that said drug was a harmless relief"; "that each ounce of said drug contained 30 percent of alcohol"; and if the jury find beyond a reasonable doubt that the word "Cuforhedake" means cure for headache, and that the said drug is not a cure for headache, or that said drug contains poisonous ingredients of any kind, or that said drug was not a harmless relief, or that each ounce of said drug did not contain as the maximum quantity 30 percent of alcohol, or that all or any of said statements were in any way false or misleading, then they shall find the defendant guilty as charged in the first count of the information; and if they further find that the said defendant, Harper, did sell and offer for sale, on the day and days aforesaid, the said drug to Frank T. Stone and S. Stuart Poole, then they shall find the defendant guilty on the fourth count of said information.

The fourth count, I believe, is a charge of selling. One charge is for making in the District of Columbia, and the other charge is for selling a misbranded article in the District of Columbia. The two are to be considered separately. If you believe that he sold a misbranded article then you will bring a verdict on the fourth count. If you believe that he misbranded in any of the ways claimed by the Government, beyond a reasonable doubt, then you shall bring in a verdict of guilty on the first count.

There is one other prayer for the Government:

A false statement within the meaning of the act of June 30, 1906, is any statement that is untrue, erroneous, not strictly in accordance with fact, or calculated in any way to deceive; a misleading statement within the meaning of said act is any statement that may in any way tend to lead a person wrongly, or misguide, or lead astray or into error, or cause to mistake, or delude or deceive; and if the jury find that any of the statements charged as false or misleading in respect to said drug, from any point of view, or from any aspect considered, may in any way reasonably be considered untrue, or not strictly in accordance with fact, or calculated in any way to deceive, or lead into error, or cause to mistake or be deceived, then the jury should find that such statement or statements are false or misleading, and that said drug is misbranded.

In considering the expert testimony, a prayer was prepared, which was also read, but I will read it again:

The jury are instructed that the evidence of the expert witnesses who have testified in this case is to be received and treated by them precisely as other testimony. The weight to be given to it by the jury is to be determined by the character, the capacity, the skill and experience, the opportunities for observation, and the state of mind of the experts themselves, as seen and heard and estimated by the jury, by the nature of the case, and all its developed facts.

In other words, I charge you, in substance, that in testing the evidence of experts you have the right to consider whether they have

shown sufficient knowledge, and to consider their conduct upon the witness stand, everything about them that has occurred in your sight, and everything that they have given upon the witness stand, for you are the ones to determine the weight to be given to the testimony of experts or those who come to testify as experts.

The law presumes that a person charged with a crime is innocent until he is proved by competent evidence to be guilty. To the benefit of this presumption the defendant is entitled, and this presumption stands as his sufficient protection, unless it has been removed by evidence proving his guilt beyond a reasonable doubt. That, you gentlemen understand, has been charged you over and over again. The right of a defendant in a court of law in this country is that he stands before you as innocent until he is proven by competent evidence guilty beyond a reasonable doubt.

Here is another prayer granted for the defense:

The jury are instructed that under the act under which this information is filed the defendant is not required to state on the label or package containing the preparation in question any of the ingredients contained therein except the quantities or proportions of acetanilid and alcohol.

Whilst that is true, yet the statement upon the label of the proportion of those two ingredients, if there are other statements upon the carton or label, or other document a part of the carton, which are false and misleading, the fact of the statement of the two drugs would not take away the character of the misleading statements. For instance, the ordinary purchaser of such drugs at a drug store does not know the value or the effect of these several drugs, and if there is put upon the outside of the package the quantity of this drug, and at the same time a statement that there are no harmful ingredients in it, or no poisonous ingredients in it, the fact that the label would show that there was a poisonous or harmful ingredient in it, if such were the fact, would not remove the liability to a penalty under this law, because it is the ordinary purchaser that we are dealing with. The ordinary purchaser does not know, except in some few instances of well-known poisons, the nature of the various ingredients going into drugs. If there is that which is false or misleading upon any part of that which is sold accompanying the drug, he would be liable under the provisions of this act.

Here is a prayer granted to the defense which is somewhat on that line:

The jury are instructed that the purpose of the act of June 30, 1906, was to prevent the public from being deceived or misled in the purchase of drugs, and that the defendant cannot be found guilty of misbranding his preparation unless on the label, bottle, or package of his drug he made any false statements or such statements concerning the same as would naturally and reasonably deceive or mislead or tend to deceive or mislead.

The jury are further instructed that in order to convict the defendant in this case of the offenses charged in the information, or either of them, they must believe and find beyond a reasonable doubt that all or some one of the alleged false or misleading statements are or is false or misleading in some particular.

Another prayer:

The jury are instructed that the burden of proof in this case is upon the prosecution and before they can find the defendant guilty the evidence adduced must satisfy them beyond a reasonable doubt that the statements contained

on the label or package of the defendant's preparation or the printed matter connected therewith or some one or more of said statements was or were false or is misleading.

That covers all the prayers.

Gentlemen, in considering this case, you do not want to take into consideration the position or standing of the defendant. Everyone that appears before the bar of this court stands on an equal plane, as far as the verdict of the jury is concerned. We are not trying Mr. Harper, the president of the American National Bank, or Mr. Harper, the president of the Chamber of Commerce; but we are trying here Robert N. Harper, a citizen of the District, and you gentlemen are sworn to try the case, standing between the defendant on one side and the United States on the other.

You have nothing to do with the question, as counsel have told you, of the penalty. You are here to determine the plain questions of fact that are presented.

If you find any one of the charges brought by the Government in the first count against Mr. Harper, although you may find him not guilty on all the others, any one of them would be sufficient and would require you to bring in your verdict of guilty, because if he is guilty beyond a reasonable doubt upon any one of the charges of false or misleading statements coming under the word " misbranded ", then he is guilty, because the law requires that when a man puts out to the general public a drug he shall put on that no statement, he shall put on that no label which is false or misleading in any particular. If you find that this has been done, that there is a false or misleading statement in any particular upon this preparation put out by Mr. Harper, then your verdict must be " Guilty."

If, however, you find that in no one of the points named has Mr. Harper made a statement which is false or misleading, then, of course, your verdict would be in favor of Mr. Harper and would be " Not guilty."

If you find him guilty upon the first count and find that he sold this article to the firm of Stone & Poole, then you would find him, in that connection, guilty on the fourth count. If, however, you find him not guilty on the first count, you must necessarily find him not guilty on the fourth count.

Mr. TUCKER. Has Your Honor concluded?

The COURT. Yes; unless there is something that counsel wants me to say further.

Mr. TUCKER. What I want to say is this: Under the rule established by the Court of Appeals, where instructions are repeated in the charge of the court, it is necessary for the parties to reserve their exceptions again to the prayers, repeating their exceptions. I accordingly except, for the reasons I have stated, to the granting of each and every of the prayers granted on behalf of the prosecution, and to the refusal of the court to grant each and every of the prayers presented on behalf of the defense and refused, and to the modification of the court to such of the defendant's prayers as have been modified by the court; all on the grounds I have stated.

The COURT. There was only one, I think.

Mr. TUCKER. Only one, I think. I simply put it in the plural to cover any possibility.

I also object and reserve an exception to the language of the court in the charge relating to the subject of dosage, and in instructing the jury, in effect, that they should disregard the dosage as prescribed on the label of the defendant's bottle.

I also object and except to such part of the charge as stated to the jury that the ordinary purchaser does not know the nature of the ingredients in drugs, as a rule, on the ground that that is a matter for determination by the jury.

The COURT. Gentlemen, take the case.

SAVAGE v. SCOVELL[13]

(Circuit Court, E.D. Kentucky, July 16, 1908)

171 Fed. 566

In Equity. Motion for preliminary injunction and demurrers to the bill. Demurrers overruled.

COCHRAN, *District Judge.* This cause has been submitted on motion for a preliminary injunction and demurrers, special and general to the bill.

It is claimed by plaintiff that he is entitled to the relief he seeks because the article manufactured and sold by him is not covered by the Kentucky act involved herein, (Laws 1906, p. 282, ch. 48). He maintains that said act covers only that which is a food, and said article is not a food, but a medicine. I think the distinction between what is a "food" and what is a "medicine" is clear, and there can be no question that said act covers the former, and not the latter. A "condiment" is a food, and not a medicine. It is therefore covered by the act, and that by express terms, but the act is not prevented from covering that which is a food because it is a medicine also. Conceivably an article may be a food and a medicine both, and that when used in the same way, i.e., when taken internally. Such an article is covered by the act notwithstanding its medicinal quality.

I have considered the evidence carefully and have reached the conclusion that the article of plaintiff's manufacture is a food—probably it is better to say that it is a condiment—and that such is the effect of his representations and claims in regard thereto. Undoubtedly he claims it to be a medicine also, and it may be said that the stress of his claims lies here; but in a real sense it must be said to be at least a "condimental food", and hence that it is covered by the act. Plaintiff is in no position to complain of his article being treated as what he calls it. The evidence shows that his action in naming it a food was not purely arbitrary, but based on reality.

The act itself is not unconstitutional. It is an inspection law, and the States have the right to pass inspection laws. This is expressly recognized in the second clause, section 10, article 1, of the Federal Constitution; but, this apart, a State has power to enact inspection laws, even though it affects interstate commerce, at least in the absence of congressional legislation making a difference in the situation. This is on the ground that Congress by its nonaction has

[13] Not arising under the Food and Drugs Act.

impliedly consented to the enactment thereof, i.e., Congress, instead of regulating interstate commerce in such particular directly, does so through the State legislature enacting the law. At the time of the passage of the Kentucky act and its going into force, the Federal pure food law (act June 30, 1906, ch. 3915, 34 Stat. 768) had not been enacted.

The position that the act is valid as an inspection law finds direct support in the case of *Patapsco Guano Co.* v. *Board of Agriculture*, 171 U.S. 351, 18 Sup. Ct. 862, 43 L.Ed. 191. The case of *Bowman* v. *Chicago & N. W. R. Co.*, 125 U.S. 465, 8 Sup. Ct. 689, 1062, 31 L.Ed. 700, is not to the contrary. The law involved there was not an inspection law.

It is claimed that said act is unconstitutional, in that it authorizes the director of the agricultural experiment station to take as much feeding stuff as he might desire, provided he confined himself to 2 pounds from every package. I do not think that such is the meaning of this provision of the act. An inspection law can properly provide the taking of so much of an article covered by it as is necessary for analysis in order to determine its true nature. This is just as proper as a fee for the inspection. The meaning of this act is that said director may take as much, not as he desires, but as much as is necessary for analysis; but in no event shall it exceed 2 pounds. It was not intended that the director should have the right to take 2 pounds in every instance out of every package whether necessary to make an analysis or not. It is not alleged that in the execution of the law defendant has taken, or intends to take, more from the packages containing plaintiff's article than is necessary to make an analysis.

Again, it is urged that said act has been done away with by the Federal law before referred to. It is questionable whether Congress can affect a State inspection law simply by legislation covering the same subject—whether in order to do so it must not enact legislation under clause 2, section 10, article 1, of the Federal Constitution, expressly revising and controlling same. But, this apart, the two laws do not cover the same territory. The Federal law simply covers the subject of adulteration and misbranding. The State law has nothing to do with either. It has to do with the subject of disclosing the ingredients of the articles covered by it. Its policy is to compel a statement of ingredients so that purchasers thereof in Kentucky may know exactly what they are buying. There may be no adulteration or misbranding, i.e., no violation of the Federal law, and yet there may be a violation of the State law in not disclosing ingredients.

It follows therefore that the motion for a preliminary injunction must be denied.

Inasmuch as the bill alleges that plaintiff's article is a medicine, and not a food or condiment, and hence not covered by the act, the bill sets forth a good cause of action, unless defendant's point that this is a suit against the State of Kentucky, and hence within the prohibition of the eleventh amendment, is well taken. I do not think that this point is well taken. This is not a suit against the State, but against M. A. Scovell. If the plaintiff's article is not a food, but a medicine, as alleged in the bill, then said defendant has no right to set on foot prosecutions against plaintiff and dealers in his article

under said act, and he owes plaintiff a duty not to do so, and plaintiff is entitled to have this duty performed. I have covered this whole subject in a paper read before the Kentucky State Bar Association, on July 8, 1908, at Louisville, to which I refer as setting forth fully my views on it. It took considerable time to prepare this paper, and this accounts somewhat for my delay in disposing of this case. The subject was in so much confusion that I could not handle a case successfully involving the question of maintainability of suits against the executive officers of a State without a thorough investigation on my own part covering the whole ground.

The demurrers to the bill are overruled.

If parties agree, the cause can be submitted on bill, answer, and affidavits, as was done in the case of *Allegheny Oil Co.* v. *Snyder*, 106 Fed. 764, 45 C.C.A. 604. If so, a decree will be entered dismissing plaintiff's bill at his costs. Of course, the temporary restraining order granted herein ceases as of this date to be of any force.

UNITED STATES v. 100 CASES OF TEPEE APPLES ET AL.

(District Court, W.D. Missouri, Oct. 23, 1908)

179 Fed. 985; N.J. No. 36

Libel under section 10 of the Food and Drugs Act.

C. H. Godfrey & Son intervened as claimants and excepted to the sufficiency of the libel on the grounds that the act was unconstitutional and because no preliminary hearing as provided by section 4 of the act had been accorded the claimants by the Secretary of Agriculture. These exceptions were overruled by the court. Jury was waived and the case tried to the court on an agreed statement of facts and deposition of C. H. Godfrey. Decree of condemnation and forfeiture.

Smith McPherson, *District Judge.* This case is by information filed by the United States attorney, charging that Ridenour-Baker Grocery Company, of Kansas City, Missouri, has in its possession cases of apples and blackberries in original unbroken packages which are misbranded within the meaning of the act of Congress approved June 30, 1906, known as the "Food and Drugs Act."

The fruits were thereupon seized by the marshal, and notice thereof given. In due time C. H. Godfrey & Son, of Benton Harbor, Michigan, appeared and made defense. A jury was waived and the case tried to the court. The evidence consists of an agreed statement of facts and the deposition of C. H. Godfrey. And these are the facts:

Godfrey & Son pack and can fruits, with their factory at Benton Harbor, Michigan, and such has been their business for several years, with their principal office at that place, the fruits grown there, as well as in other States. Their only post office address was there.

The apples and berries in suit were grown at and near Springdale, Arkansas, and by Godfrey & Son there bought and canned, and by them later on sold and shipped to the Ridenour-Baker Company at Kansas City. Each can of apples was labeled with a blue paper about 10 inches long and 5 inches wide, with a picture of a red

apple, an Indian tent, or "tepee", with the words "Tepee Apples; Packed by C. H. Godfrey & Son, Benton Harbor and Watervliet, Mich."

The berry cans had the same label in all respects, except the picture was of a cluster of blackberries and the words "Tepee Blackberries."

The opinion of the Secretary of Agriculture was that such words to the exclusion of Springdale, Arkansas, where the fruit was grown and packed, mislead the public. Evidence is offered that Godfrey & Son did not know of such opinion, and that they believed the cans were properly labeled. Such evidence is not admissible and is ruled out.

The evidence shows that Michigan and northern apples are of a better quality and flavor than are Arkansas apples, and that is a matter of common information. As to the berries, the evidence is not so certain, although the deposition of Mr. Godfrey fairly shows that Michigan blackberries, with one variety excepted, are better than those of Arkansas.

Adulteration of goods and false labeling had become so common that it was well-nigh impossible to purchase pure goods, or that which was called for. The same was true as to medicines. Congress undertook to remedy it. The one purpose was to prevent the sale of adulterations. The other purpose was to enable a purchaser to obtain what he called for and was willing to pay for. And under this latter view it is immaterial whether Michigan fruits are better than those grown in Arkansas. A purchaser of canned goods may prefer Michigan fruits. He may believe them to be better than Arkansas fruits. He has the right to call for them, and when he pays or is debited for them he has the right to have Michigan fruits. The purchaser has the right to determine for himself which he will buy and which he will receive and which he will eat. The vendor cannot determine that for the purchaser. He, of course, can make his arguments, but they should be fair and honest arguments.

In this case the label is very attractive to the eye, and of course its only purpose is to sell the fruit. But for that the label would not be on the can. That is what the purchaser at retail looks for, and that is what, more than any other statement or argument, induces the purchase. That the evidence shows that to be misleading, because the words thereon, "Packed by C. H. Godfrey & Son, Benton Harbor and Watervliet, Mich.", is understood by all adults and children as not only being there packed, but fruits grown in that vicinity. Of course it is idle to insist, as Mr. Godfrey does, that the fruits could not have been raised *within* the city of Benton Harbor. The term "misbranded" as used in the statute, as defined by the statute, is "the package or label of which shall bear any statement, design, or device regarding such article * * * which shall be false or misleading *in any particular*, and to any food which is falsely branded as to the State, Territory, or country in which it is *manufactured or produced*."

Again, the statute recites, "If it be labeled or branded so as to deceive or mislead the purchaser, it should be considered as misbranded."

There can be no doubt, as it seems to me, that any purchaser from this label would be deceived, in that he would be receiving Arkansas

fruits instead of Michigan fruits. Deception is seldom practiced by a literal falsehood, but is usually joined with some truth, so that the entire statement will deceive. And so in this case. Of course the statement is true that Godfrey & Son reside and do business at Benton Harbor; but that one true statement is used in conjunction with the packing of the fruits, and I repeat that I would believe from that, as would all others, that it is Michigan fruit within the cans. And if Godfrey & Son believe, and if it be true, that Arkansas fruits are as good or better than Michigan fruits, let that fact be disclosed by labels and otherwise. This statute is to protect consumers and not producers. It is a most beneficent and righteous statute, and within the powers of Congress to legislate concerning, and should be enforced. It cannot be enforced if it is to be emasculated, as is sought in the present case. The order will be that the fruits and cans under seizure will be sold by the marshal after being properly branded. This will be done, instead of destroying them, as the fruits are not deleterious.

But this order may be avoided under the statute if Godfrey & Son will pay the costs and give bond to properly brand the goods in accordance with this opinion, and sell them in all respects in conformity to law.

UNITED STATES v. 50 BARRELS OF WHISKY

(District Court, D. Maryland, Oct. 26, 1908)

165 Fed., 966; N.J. No. 68

Libel under section 10 of the Food and Drugs Act. Exception to libel overruled. Jury trial. Verdict in favor of the United States.

Morris, *District Judge.* (Overruling exception to libel.) In this case, which is a libel for the seizure and forfeiture of 50 barrels of distilled spirits alleged to be misbranded contrary to the provisions of the act of Congress of June 30, 1906, the libel does not allege that there had been any preliminary examination such as is provided for by section 4 of the act.

The claimant has excepted to the libel upon the ground that the court has no jurisdiction unless such a preliminary examination has preceded the seizure.

It is urged that the harshness of the proceeding in seizing goods alleged to be misbranded without giving the owner the opportunity of being heard as to their true nature is such that the court should if possible construe the law so as to require the examination as a prerequisite to seizure. Such seizures are not unusual, and it is plain that if the harshness were conceded it would not justify the court in reading into the law a limitation which it does not contain. The act provides two different proceedings to enforce the provisions. One is by a criminal proceeding in personam; the other is by a proceeding in rem, by seizure of the offending thing itself, and forfeiture if found to be in violation of the law. In this latter case there is no provision for a preliminary examination. Section 10 of the act provides that

any article of food, drugs, or liquor that is adulterated or misbranded, which is being transported from one State to another, shall be liable to be proceeded against and seized for confiscation by process of libel for condemnation. It is further provided that the proceedings of such libel cases shall conform as near as may be to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case. The libel alleges that 50 barrels of distilled liquor are now at a named place within the district, having been transported from the city of New Orleans, in Louisiana, to Baltimore, Maryland, branded "Bourbon Whisky", which brand indicates a liquor containing all the congeneric substances obtained by distillation from a fermented mixture of grain, of which Indian corn forms the chief part, and confined to whisky distilled in the State of Kentucky, and that the 50 barrels of distilled liquor in question, branded Bourbon Whisky, are not whisky at all but a distillate of molasses distilled in New Orleans, La. The libel then prays that the 50 barrels of liquor may be proceeded against and seized for condemnation, in accordance with the act of Congress approved June 30, 1906, and prays the court to order process of attachment in due process of law, and that all persons having or pretending to have any right, title, or claim in said liquor may be cited to appear and answer the premises. This is according to the course of proceeding in libels in admiralty, and in similar proceedings in rem for forfeitures for violation of the internal revenue laws. Such seizures are made in cases in which forfeiture of the goods is the penalty, without preliminary examination or proceedings of any kind, in cases of violation of the customs laws and the shipping regulations, as well as violations of the internal revenue laws.

The exception is overruled.

At the trial it was proved, and not denied, that the spirits libeled had been distilled in New Orleans, La.; that the material from which they had been distilled was the cheaper grade of New Orleans molasses (commonly known as "Blackstrap"); that to each 350 gallons of molasses was added about 1 gallon of sulphuric acid; and that this mixture was further diluted by the addition of 5½ gallons of water to every gallon of molasses.

The libelant produced some 50 or more witnesses, being distillers of rye and Bourbon whiskies, retail liquor dealers, retail grocers, druggists, the chairman of the revision committee of the United States Pharmacopœia, physicians, chemists, and food experts, who testified that in their understanding the word "whisky" imported a distillate of grain; that the words "Bourbon Whisky" imported a distillate of mixed grains, of which mixture Indian corn constituted the larger part. Most of these witnesses were further of the opinion that the phrase "Bourbon Whisky" implied that the whisky had been distilled in Kentucky. All the chemical witnesses, on both sides, testified that in the present state of chemical knowledge it is not possible by chemical analysis, alone, certainly to tell whether a given product is brandy from grapes, whisky from grain, or rum from molasses.

The claimant proved that its distillery had always been surveyed and registered as a sweet-mash molasses distillery; that during the six years immediately preceding the seizure, 12,000 barrels of its

product were branded and entered as "Bourbon Whisky", and that out of said 12,000 barrels, 9,000, of which the 50 barrels, more or less, seized were a part, had been withdrawn and sold to various persons as Bourbon whisky; that the said barrels so entered and withdrawn were reported by the claimant and the Government storekeeper at the distillery to the collector of the district, by him reported to the Commissioner of Internal Revenue, and by the latter reported in his printed annual reports as entries and withdrawals of Bourbon whisky; that the branding of the words "Bourbon Whisky" had been put on each of the said barrels by the United States gager in charge of such distillery. The claimant offered the annual reports of the Commissioner of Internal Revenue for the years from 1901 to 1907, inclusive, to prove that during most of these years there had been only one distillery in Louisiana, and that was the claimant's molasses distillery; that no material other than molasses was used for distillation in that district, and that these reports did not show that any rum had been distilled in the district of Louisiana. The claimant further offered said reports to show that for many years next preceding the seizure the records of the Internal Revenue Department purport to show that Bourbon whisky had been produced in some 10 States other than in Kentucky. These reports, in this respect, show that more than 90 percent of all the whisky branded "Bourbon Whisky" produced in this country was produced in Kentucky, and that the larger part of the small percentage not produced in Kentucky was produced in States immediately bordering on Kentucky. The claimant further offered chemical evidence to the effect that whenever starch, malted cereal, cane sugar, or grape sugar are subjected to the ordinary processes preliminary to fermentation a common sugar is derived from them. So that, while there are chemical differences in the mash, depending on the material out of which the mash is made, a large part of such mash in each case consists of a sugar common to all. The claimant further offered chemical testimony to the effect that the character and kind and race of the yeast used in fermentation has an important effect upon secondary products and upon the flavor of the finished product; that a large part of the distinction in the aroma between American whiskies on the one hand, and Scotch and Irish whiskies on the other, is due to the circumstance that American whiskies are aged in charred barrels; that such improvement in the flavor of whisky in charred packages as takes place after the fourth year is due largely to concentration, and the oily appearance of matured whisky is due to material extracted from the charred packages, and that the body of whisky, so called, is due largely to the solids extracted from the wood. The claimant further offered evidence to the effect that sulphuric acid is used to invert the sucrose, so that fermentation can be accelerated, and ammonia is used as a yeast food; that there were no poisonous or deleterious substances in the whisky seized, and that chemical analysis showed that no sulphuric acid or ammonia remained in the whisky seized, those substances having been eliminated in the process of distillation.

The libelant proved in rebuttal that the gager who branded the barrels in this case "Bourbon Whisky" received his information that the contents of the barrels were Bourbon whisky from the distiller,

and that many gagers in the service in other districts had habitually acted upon such information in determining what was the name, known to the trade, by which each package of distilled spirits should be branded. The Government further proved that once a month the distiller made a sworn return of the quantities and kinds of spirits distilled by him, giving to each class of them the name by which he asserted they were known in the trade, and further proved an internal revenue regulation which provides that, as to the kind of spirits produced, the gager should see that his returns agreed with those made by the distiller, and that the tables in the annual reports of the Internal Revenue Department read in evidence by the respondents were simply compilations of these distillers' monthly reports. The Government offered evidence of a chemical expert, who has made a special study of fermentation and distillation, to the effect that it is not necessary to use sulphuric acid in distilling molasses for the purpose of accelerating fermentation; that he had made accurate experiments to determine whether the addition of sulphuric acid to the mash would increase the rate of fermentation, and the result of the experiment was to show that the addition of sulphuric acid made no difference either in the rate at which the sugar was inverted, as determined by examinations with the polariscope, or in the rate at which the sugar was fermented, as determined by the study of the rate at which the specific gravity of the liquid diminished; that there may at times be a very good reason for the use of sulphuric acid, and that is to check the multiplication of foreign ferments or acetic acid bacteria. A good many different antiseptic materials have been used for such purposes. Of these sulphuric acid is one, and it is also about the cheapest, and about as readily obtained as any.

Another way of preventing the existence of these false ferments is to keep the distillery clean.

The libelant offered three prayers and the respondent one prayer, which latter was as follows:

The Louisiana Distillery Company, the claimant in this case, prays the court to instruct the jury that a portion of the product of its distillery, including therein the 50 barrels, more or less, seized in these proceedings, having been branded by the United States gager, from time to time, during the 7 years preceding the seizure herein, as "Bourbon Whisky", and having during that period been as "Bourbon Whisky" entered in bond in the United States bonded warehouses of said claimant, the entries thereof reported as "Bourbon Whisky" to the internal-revenue collector in the district of Louisiana, and having been reported as "Bourbon Whisky" to the Commissioner of Internal Revenue, and portions thereof, as shown by the evidence in the case, having been withdrawn from said bonded warehouses as "Bourbon Whisky" and the said withdrawals having been reported as "Bourbon Whisky" to said collector, and by him reported to the Commissioner of Internal Revenue as "Bourbon Whisky", and the taxes on all said withdrawals having been paid to the United States Government, and the said Commissioner of Internal Revenue having full knowledge during all this time that the said distillery was surveyed as a sweet-mash molasses distillery, and that molasses and not grain was used therein for the distillation of spirits, and that the product thereof was during said period of 7 years branded "Bourbon Whisky", and that the entries and withdrawals therefore were as "Bourbon Whisky" and the taxes thereon paid as such, then the libelant is estopped from claiming that the contents of the said 50 barrels of whisky, more or less, were or are other than "Bourbon Whisky", and their verdict must be for the Louisiana Distillery Company.

MORRIS, *District Judge* (charge to the jury). I will not call upon counsel for the United States to reply. The case as it is presented

to the jury is a very clear one. I reject the only prayer offered by the defense. Really, that prayer concedes the misbranding of the liquor, and asks me to say to the jury if they shall find that this was done under the control and by the agents of the United States, the United States, which is the plaintiff in this case, is estopped from proceeding to condemn these goods and forfeit the goods for misbranding. That proposition I reject. Everyone who deals with agents of the United States deals with them with the knowledge imputed to him of the restriction upon their authority. It seems to me it can not be successfully contended that any agent of the United States has authority to do a thing which is forbidden by law; and it is forbidden by this law passed in 1906, the pure food law, to misbrand any goods which are intended to be or are actually transported from one State to another. Of course the gentlemen of the jury would know, or should know, that the United States has no authority, under the Constitution of the United States, to regulate the sale of goods within the limits of a State. It is only when they are transported from one State to another, and become a part of interstate commerce of the country, that the United States has the authority to pass laws regulating them. So this liquor, without infraction of any law so far as I know, might have been offered for sale and sold in Louisiana, unless there is some law of Louisiana which prohibits the misbranding of or misrepresentation with regard to the constituents of an article that is offered for sale. It is only, therefore, when these goods become a part of the interstate commerce of the country that this pure food law of 1906 applies to them, that "misbranding" shall apply to the placing on the package of any statement which shall be false or misleading in any particular, and provides that any article misbranded, which is transported from one State to another for sale, is liable to confiscation. Therefore I do not think that anything that was done in the distillery in Louisiana, in New Orleans, in any way estops the United States or estops the authorities, or the agents of the United States in Maryland, from proceeding to condemn these goods upon the ground that they were misbranded. It would be destructive of the enforcement of many of the laws of the United States if the act of any agent of the United States could be set up as a defense against the explicit law; the explicit law in this case being that any goods that are misbranded shall be forfeited. If any gager, at the request of a distiller or under a generally understood practice of the distillery, should misbrand an article of distilled liquor, it would be utterly subversive of the law, if the act of the gager could be a defense to the positive enactment of the act of 1906 which forbids misbranding goods that are to be transported from one State to another. I, therefore, reject that contention on behalf of the claimant of the goods in this case.

The real issue which the jury are to determine is whether these goods are whisky as known to the trade and to the community generally, and to those who deal in whisky. If it is not whisky, the case is made out in favor of the United States. If the jury believes—and there is a great deal of testimony to that effect—that the word "whisky" is applied only to a distillate made of grain, that is an end of the defense in this case. If they so find, their verdict must be for the United States, because it is admitted in this case, and it is not

a question of dispute, that this liquor is not made from grain, but is a distillate of molasses with a slight infusion of sulphuric acid.

But the jury might possibly find that it could be called "whisky." Then there is a second question, can it be called "Bourbon Whisky"? There is a great deal of testimony to show that Bourbon whisky, in its most general sense, is a whisky made from grain of which corn is the larger constituent. If you find that this was not such a whisky, then it is not Bourbon whisky, and your verdict must be for the United States. Then there is testimony also to the effect that Bourbon whisky, as understood in the trade, is confined to a whisky made in Kentucky. If you find that to be the fact—and that is for you, entirely, on the testimony—if you find that in the trade, and among those who deal in and who are familiar with the article, Bourbon whisky implies that it is made in Kentucky, then of course that is an end of the case so far as the claimant is concerned, because it is admitted that this liquor was made in New Orleans.

I might say that a good deal has been said about the hardship and injustice of condemning an article which once has been branded by the gager, but I do not think that that appeals very strongly to any one's sense of morality, because a gager is not a man who is to decide what is the trade-name of an article. He takes that largely from the distiller. He is not a dealer in liquor, nor is he a man of science who is to determine once for all, and incontrovertibly, whether it is what it is branded or something else.

I will now give you the instructions asked for by counsel for the United States. The first prayer is as follows:

The jury are instructed that if from the evidence they shall find that the word "whisky", as understood by scientific men, the liquor trade, and by the public generally, is confined to a distillate of grain, and shall further find that the contents of the barrels libeled in this case are a distillate of molasses, and that the said barrels were branded "Bourbon Whisky", then the said barrels were misbranded, and their verdict must be for the libelant.

The second prayer has reference to the restricted meaning of "Bourbon Whisky", as applying to whisky distilled in the State of Kentucky. It is as follows:

The jury are instructed that if they shall find from the evidence in this case that the phrase "Bourbon Whisky," as defined in the standard works of reference in use in this country, and as understood by scientific men, the liquor trade, and by the public generally, imports a liquor distilled in the State of Kentucky, and shall further find that the contents of the barrels libeled in this case were distilled at New Orleans, in the State of Louisiana, and shall further find that the said barrels were branded "Bourbon Whisky", then the barrels are misbranded, and their verdict must be for the libelant.

The third prayer has reference to what you may find from the evidence is the more general acceptation of the words "Bourbon Whisky", in case you find that the words do not necessarily require that it shall be made in Kentucky. The instruction is as follows:

The jury are instructed that if they shall find from the evidence that the phrase "Bourbon Whisky", as understood by scientific men, the liquor trade, and the public generally, is confined to a distillate of grain made from the mixture of fermented grain, of which mixture corn constituted the greater part, and shall find that the contents of the barrels libeled in this case are a distillate of molasses, and shall further find that the said barrels are branded "Bourbon Whisky", then the said barrels are misbranded, and their verdict must be for the libelant.

I do not think there is anything further that I need say to the jury, except to remind you that there is no dispute at all as to the material out of which this distillate was made. The whole case, in my judgment, and I so instruct you, turns upon whether the general acceptation of the word "whisky" means that it is made from grain. Of course, this liquor was not so made.

Further, in regard to Bourbon whisky, if the term "Bourbon Whisky" implies that the article was made of corn in greater part—not made of molasses, but made of grain of which corn was the greater part—then, of course, it was misbranded.

So, further, if you find that Bourbon whisky is confined to whisky made in Kentucky, and of grain, and that the larger constituent part must be corn, then, of course, this would not be Bourbon whisky, because it was not so made.

As to what the testimony has proved to your satisfaction are the proper meanings, accepted by the trade and by scientific men, of "whisky" and "Bourbon Whisky", those are facts to be found by you from the testimony, which I leave entirely to you. It is my duty to instruct you upon the law, and to leave the facts to be found by you.

UNITED STATES v. SCANLON

(District Court, N.D. Ohio, E.D., Nov. 27, 1908)

180 Fed. 485; N.J. No. 47

Information alleging violation of section 2 of the Food and Drugs Act. Tried by the court. Judgment of guilty.

TAYLER, *District Judge* (orally). A cursory examination of this label—that is the only examination that the ordinary customer makes, and that is the examination which is controlling in a case of this kind—presents the suggestion, if it does not carry with it the absolute statement, that this bottle contains Ohio maple syrup; but a careful scrutiny discloses, between the red words "Ohio" above and "Maple Syrup" below, a blue word "Blended", and then, below that, in smaller type, the statement that "This syrup is made from the sugar maple tree and cane sugar."

I think it was intended to convey the impression that there was a mixture, in the popular meaning of a mixture, of maple syrup and of a syrup which is made from cane sugar or New Orleans molasses or something of that kind, that people prefer to use rather than the heavier or thicker kinds of syrup; a kind of appropriate union of syrups that are used for a common purpose. At all events, the information conveyed by this label as one looks at it is that it is primarily a maple syrup, and then, upon a little closer inspection, that it is not exactly all maple syrup but that it has some syrup in it made from cane sugar. The label was evidently designed to go as far as it could in advertising the fact that maple syrup was there and still to comply with the pure food act.

Now, it would be very interesting to enter into this discussion, not exactly sophistical, but still drawing rather sharp lines of distinction between various conceptions of the meaning of the law and the chem-

ical aspects of these various products of the maple tree; but I do not think it is necessary for me to go into it. It is not so much a question of chemistry as of popular comprehension. We would not have any pure food laws if we were all chemists, because then we would be able to find out for ourselves what the thing was we were buying; and, of course, the opportunity and suggestion of temptation to deception would be very much reduced if a man who sold knew that he was dealing with a person who could find out easily just what he was buying. It is not a question of chemistry in this case, any more than it is with butter. It is a question of what is the popularly recognized definition of maple syrup; and that undoubtedly is, and we do not need the chemists to testify to it, that it is the syrup produced from boiling down the sap that flows in the spring of the year from the live maple tree. It has a certain consistency, and, of course, a certain specific gravity, which a chemist can tell us about; but those persons who have used it know in a general way when it has a proper consistency and a proper specific gravity, as they certainly do whether it has the proper flavor.

So that, if this syrup is made, as Mr. Scanlon says it is made, by some treatment of the chopped-down maple tree, whereby he gets an enormously larger amount of what may be called maple saccharine than is obtained from the free flowing of sap from the live tree, that is not maple syrup which he gets from it. If his statement is true—and I have no right to question its truth, except that I can hardly believe him when he says he obtains so much—that he gets his maple syrup and maple sugar that way, that is not maple sugar which he makes, and, therefore, he is not permitted to make use of that word under the pure food act. It seems to me that is all there is in this matter for me to consider now.

It is an interesting question whether this is not a "blend." But I do not pass upon that. I pass upon the broad question and lay down the broad proposition that this label is misleading and is a violation of the law; that the contents of the bottle are not what the label manifestly and suggestively declares those contents to be; and, primarily, I think the fundamental fact is that it is not maple syrup. The people who buy maple syrup would be in a very different frame of mind if they knew that the so-called maple syrup that made this so-called maple blend was derived from a treatment of the wood of the maple tree after it was chopped down from that in which they are when they buy what they understand to be maple syrup made from the boiled-down sap drawn from the live tree. So I will have to find the defendant guilty.

UNITED STATES v. GRIEBLER

(District Court, E.D. Illinois, Nov. 30, 1908)

N.J. No. 37

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

WRIGHT, *District Judge* (charge to the jury). Gentlemen of the jury: In this case the Government charges the defendant that he

shipped and delivered for shipment from Trenton, in the county of Clinton, in the State of Illinois, to Carlyle Dairy Company, at St. Louis, in the State of Missouri, an article of food, to wit, a certain quantity of milk which was then and there adulterated by having mixed and packed therewith water so as to reduce and lower and injuriously affect the quality and strength of said milk, contrary to the statute, etc.

There are two counts in this information, but it isn't necessary to specifically call your attention to more than one, because, as I understand the prosecution, they are not claiming that the statute was violated but the one time.

The act of Congress makes it unlawful for a person to ship an article of food from one State to another State, or to deliver such article for shipment from one State to another State, which, at the time of the delivery, or shipment, was, or had been, adulterated. The adulteration to be contrary to the statute must be, first, if any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength; second, if any substance has been substituted wholly, or in part, for the article.

Before the Government can claim a conviction at your hands it must be proved by the evidence in the case beyond a reasonable doubt that the defendant is guilty as charged in the information. If, after a fair and impartial investigation, you have a reasonable doubt of his guilt, as charged in the information, then it would be your duty to acquit him. If, after the same investigation of all the evidence in the case, you have an abiding conviction of his guilt, then it would be your duty to convict him.

A reasonable doubt is not such a doubt as is engendered by imagination, or by an undue sensibility of the consequences of your verdict. Nor can you go outside of the evidence. A doubt must arise from a fair and impartial consideration of the evidence, and it is such a doubt as if interposed in the graver transactions of life it would cause a reasonable man to pause before acting upon it. Now, if you have such a doubt of the guilt of the defendant in this case as I have endeavored to define, you will acquit him. If you have an abiding conviction of the truth of this charge, then you will convict.

The real issue in this case is whether, under the evidence here, the milk, at the time it was shipped, or delivered for shipment, contained water. That is the charge in the information. It is not necessary for the Government to prove that the defendant actually put the water in himself, nor is it necessary to prove that he knew at that time there was water in the milk, if there was water in it. Under this statute, for the protection of the public—those who consume—a person who undertakes to ship food products must be held to know what it is he puts into commerce, must know at his own peril what it contains. It is sufficient if you believe he delivered the milk for shipment, or shipped it, and that there was water in it, and that the water was mixed therewith so as to reduce or lower or injuriously affect its quality or strength; and as to that question you know as much as any witness. It is not a matter for an expert. It is a matter of everyday knowledge as to whether water in the milk would reduce or lower its strength. Everybody knows that it does. So if you believe from the evidence that there was water in the milk you will convict the defendant. If you find there was no water in it you will acquit him.

UNITED STATES v. 650 CASES OF TOMATO CATSUP

(District Court, D. Rhode Island, Jan. 21, 1909)

166 Fed. 773

Libel under section 10 of the Food and Drugs Act. No answer filed by claimant. Decree in favor of the United States.

BROWN, *District Judge.* This libel prays condemnation of 650 cases of tomato catsup, under act Cong. June 30, 1906, ch. 3915, 34 Stat. 768, known as the "pure food law." The charge is of misbranding.

The only material part of the label is the following:

> Made from choice ripe tomatoes, granulated sugar, selected high grade spices. grain vinegar.

The libel alleges that the articles are misbranded—

> For the reason that said catsup is made in part from tomato pulp screened from peelings and cores, as the offal of tomato canning factories, and not from choice ripe tomatoes, granulated sugar, and selected high grade spices, grain vinegar, as stated in said labels.

It is not charged that there is a violation of section 7, paragraph 6, which relates to preparations "consisting in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance", etc.

The sole allegation is that the label is in the above particulars misleading and false.

The words "as the offal of tomato canning factories" are not of exact signification. They do not charge a violation of section 7, paragraph 6. The indefinite suggestion of the word "offal" cannot be considered as the equivalent of a charge that the tomato pulp was a filthy, decomposed, or putrid vegetable substance. The inconsistency, if there be any, must be between the statement that the catsup is "made from choice ripe tomatoes" and the fact that it is "made in part from tomato pulp, screened from peelings and cores."

The act in question imposes criminal penalties and the forfeiture of the offending article. Where the charge is of misbranding, it is essential that the libel should set forth the branding and facts inconsistent therewith. If there is indefiniteness in the statement, this indefiniteness must be removed by proof.

The mere fact that certain portions of the tomato are not used in a tomato canning factory does not establish the fact that they are not suitable for the making of tomato catsup. In order to decide that the libel states on its face a case of misbranding, the court would be required to rule that tomato pulp, screened from peelings and cores, is not made from choice ripe tomatoes.

Among the processes of catsup making which may be considered to be within judicial notice is the process of screening or sifting. The tomato is usually reduced to pulp, and that pulp made from peelings and cores is substantially different from the pulp of choice ripe tomatoes, in catsup making, cannot be inferred from a mere interpretation of the language of the libel. It is especially necessary,

in administering an act like the pure food law (however beneficial it may be), that there should be reasonable definiteness and accuracy, not only in the statement of offenses against the act, but in conceptions of what is within the intent of Congress and what is not within that intent. In the administration of such an act it is particularly essential that it should not be given forced or strained constructions.

Though the claimant has not answered or contested the allegations of the libel, so that it may be taken pro confesso, yet it is the duty of the court, before entering a decree of condemnation in spite of such confession by default, to see that a case is made out.

The pure food act provides that proceedings for condemnation shall conform as near as may be to the proceedings in admiralty. By the twenty-ninth admiralty rule, upon the taking of a libel pro confesso, "the court shall proceed to hear the cause ex parte and adjudge therein as to law and justice shall appertain." The rule stated in *Thompson* v. *Wooster*, 114 U.S. 104–111, 5 Sup. Ct. 788, 792, 29 L.Ed. 105, seems applicable to this proceeding:

> The bill, when confessed by the default of the defendant, is taken to be true in all matters alleged with sufficient certainty; but in respect to matters not alleged with due certainty, or subjects which from their nature and the course of the court require an examination of details, the obligation to furnish proofs rests on the complainant.

Ohio Central Railroad Co. v. *Central Trust Co.*, 133 U.S. 83–90, 10 Sup. Ct. 235, 237, 33 L.Ed. 561, also contains language appropriate to proceedings upon default in condemnation proceedings:

> A decree pro confesso is not a decree as of course according to the prayer of the bill, nor merely such as the complainant chooses to take it; but it is made (or should be made) by the court according to what is proper to be decreed upon the statements of the bill assumed to be true. If the allegations are distinct and positive, they may be taken as true without proof; but if they are indefinite, or the demand of the complainant is in its nature uncertain, the requisite certainty must be afforded by proof.

The counsel for the claimant protests that nothing putrid or unwholesome is contained in the catsup. He states that defendant's position is substantially that of one pleading nolo contendere, and that it prefers to throw up all claim to the goods rather than to contest the matter further. This, however, amounts to nothing more than a concession that what is alleged in the libel is true, with a protest against any objectionable significance in the word "offal."

I consider it to be the duty of the court, before condemning property, to see that there is a proper basis for such condemnation; and this duty is not changed by the concession of the defendant that it would rather its property should be condemned than that it should be put to the expense of contesting the matter with the Government.

I am of the opinion that it is incumbent upon the United States to produce evidence to support the allegation that these goods are misbranded, in that the label contains a substantially false and misleading statement.

Where, upon the facts alleged, there can be no doubt of the substantial and necessary inconsistency between the statements of the label and the actual facts, the court may proceed at once to enter a decree of condemnation upon defendant's concession by default of the facts alleged, without requiring of the Government further proof. The present case, however, is not of that class, but requires further

examination of details to determine whether the charge of misbranding is true.

The case may stand for ex parte hearing of proof in support of the libel.

IN RE WILSON

(Circuit Court, D. Rhode Island, Mar. 8, 1909)

168 Fed. 566

Motion for leave to file an information alleging violation of section 2 of the Food and Drugs Act. Motion denied.

BROWN, *District Judge.* The attorney for the United States moves for leave to file an information alleging violation of the Food and Drugs Act, June 30, 1906, in accordance with the practice followed in *United States* v. *Smith* (C.C.), 40 Fed. 755.

It is conceded that it is proper for the court to examine the information and the affidavits in support thereof, and if the same shall be found insufficient to deny the motion.

The information charges that a certain company shipped, by a carrier, from the state of Rhode Island to the District of Columbia, a certain article of food in bottles, to wit, syrup, bearing a certain label upon which was printed the following words: "Gold Leaf Syrup, composed of Maple and White Sugar; Huntington Maple Syrup and Sugar Company, Providence, R.I."; and that the label bore also, in the center thereof, the design and representation of the leaf of the maple tree, as the trade-mark of said company. It is alleged that the syrup was misbranded, and that—

> the design and device and said printed matter were false and misleading and calculated to deceive and mislead the purchaser thereof, in that said article of food was in fact composed principally of white sugar, and contained no substantial quantity, but, on the contrary, a very small quantity, of maple sugar, to wit, not more than 10 per centum by weight of maple sugar; whereas, said design and device, and said printed matter upon said label as aforesaid, represent, and are calculated to lead the purchaser thereof to believe, that said article of food is composed principally or in substantial part of maple sugar.

Appended to the motion is an affidavit in support of the information by an analyst of the Bureau of Chemistry to the effect that as a result of an analysis of the syrup it was found to contain approximately 90 percent of white sugar and not more than 10 percent of maple sugar.

A sample of the bottle is also presented, with a label printed in gold, blue, and red, which at the top has in plain large letters the words "Gold Leaf" in gold, "Syrup" in red, with a blue circular underscoring, a trade-mark consisting of a gold leaf, said to be a maple leaf, with stalks projecting on each side, apparently representing sugar cane, with the name of the company in smaller letters in the middle; the words "composed of" in white on a blue field, being very distinct, and the words "maple and white sugar" in blue on a white field at the bottom, being also very distinct. The very conspicuous features are the words "Gold Leaf Syrup", "Composed of", and "Maple and White Sugar."

It is impossible, upon the most partial interpretation of these statements, and having in mind the decisions of the courts concerning what amounts to fraudulent misrepresentation upon labels, to find any intimation as to the proportions of maple and white sugar contained in this preparation, which is given the general title of "Gold Leaf Syrup." The purchaser is informed in the most distinct and unequivocal manner that he is buying a compound of maple and white sugar, and from the report of the analyst it appears that this is the fact. There is no statement contained on the label which is in the slightest degree calculated to convey the impression that there is more maple than white sugar, and, if a purchaser should suppose that there was, such an idea would come entirely from his own imagination, and not from any suggestion fairly implied by the label. The label affords not the slightest evidence of an intention to convey such an idea to the purchaser.

Such remote possibilities of the imagination cannot be a basis for a proper interpretation by the courts of terms of clear and unambiguous meaning. The label says nothing of proportions, either directly or by any reasonable implication.

As to the maple sugar, it appears as a fact that 10 per centum is contained in the avowed compound. The article is designed for table use. The addition of so substantial an amount of maple sugar as 10 percent, if sufficient to give to this compound syrup a maple flavor, serves to make the article more palatable and to satisfy the purpose of the buyer. A person who should buy this syrup would expect that he was getting a considerable portion of white sugar, with the addition of a sufficient amount of maple sugar to please his palate. Unless his palate is disappointed by the absence of the flavor which he expects, I am unable to imagine how there can be any variance between the contents of this bottle and the statements on the label. Even if we search this label with a most prejudiced eye, and endeavor to discover upon it some innuendo or insinuation, we are at great difficulty in finding even the most remote suggestion. Is there an innuendo that there is more maple than white sugar in the composition? Clearly not. Is there an innuendo that there is more than 10 percent of maple sugar? Viewing this in the light of the subject matter, to wit, the purpose of the purchaser and the expectations aroused in him as a consequence of statements on the label, I am unable to perceive any more definite suggestion than that there is imparted to the Gold Leaf Syrup a desirable quality due to the presence of maple sugar.

In order to convict a person of misbranding upon such a showing of fact, the court would be obliged to go entirely beyond all the established legal principles upon the question of deceit and misrepresentation, and beyond any of the decisions of the equity courts as to what is abhorrent to the conscience of a chancellor. In fact, I think that we should be obliged to go not only outside the boundaries of legal and equitable rules but also outside the boundaries of rational common sense.

From examination of former cases dealing with the subject of misleading representations on labels, I am impressed with the great value of the legislation known as the "Pure Food Act" (act June 30, 1906, ch. 3915, 34 Stat. 768); but I am further impressed with the

fact that an attempt to apply that act to cases of this character cannot but serve to bring that act into such disfavor as to impair its usefulness. The distinction between the enforcement of law and the abuse of law is lost sight of in the attempt to make this obviously innocent act a criminal misdemeanor.

The motion for leave to file the information is denied.

UNITED STATES v. ORIENTAL DRAGÉE COMPANY

(District Court, D. New Jersey, Apr. 10, 1909)

N.J. No. 176

Information charging violation of section 2 of the Food and Drugs Act. Demurrer to the information overruled. Jury trial. Verdict of guilty.

CROSS, *District Judge* (overruling demurrer to information). Omitting the formal parts, the information alleges that the defendant, a corporation of New Jersey, and carrying on business at Jersey City, within said State, on July 31, 1907, at Jersey City, aforesaid, and within the jurisdiction of this court, did wilfully and unlawfully deliver for shipment, and ship and caused to be transported in interstate commerce from the State of New Jersey to the State of New York, an article of food which was adulterated within the meaning of the act of Congress, entitled, "An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, or liquors, and for regulating the traffic therein, and for other purposes", approved June 30, 1906, in that the said defendant on the day and year aforesaid, and within the jurisdiction of this court, did ship from Jersey City in the State of New Jersey, and did cause to be delivered to E. W. Dunstan Company, in the City of New York, in the State of New York, a large quantity, to wit, 25 boxes of Argente Moyens Assortis or Silver Dragees, which said Argente Moyens Assortis or Silver Dragees was an article of food, that is to say, was confectionery and was adulterated within the meaning of the act aforesaid, in that being confectionery as aforesaid, the same contained a mineral substance, to wit, 48 [hundredths] per centum of metallic silver, and in that the said confectionery known as "Silver Dragees" was coated with silver, being a mineral substance and which formed a constituent part of the said confectionery; the said defendant then and there well knowing that the said confectionery was an article of food and was so adulterated. Then follow the usual formal statements. As will have been observed, the information is founded upon what is popularly known as the "Pure Food Act" (34 Stat. 768). The material parts of the act pertinent to the present controversy, will be found in section 7, and are as follows: "That for the purposes of this act an article shall be deemed to be adulterated: * * * In the case of confectionery: If it contain terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt, or spiritous liquor or compound or narcotic drug." The defendant

has demurred to the information, claiming, among other things, that silver, with which the confectionery in this case is alleged to have been adulterated, is not a mineral substance of like character with those specifically mentioned in the act; that the information does not allege that the adulterant, to wit, silver, is an ingredient deleterious or detrimental to health, or that the strength and purity of the confectionery falls below the professed quality or standard under which it is sold. As I construe the section in question so far as it relates to the confectionery, it contains five classes of prohibited articles, the introduction of any designated ingredient of either of which violates the act; that is to say, the act would be violated if the confectionery contained terra alba, barytes, talc, chrome yellow, or other mineral substance, or if it contained any poisonous color or flavor, or if it contained any other ingredient deleterious or detrimental to health; or if it contained any vinous, malt or spiritous liquor or compound thereof, or lastly, if it contained any narcotic drug. If the construction suggested is correct, then it was unnecessary that the pleader should aver that silver, the mineral substance alleged to have been introduced in this case, was "deleterious or detrimental to health." Those words are limited to the term "ingredient", they qualify that word only, and not any preceding word or words. If a comma had been interposed after the word "ingredient", the construction would perhaps have been different. The introduction into confectionery of mineral substances, is, in my judgment, therefore prohibited irrespective of the presence or absence of any poisonous, deleterious, or detrimental quality; they are prohibited because they are adulterants, and for that reason only. Coloring or flavoring matter, however, may be introduced provided it is not poisonous, but any other ingredient, although not theretofore specified or classified, which is deleterious or detrimental to health, is prohibited. Certain specified articles are, by the first clause quoted, inferentially denominated minerals, and their use is prohibited; then to the specific mineral substances whose use is thus prohibited, is added "or any other mineral substance." The information, in brief, alleges that confectionery was shipped by the defendant and delivered in interstate commerce; that such confectionery was adulterated by having in it as one of its constituent parts silver, which is alleged to be a mineral substance. Assuming, because it is admitted by the demurrer, that silver is a mineral substance, its introduction into confectionery as an ingredient, which is also admitted, brought the confectionery within the prohibition of the statute, once it was shipped in interstate commerce. It is urged, however, that silver is not of the class of the specified mineral substances, whose use is prohibited. It must be borne in mind nevertheless, that we are considering an act which relates to the adulteration of food products of which confectionery is one. Silver is a mineral incapable of assimilation through the stomach. It will not yield to the processes of digestion. One of the main purposes of the act is to prevent the introduction of such substances into food products. The title of the act embraces adulterated foods as completely as it embraces misbranded foods, or poisonous foods, or deleterious foods. It refers to each class separately and in the alternative, and the act deals with each class. Technical rules of construction must give way to the avowed pur-

pose and intention of an act. If it be that an act admits of more than one construction, then that one will be adopted which best serves to carry out the purpose of the act. Hence I do not feel warranted in permitting the doctrine of *ejusdem generis* or other technical rule of construction to limit the scope of the act. If silver may be used, as claimed, to beautify the confectionery, why not lead to give it weight. The language under consideration is clear and does not require for its construction the application of technical rules. To yield to the construction of defendant's counsel would open the door for the emasculation of the act.

As to the contention that it was necessary to allege that by the use of silver the strength and purity of the confectionery fell below the professed quality or strength under which it was sold; it is only necessary to say that that clause of the act applies to drugs and to drugs only. It is found in the paragraph dealing with drugs and precedes that which relates to confectionery, which in turn precedes the clause relating to food. Each paragraph is dealt with separately. The clause referred to cannot be read into that part of the act which relates to confectionery. It is no part of it.

The demurrer will be overruled.

UNITED STATES EX REL. ALSOP PROCESS CO., PETITIONER v. JAMES WILSON, SECRETARY OF AGRICULTURE, RESPONDENT

(Supreme Court, District of Columbia, Apr. 30, 1909)

N.J. 498

Petition for a writ of mandamus to restrain the Secretary of Agriculture from publishing and circulating Food Inspection Decision No. 100. Petition dismissed.[14]

On or about January 23, 1909, the Alsop Process Company filed in the Supreme Court of the District of Columbia a petition for a writ of mandamus directed to the Secretary of Agriculture alleging in substance that relator is a corporation engaged in the business of manufacturing and selling machinery and apparatus used by millers for the bleaching of flour by so-called Alsop process (giving a description of said process), and further, that the Secretary of Agriculture caused hearings to be held to determine whether flour bleached by the Alsop process was adulterated within the provisions of the Food and Drugs Act of June 30, 1906, and after hearing the evidence for and against flour thus bleached, decided that, in his judgment, flour so bleached was adulterated within the meaning of the aforesaid act, and that the Secretary of Agriculture, without warrant or color of law, published and caused to be published the said decision designated as Food Inspection Decision No. 100, which publicly condemned as adulterated within the meaning of the Food and Drugs Act flour bleached by relator's process to the great damage of its business. The petition prayed that the Secretary of Agricul-

[14] Affirmed, *United States ex rel. Alsop Process Co., Petitioner,* v. *James Wilson, Secretary of Agriculture, Respondent,* p. 54, *post.*

ture be commanded to revoke and cancel and annul said decision and not to deliver or circulate additional copies thereof.

Upon the filing of the petition the court issued a rule directed to the Secretary of Agriculture as respondent requiring him to show cause by a certain date therein named why the prayer of said petition should not be granted.

Respondent duly answered said petition and to this answer the relator filed a demurrer. The case came on for hearing upon the questions raised by the above-mentioned pleadings and the court overruled relator's demurrer. The following is the opinion of the court:

STAFFORD, *J.* This is a petition for a writ of mandamus. A rule to show cause was issued which the respondent has answered and to this answer the petitioner has demurred. The case was heard upon the demurrer and would have been disposed of at the time had it not been that the court understood that the parties desired that an opinion should be filed dealing fully with all the points involved. The case has been left undisposed of in hope that opportunity would be found to prepare such an opinion, but the pressure of other duties having thus far prevented, and no likelihood appearing that the same can be done within the next few days, it is thought best to dispose of the case without answering categorically the numerous points made in the brief of the petitioner. After all what the case amounts to is this: The Secretary of Agriculture has made up his mind that bleached flour is obnoxious to the provisions of the pure food act and has made that opinion public, announcing at the same time that after six months, during which time the manufacturers and dealers will have an opportunity to adjust themselves to the situation, he will call upon the respective district attorneys to proceed against violators of the law. The petitioner claims to be the owner of a patent on the bleaching process and to be injured by the announcement of this opinion and intention. He is not the owner of any flour; he merely owns the patent and makes and sells the machinery. He says that the Secretary did not proceed according to the provisions of the pure food law in making up his mind; that he had no right to tell the public what opinion he had formed, nor what course he intended to pursue; that if he is going to recommend prosecutions at all he is bound to do so at once and not wait six months. He therefore asks this court, by the great writ of mandamus, to command the Secretary to vacate his decision, to take back what he has said, and hereafter to proceed strictly according to the law. The mere statement of the proposition seems to furnish its own answer and to render an elaborate opinion unnecessary. This court cannot change the fact that the Secretary entertains this opinion, nor the fact that he intends to call on the district attorneys to test the case in the courts. It cannot command him not to make his opinion and intention known and if it could it would be useless for he has already made it known, and the petitioner itself is making the fact still more widely known by this proceeding. The merits of the real question, namely, whether flour subjected to the bleaching process may be sold without violating the pure food law, is one that will ultimately be determined by the courts. In the meantime the Secretary is not violating any law in having an opinion and in telling the public what it is.

The demurrer is overruled.

UNITED STATES v. 300 CASES MAPLEINE

(District Court, N.D. Illinois, Apr. 30, 1909)

N.J. No. 163

Libel under section 10 of the Food and Drugs Act against 300 cases of Mapleine, alleging that said product was misbranded in that the label "Crescent Mapleine" falsely represented the article to contain a product of the maple tree. Exceptions to libel overruled. Jury trial. Verdict in favor of the United States.

SANBORN, *District Judge* (charge to the jury). This is a civil case, as distinguished from a criminal case, and is called a suit *in rem.* That is, a suit against property, there being in the first instance no defendant, but the owner of the property being allowed to intervene and set up a claim for the property and defend, proceeding just as if such owner were an original defendant in the suit. But it does not become a suit against any person at any stage of the case.

If there was a misbranding under the food and drugs statute, then as soon as the misbranded packages were started on shipment from Seattle to Chicago, they became forfeited to the United States. They might then be seized by the officers of the United States as its own property wherever the boxes might be found, so long as they are either being transported, or after transportation so long as they remain unloaded, unsold, or in the original packages. If, however, the Government waits until the cases are broken open, then it at once loses all its title and ownership to the goods which it previously had, and then can only proceed under the criminal provision of the Food and Drugs Act by prosecuting any person or any corporation who either ships misbranded goods or receives them, or delivers them in original packages to any other person.

I call to your attention this because counsel have adverted to the fact that the Government might have proceeded against the bottles. The Government had no right to proceed against the bottles, but must proceed only against the orignal packages, or else prosecute any person who has anything to do with the packages themselves.

Now, as this case is not technically brought against any person or any corporation, but only against the boxes, the fact that the Crescent Manufacturing Co. may sustain a loss, if you find the cases were misbranded, or there was any false statement on the label, is not in question, and should not be considered by you in reaching the verdict, but as the case involves a forfeiture of property, that is as the property becomes the property of the Government immediately upon being misbranded and shipped, and as the burden of proof is on the Government to show by the greater weight of the evidence that the label in question is false or misleading to the ordinary purchaser, it is your duty under these circumstances to scrutinize the evidence tending to show that the label was calculated to deceive more carefully than you otherwise would in the ordinary civil case. This is because misbranding is attended with harsh consequences operating, as it does, as a forfeiture of the property, of the ownership of all the articles so misbranded.

Now, in deciding the meaning of the word "Mapleine", you are to give it its ordinary and customary meaning, as understood by the general public, and not any technical meaning given it by any expert witness. You may consider, of course, all the testimony of all the witnesses, expert or otherwise, but the test is what the common run of purchasers would understand by the word. The important question is whether there was or was not a misbranding. You will notice how broad the law is in its definition. If the statement, design, or device in question is false or misleading, not neccessarily as a whole, but in any particular, then there was a misbranding, if from the evidence you find that in any one point there was a false or misleading statement on the label, taking into consideration what I shall state hereafter as to the bottles and the cartons, then there should be a verdict of guilty.

The purpose of the law is not to protect experts or scientific men alone who know the nature and value of food products, but to protect ordinary people like you and me—people without scientific knowledge or experience.

Was there a false statement on the label—that is, a statement that was untrue, erroneous, or not strictly according to the fact? Or, was there in the label a misleading statement—one which would in any way tend to lead an ordinary person wrongly, and misguide or lead astray, lead into error, cause to mistake, delude, or deceive? If you find the label was either false in any particular, or misleading in any particular, from any point of view, or any aspect which may reasonably be considered false or untrue, or calculated to deceive, mislead, delude, cause to mistake or lead into error or mistake, the ordinary purchaser; then there was a misbranding under the provisions of the statute. Now, in considering this question of false statement or misbranding, there are certain things which appear in the evidence, which you are not only allowed to take into account, but which you should consider. I may mention as follows:

Whether purchasers of "Mapleine" bought from the box label alone, or from the box label and the statements on the cartons or wrappers and the bottles. Now, if you find that the "Mapleine" was bought from the labels on the cartons and bottles, then you may consider whether the ordinary purchaser, the average purchaser, would be deceived or misled.

Another question which you should take into account is whether "Mapleine" is known, or was when these boxes were seized, known as an article of food under its own distinctive name—and a distinctive name is either one so arbitrary or fanciful as to clearly distinguish it from all other things, or one which by common use has come to means a substance clearly distinguishable by the public from everything else. In this connection you should consider whether the evidence shows that there was no other article in the market or common or general to the public, used as maple extract or containing maple product. You should also consider if you think that "Mapleine" was bought from the carton or bottle as well as from the words on the box, the size and appearance of the boxes or the cases or bottles, and the labels, the color of "Mapleine" as compared with genuine maple—its taste and smell—the price asked for it, and the directions for its use. Even if you should believe that the word "Maple-

ine " standing alone would be deceptive and misleading yet you may consider any statement contained on the carton or bottle which you believe the common run of purchasers would read in making their purchases. If you believe that " Mapleine " has been on the market a sufficient length of time and has been sufficiently advertised so as to have become generally known to the public as an article containing no genuine maple syrup or any maple product, but only to produce a maple flavor, then you should take this into consideration on the question whether the label was or was not deceptive or misleading. You should also consider that the label was registered as a trademark by the Commissioner of Patents of the United States, in connection with the picture of a leaf, as having some bearing on the question whether the word " Mapleine " has become a distinctive name, or is a distinctive name, as I have defined that term to you. You should also remember that " Mapleine " is not injurious to health. Further, if you believe from the evidence that no complaints of mistake or of being deceived or misled have been made by purchasers of " Mapleine ", you may consider this as tending to show that the label on the cases, cartons, and bottles is not calculated to deceive or mislead. But, it is not necessary, in order that you should render a verdict of guilty, that any person was actually deceived or misled into purchasing " Mapleine " by the label on the cases in question. It is enough if you find that the label is misleading in any particular.

Gentlemen, I stated to you that the Government had the right to seize the boxes, but after the boxes had become opened the Government lost its right to seize the contents of the boxes. I was slightly in error in making that statement, in not going further and stating that while the Government can only seize the original package, yet it may open the package, and if it finds anything wrong on the inside of the package which does not appear on the outside, that is misbranding or any false statement, it has just as much right to proceed in a case of this kind upon that false statement or misbranding as it has upon the label on the outside of the package which is seized. But, if it does not seize the original package before it is opened, then it has no right whatever to do anything more than to prosecute any party who may deliver the goods or receive the goods in a criminal case.

Your verdict will be " Guilty " or " Not Guilty ", and the verdict will be handed to you by the officer.

Referring to the second page of the charge, the paragraph commencing:

" Now in deciding the meaning of the word ' Mapleine ', you are to give to it its ordinary and customary meaning."

The instruction given was that in deciding the meaning of the word " Mapleine " you are to give it its ordinary and customary meaning, as understood by the general public, and not any technical meaning given it by any expert witness. You are to consider all the testimony of all the witnesses, expert or otherwise, but the test is what the common run of purchasers would understand by the word. What is there about that that is uncertain or mixed?

The question is what this word " Mapleine " in connection with all the facts and circumstances of this case, means to the common run of purchasers.

You are to consider whether they bought on the box label, or on the label on the cartons and bottles; consider the language on the cartons; and after you have considered all of them, you are then to try and solve the question of misbranding—that is, whether the common run of purchasers would understand by that word that there was or was not any genuine maple in the product.

The question is what would the ordinary purchaser—just the common run of purchasers—in view of the way in which they buy it—language on the box and everything that comes to their attention, looks of the bottle, color of it (if they see it), the fact that the bottle is small, and all other facts that present themselves to the purchaser when he comes to buy the goods. What would they understand from the whole situation? Not exactly what the word "Mapleine" standing by itself—but the question is, what it means in connection with all the facts and circumstances that present themselves to the purchaser; how would the purchaser understand it, seeing the bottle, or seeing the box?

Even if you should believe that the word "Mapleine" standing alone, would be deceptive and misleading, yet you may consider any statement contained on the carton or bottle which you believe the common run of purchasers would read in making the purchase.

Now, gentlemen of the jury, in another part of the charge it was stated, the question was stated in this way: Was there a false statement on the label, that is, a statement that was untrue, erroneous, or not strictly according to the facts. Or, was there in the label a misleading statement, one which would in any way tend to lead an ordinary person wrongly, or misguide, or lead astray. Now, there were two questions submitted there, and that was taken from the first part of section 8 of the law defining the word, "misbranded."

It says the word misbranded shall apply to all articles of food, the label, the package label, of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular. Now, in determining what the meaning of this word misbranding was, you are to determine two things: Was the label false in any particular? was it misleading in any particular?

Now, whether or not it was false, depends a good deal, you see, upon whether it would mislead anybody, whether it would deceive anybody, because this term "Mapleine", of course, is a coined word, and is not in the dictionary. You heard the testimony as to what meaning was given it by the Crescent Manufacturing Company, but that is not the test. The test is, what is the general signification of the word, as the ordinary man would understand it? Was it false in any particular, in its true and proper signification? Now, its true and proper signification depends upon what the ordinary man would understand from all the facts and circumstances appearing in the evidence. These two things, while they are separate, are yet connected, because here is a term which starts out without any meaning—I mean any settled or definite, or dictionary meaning. The parties who coin the word give it a meaning, and then they send out the label with the word upon it. Now, the question is: Is there anything false in that word, any suggestion of any falsehood in that word, or any suggestion of anything misleading or deceiving in that word? Now, I

think it comes down to the question as to what the people would understand by that word from the whole situation, including all the statements on the label, and anything else the purchaser would naturally see.

Here is a word that starts out without any meaning at all in the dictionary. It may be plain on its face, and may not. If you think this word is plain on its face, of course, you must find the property guilty under the law, but if you think this word is ambiguous on its face then you may go into the question, what would the ordinary man understand by it, in view of all the facts and circumstances brought to his notice in purchasing the goods? The real purpose of the act is to protect the public against imposition. You may take that into consideration. Now, if nobody is injured, nobody harmed, what difference does it make?

I can see it is a close case, gentlemen, and a difficult question, but you must do the best you can with it.

UNITED STATES v. FRENCH SILVER DRAGÉE CO.

(Circuit Court, S.D. New York, May 19. 1909)

N.J. No. 249

Information alleging violation of section 2 of the Food and Drugs Act. Demurrer to information overruled. Jury trial. Verdict of guilty.[15]

HOUGH, *District Judge* (overruling demurrer). The brevity of this memorandum does not indicate that in my opinion the question raised by this demurrer is trivial.

On the contrary, it is extremely important and presents (I think) a question of first impression under the pure-food law which will ultimately require either amendment of the act or decision of the highest court.

I incline to the following view:

What is or is not an adulteration in commercial or scientific parlance is wholly unimportant, because section 7 of the act defines adulteration and whether such definition squares with the views of the trade or of scientists is no concern of the courts.

Confectionery is therefore by statute adulterated "if it contains terra alba, barytes, talc (or) chrome yellow." This much is not open to doubt.

Next it seems to me the court may take judicial notice of the nature of the substances declared adulterants by statute. They are all undoubtedly mineral substances;—they are not all poisonous, though all possess color. Nor can it be said that they all possess flavor in the sense of that word as applied by most people to confectionery.

There being no punctuation between the phrase "or other mineral substances" and the phrase "or poisonous color or flavor", the word "other" must be held to apply to "mineral substance" and "poisonous color or flavor." But the enumeration of terra alba et al. gives

[15] Reversed, *French Silver Dragee Co. v. United States*, p. 121, *post*.

an illustration (so to speak) of "mineral substances" and of poisonous color" (i.e. chrome yellow), but so far as I understand the nature of the articles enumerated it does not give an instance of a poisonous *flavor* as distinguished from poisonous color.

Let therefore the rule so insisted upon by the defendant be applied and the act be limited to mineral substances, poisonous colors and poisonous flavors *ejusdem generis* with the articles enumerated; and it must then follow that while the proscribed poisonous color or flavor must be a mineral substance, it does not follow that every mineral substance to be proscribed must possess either poisonous color or poisonous flavor.

The act is undoubtedly obscure in connecting color and flavor with substance, for strictly speaking neither color nor flavor can have *substance*, nor be *mineral*.

I am therefore inclined to think that this statute must be construed as prohibiting the use in confectionery of all minerals substances of the same nature as those enumerated, and of those enumerated some are well known to be merely inert, possessing no poisonous qualities whatever (e.g. terra alba and talc).

The best that can be said of silver is that it is inert, and it is just as much a mineral substance as is terra alba.

With some doubt I overrule the demurrer.

UNITED STATES v. ST. LOUIS COFFEE & SPICE MILLS

(District Court, E.D. Missouri, May 22, 1909)

189 Fed. 191; N.J. No. 301

Information charging violation of section 2 of the Food and Drugs Act. Demurrer to evidence sustained and jury directed to return verdict for defendant.

DYER, *District Judge*. Since the adjournment of court on yesterday I have considered more fully the demurrer interposed by the defendant's counsel to the case as stated in the two counts of the information and the evidence offered by the Government in support thereof.

This is the first case arising under the act of June 30, 1906, ch. 3915, 34 Stat. 768, entitled "An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes", that has been presented to this court for determination.

For a violation of this statute penalties are imposed and it is made the duty of the United States attorney, when the Secretary of Agriculture shall report to him any violation of the act to cause appropriate proceedings to be commenced and prosecuted without delay for the enforcement of the penalties, etc.

The Secretary reported this defendant to the district attorney and as a result the information now under consideration was filed in this court.

The proceeding is for a violation of the statute that imposes penalties, and by its terms declares each violation a misdemeanor. The information therefore should be as certain and definite as if the offense were charged in an indictment.

Judging by the well-recognized requirement of pleading in such cases, do the counts or either of them state clearly and with sufficient certainty any offense against the statute under which the proceeding was commenced, and is now prosecuted?

The importance of and the great good to the public that will follow the enforcement of this act, can hardly be measured, and the delay taken by the order of adjournment yesterday was for the purpose of enabling the court to determine (with proper regard to the contention of the district attorney on the one side and of defendant's attorneys on the other) its decision.

The first count in the information charges in substance: "That by Circular No. 19 of the United States Department of Agriculture, dated June 26, 1906, the Secretary established certain standards of purity for food products as authorized by an act of Congress of March 3, 1903 (act Mar. 3, 1903, ch. 1008, 32 Stat. 1158). That said order No. 19 provided that 'Vanilla extract is a flavoring extract prepared from vanilla beans'", etc. The count then states "that in trade and commerce and the science of food chemistry, the words 'vanilla extract' signify an extract prepared from the 'vanilla bean, etc., etc.' and in trade and commerce the words 'vanilla extract' are synonymous with the words 'vanilla flavor' when placed on bottles containing a liquid to be used for flavoring purposes."

The information (after making the foregoing recitals) charges that the defendant on the 26th of October 1907 unlawfully and knowingly shipped by the Missouri Pacific Railroad from St. Louis, Mo., to Kansas City, for sale in interstate commerce, a certain bottle labeled "*Nectar Choice Flavor of Vanilla*, sugar colored, for flavoring ice cream, etc." That the contents of the bottle were *adulterated* in violation of the act of June, 1906, in that said bottle contained a liquid which did not contain any extract of vanilla, as defined by Circular No. 19, and by the usages of trade and commerce, and was in fact an imitation and substitute therefor, etc.

By the word "adulteration" as used in the act, it is understood to mean "to corrupt, debase, or make impure by an admixture of a foreign or a baser substance." How can it be successfully claimed that because the liquid in the bottle offered in evidence did not contain extract of vanilla that it was therefore adulterated within the meaning of the statute?

The Circular No. 19 issued by the Secretary of Agriculture was issued long before the enactment of the statute under which this proceeding is had, and for that reason, if for no other, cannot be considered in determining the question of the guilt or innocence of the defendant in this case.

By section 2 of the act of June 30, 1906, it is made an offense to introduce into any State, etc., any food or drugs *adulterated* or *misbranded.*

The first count charges that the bottle sent from St. Louis to Kansas City contained "adulterated liquid extract or flavor." It also

charges that the liquid did not contain any extract from the "vanilla bean", but did have a vanilla *flavor*.

The court is now asked to say that "Vanilla Extract" and "Vanilla Flavor" as known to the trade, is one and the same thing, and that in dealing with the defendant in this case "extract" and "flavor" are synonymous in meaning, and that, therefore, if the defendant shipped a liquid which had the flavor of vanilla it was guilty of *adulteration* of the extract of vanilla, within the meaning of the statute.

Neither the Secretary of Agriculture nor the public generally can change the meaning of the words "extract" and "flavor." Without references to the dictionaries and the definition of the words contained therein, it is known that "extract" is one thing and "flavor" another.

The evidence in this case has failed to convince the court that even among dealers the words "extract" and "flavor" are considered synonymous terms.

The information charges that there was an adulteration of the article, but fails to state in what particular and how it was adulterated. It states a conclusion without making the necessary averments from which the conclusion could be fairly reached.

Section 7 of the act of June 1906 provides that an article shall be deemed to be adulterated when:

> In case of food:
> First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.
> Second. If any substance has been substituted wholly or in part for the article.
> Third. If any valuable constituent of the article has been wholly or in part abstracted.
> Fourth. If it be mixed, colored, powered, coated, or stained in a manner whereby damage or inferiority is concealed.
> Fifth. If it contain any added poisonous or other deleterious ingredient which may render such article injurious to health.

The information fails to charge that the article sold and delivered to the grocer in Kansas was mixed or packed in such a manner as to reduce or lower or injuriously affect its quality or strength; nor does it charge that any substance was substituted for the article; nor does it charge that any valuable constituent was abstracted; nor does it charge that the article was colored in a manner whereby inferiority was concealed; nor does it charge that the article contained any added poisonous or other deleterious ingredient that would render it injurious to health.

It would seem that one or more of these things should be specifically charged in the information, and that the charge should be made with such particularity as to fairly inform the defendant of the act of violation complained of, and for which it is to answer.

The conclusion reached by the court is that the first count does not sufficiently charge an offense under the statute, and that the evidence offered by the Government does not aid the defect.

The second count is similar in all respects to the first, as far as the recitals are concerned.

This count seeks to charge "misbranding" under section 8 of the act.

That section is as follows:

SEC. 8. That the term "misbranded" as used herein shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

That for the purposes of this act an article shall also be deemed to be misbranded * * * in case of food:

First. If it be an imitation of or offered for sale under the distinctive name of another article.

Second. If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if it fail to bear a statement on the label of the quantity or proportion of any morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any of such substances contained therein.

Third. If in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package.

Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular; provided that any article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word "compound", "imitation", or "blend", as the case may be, is plainly stated on the package in which it is offered for sale; provided that the term "blend" as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only.

It will thus be seen that this count does not follow the words of the statute in charging the offense, but repeats the facts contained in the first count.

The charge in this, as in the first count, should be specific enough to fairly inform the defendant of the charge it is to meet. In my opinion the count is insufficient.

There is nothing left for the court to do on this information but to direct a verdict of not guilty.

UNITED STATES v. 65 CASKS OF LIQUID EXTRACTS

(District Court, N.D. West Virginia, May 25, 1909)

170 Fed. 449; N.J. No. 284

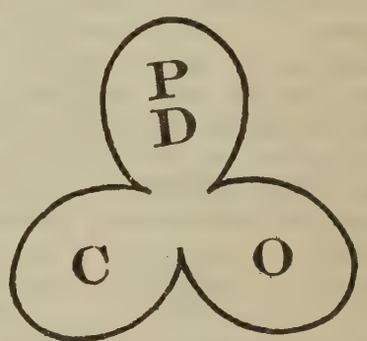
Libel under section 10 of the Food and Drugs Act. Trial before the court. Judgment in favor of claimant. Libel dismissed.[16]

[16] Affirmed, *United States* v. *Knowlton Danderine Co.*, p. 89, *post.*

AGREED STATEMENT OF FACTS

The Knowlton Danderine Company is a corporation organized under the laws of the State of Illinois, having a warehouse, laboratory, and finishing department in Wheeling, in the State of West Virginia, and is the proprietor of a preparation for the hair which it markets in 3-ounce, 6-ounce, and 12-ounce bottles, under the trade name of "Danderine," the formula of which is a trade secret and comprises liquid extracts and other ingredients. Parke, Davis & Co., who are mentioned in the said libel as shippers, are manufacturing pharmacists at Detroit, in the State of Michigan, and are under contract with the said Knowlton Danderine Company, the respondent in this proceeding, to compound the said formula and to cause to be transported and delivered in bulk in carload lots to the respondent at Wheeling, and no sale of the said danderine is made to the public or any outside purchasers until the said casks are emptied and the contents thereof placed in the properly marked bottles. The said casks are made of wood bound with iron hoops, and shipped like barrels, and for the purpose of safe transportation a sufficient number of casks, each holding about 50 gallons, are used, which, when emptied by the respondent, are returned to the said Parke, Davis & Co., to be again refilled and shipped. Each and every one of the 65 casks mentioned in libel contained a drug product accurately compounded in accordance with said formula, and said drug product contained an average of 10 per centum of alcohol. All of the said casks are marked in the same manner, with the exception that the figures, some of which show the number of gallons contained therein, and others the number of casks, are marked in the same manner when shipped, and are marked wholly upon one end of the cask. Varying as in figures as aforesaid, each cask is marked as follows:

49 ½
S 46022
63
Wheeling Terminal
19th St. Delivery
Knowlton Danderine Company
Wheeling, W. Va.
505 lbs.



There are no other marks, brands, or labels upon the said casks or any of them, and the casks which are referred to in the said libel were marked in the manner hereinbefore indicated and had no other marks, brands, or labels upon them. When the contents are removed from the said casks they are placed in bottles, and on each bottle is a printed label containing in plain letters the words "Danderine Scalp Tonic, Alcohol 10 percent."

The said respondent has a spur track running into its building at Wheeling, upon which each car is left as soon after its arrival as possible, and the casks are removed from the car promptly by the respondent, which bottles and labels the contents, which process of bottling and labeling is known as the finishing process, and in pursuance of this custom the respondent had before the seizure of the casks, which was made in this proceeding, emptied 59 of the said 65 casks, and was engaged in bottling and labeling the same, and would have continued so doing until all of the 65 casks were bottled and labeled but for the seizure in this proceeding of the 6 casks, which had not been emptied or bottled, though the last-mentioned 6 casks had been removed from the car in which they had been shipped and received.

The 65 casks mentioned in the said libel were shipped by Parke, Davis & Co. to the respondent by boat to Sandusky, in the State of Ohio, where they were transferred to a car which contained nothing else, and the said last-mentioned car was forthwith transferred from Sandusky, in the State of Ohio, to Wheeling, in the State of West Virginia, and was delivered upon the premises and in the building of the respondent, and was emptied at the time of the seizure of the said 6 casks.

The libel filed in this proceeding is based upon an examination of the samples of the contents of the said casks obtained from the respondent a few days prior to the filing of the said libel by a food and drugs inspector from the

Department of Agriculture of the United States. The Secretary of Agriculture did not cause notice to the effect that it appeared from such examination of the said sample that the same was adulterated or misbranded to be given to the respondent as the owner and claimant thereof, or to anyone else before the matter was directed to the attention of the district attorney, or before this proceeding was begun and the casks seized by the marshal.

After the United States marshal had seized 6 of the 65 casks of liquid extracts mentioned in the said libel, he permitted a food and drugs inspector of the Department of Agriculture to open one or more of the said casks of liquid extracts and to transfer and remove therefrom about 3 gallons of the contents thereof.

The situation and conditions as shown by the facts herein set forth were substantially the same from the time when the 65 casks involved in this proceeding were originally shipped from Detroit down to and including the present time.

DAYTON, *District Judge* (after stating the facts as above). The defenses relied on are: (*a*) That the Food and Drugs Act (act June 30, 1906, ch. 3915, 34 Stat. 768) does not require a drug product to be labeled, nor if unlabeled, to bear any statement respecting the amount of alcohol contained, but, if labeled, the label must contain the statement. The casks in controversy were not labeled, therefore not subject to the provisions of the act. (*b*) The libel is predicated upon an examination of specimens under section 4 of the act; but the Secretary of Agriculture did not cause any notice to be given to the party from whom the samples were obtained, nor afford such party any opportunity to be heard. (*c*) The goods seized were, at the time of seizure, no longer in the "package" or condition in which the importer received them, but had become merged with the property of the State, and were therefore not under the operation of the interstate commerce clause of the Constitution or of any law subsisting by virtue of such clause. The "original package" in this case was the car which was delivered upon the premises and into the possession of the defendant, and which had been entirely emptied of it contents before seizure of the 6 casks taken upon the warrant issued in this case. (*d*) Seizure of 6 casks upon a warrant for 65 casks was not authorized or legal. (*e*) In no event is a food or drug product subject to libel proceedings under section 10 of this act unless it is being or has been transported into another State for the purpose of sale. In this case the product seized was transported in bulk for the distinct purpose of being "finished" or, to use a non-technical term, of being bottled and labeled; and it is admitted that, when ready for sale, the salable package bore a label containing a lawful statement respecting content of alcohol.

In support of the first ground of defense, it is contended that "the courts of the United States, in determining what constitutes an offense against the United States must resort to the statutes of the United States enacted in pursuance of the Constitution." *In re Kollock*, 165 U.S. 526, 17 Sup. Ct. 444, 41 L.Ed. 813. That "regulations prescribed by the President and by the heads of the departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where the statute does not distinctly make

the neglect in question a criminal offense." *United States* v. *Eaton*, 144 U.S. 688, 12 Sup. Ct. 767, 36 L.Ed. 591. And that, therefore, this court, in construing this statute, cannot be influenced by any departmental rules or regulations prescribed for its enforcement, but can look alone to the terms of the statute, penal in character, to ascertain whether or not the owner of these casks of liquid can be held either liable to criminal prosecution or to confiscation of its property. In construing the terms of the statute, it is further insisted that a criminal offense cannot be created by implication, but only by direct and positive terms. Granting at once these several propositions to be sound, the crucial question is, Does the Food and Drugs Act in express terms require drug products to be labeled? The argument of counsel, that Congress intended by this act, not to correct the evil of failing to label, but of falsely and fraudulently labeling, and therefore, drug products, even when put up in packages suitable for retailing, but which bear no labels, are not within the misbranding provisions of the act, is ingenious but untenable, and wholly refuted by the express terms of the act. The first section of it makes it "unlawful for any person to manufacture within any Territory or the District of Columbia any article of food or drug which is adulterated or misbranded" within the meaning of the act. This is an unqualified prohibition against the manufacturing itself, so far as Congress had the power to prohibit; that is, in these parts of the country over which it had full control and jurisdiction. Section 2 provides that:

> The introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia or from any foreign country, or shipment to any foreign country, of any article of food or drugs which is adulterated or misbranded, within the meaning of this act, is hereby prohibited.

Here was the exercise, to the fullest limit, by Congress of its power, under the interstate commerce clause of the Constitution, to prevent adulterated and misbranded food and drug products from being placed upon the markets and sold as pure and genuine ones in the several States by expressly banishing them from lawful interstate commerce. In view of these express provisions, I cannot hold with counsel that the evil intended by Congress to be met was simply the false and deceptive branding of drug products and not the sale thereof. The question therefore, recurs to whether this act in such direct terms requires the labeling of drug products offered for sale in the original package as to subject one failing to do so to a criminal prosecution or to confiscation of the property. The two sections from which I have quoted expressly provide for criminal prosecution and penalties for their violation. Sections 6, 7, and 8 of this act define the terms "drug" and "food" as used; what articles of each shall be deemed adulterated, and what articles of each shall be deemed misbranded. It is provided that:

> The term "misbranded" as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular.

And further, "if the package fail to bear a statement on the label of the quantity or proportion of any alcohol", and other specified

substances contained therein. Counsel insist that these provisions do not directly require a label, and that in order to warrant prosecution the provision should have been in effect.

> For the purposes of this act an article shall also be deemed to be misbranded: In case of drugs * * * if the package or other container thereof fail to bear a label.

I think this is too technical, even under the strict rules governing the construction of criminal statutes. Suppose the provision had read "if the package fail to bear a statement on a label of the quantity of alcohol", would it not as well meet the view of counsel? A label is defined by Webster to be "a slip of paper, parchment, etc., affixed to anything, and indicating the contents, ownership, destination", etc. The use of the word itself, therefore, carries the meaning that it is a descriptive paper affixed to the package, and in express terms the act requires the descriptive matter borne by the paper to include the statement of how much alcohol, etc., is contained in the package. It does not seem to me that the ruling in the case of *United States* v. *20 Boxes of Corn Whisky*, 133 Fed. 910, 67 C.C.A. 214, can be made at all applicable here. There an entirely different character of statute was being construed. It did not attempt to bar from interstate commerce the article unbranded, but only to bar the shipment "under any other than the proper name or brand known to the trade", of spirituous or fermented liquors or wines. This statute was unquestionably passed to prevent fraud upon the revenue, and not as a regulation of interstate commerce. It follows that the first ground of defense must be unavailing.

The second, to the effect that the Secretary of Agriculture did not cause notice to be given the owner and allow hearing before seizure has been directly decided in *United States* v. *50 Barrels of Whisky* (D.C.), 165 Fed. 966, where Judge Morris, in overruling an exception to the libel based on this ground, says:

> Such seizures are not unusual, and it is plain that, if the harshness were conceded, it would not justify the court in reading into the law a limitation which it does not contain. The act provides two different proceedings to enforce its provisions. One is by criminal proceedings in personam; the other is by a proceeding in rem, by seizure of the offending thing itself, and forfeiture if found to be violative of the law. In this latter case there is no provision for a preliminary examination.

With this construction of the statute I am in entire accord, and defense on this ground must be overruled.

Nor do I think sound the third ground of defense, to the effect that in this case the car arriving at Wheeling and shunted into the private side track of respondent was the "original package" and not the several casks in which the liquid was contained. The term "original package" as employed by law, admits of no precise definition applicable to all. Generally, it is said to be a parcel, bundle, bale, box, or case made up of or packed with some commodity with a view to its safety and convenient handling and transportation. It does not necessarily mean that goods shall be inclosed in a tight or sealed receptacle. It relates wholly to goods as prepared for transportation, and has no necessary reference whatever to the package originally prepared or put up by the manufacturer. Indeed, the idea of the "original package" may well be made to cover certain forms of

property which do not ordinarily admit of being packed or incased in any other manner than in the car or vessel in which they are transported, such, for instance, as steel beams, threshing machines, and other bulky articles. *Cook* v. *Marshall County*, 119 Iowa, 384, 93 N.W. 372, 373, 104 Am. St. Rep. 283. This definition has been quoted as being the most favorable I have found to the contention of respondent in this case. Many others have been carefully collated in 6 Words & Phrases, 5059, and the term has been fully discussed in *Austin* v. *Tennessee*, 179 U.S. 343, 21 Sup. Ct. 132, 45 L.Ed. 242. Without prolonging discussion, it seems to me clear that in this case the cask is the "original package", for the very simple reason that the car was wholly incompetent to "package" the liquid itself; the cask was a complete entity of itself, not connected or bound up with any other article, but capable of and in fact containing some 50 gallons of this liquid, an amount capable thereby of being safely and conveniently handled and transported; each cask was marked to the consignee, and if separated from the car was capable of shipment independent thereof without either loss or inconvenience; the casks were shipped independently from Detroit to Sandusky by vessel, and then transferred to the car for shipment to Wheeling, their final destination. And holding the cask to be the "original package", it becomes unnecessary to consider to any extent the fourth ground of defense, that a seizure of six casks under a warrant for 65 casks was unlawful. The warrant being for the whole shipment, the Government, if it had the right of seizure at all, could take the whole or any part it could find in the original packages.

This brings us to the fifth and last defense relied upon, to the effect that this liquid extract was not shipped in these casks for the purpose of sale thus in bulk, but was so shipped to the owner thereof from one State to another for the purpose of bottling into small packages suitable for sale, and when so bottled it is admitted the bottles were labeled so as to express the content of alcohol and comply with the requirements of the act. A careful analysis of the provisions of the act has convinced me that this defense must be sustained. The language of the statute is:

> Any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded foods or drugs, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor.

Again:

> Any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act, and is being transported from one State, Territory, District, or insular possession of the United States, or if it be imported from a foreign country for sale, or if it is intended for export to a foreign country, shall be liable to be proceeded against in any District Court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation.

These provisions must be construed strictly in favor of the accused. So construed, I am persuaded they must be held to mean that any one owning an adulterated or misbranded food or drug product who ships to another in another State such product is guilty; that any one having received such product so shipped from another State by the owner or seller thereof, who shall, in the State where so received, deliver or offer to deliver such product to another in the original package, for pay or otherwise, shall be guilty; that any person who has received such product from any other State, who sells or offers it for sale, whether in the original package or not, in the District of Columbia or the Territories, is liable. Congress had no power except in the District of Columbia and the Territories to prohibit one from manufacturing adulterated food and drug products; it had no power to prevent one anywhere from personally consuming such products; it did have power to suppress the manufacture of such in the District of Columbia and the Territories, and by this act has done so; it had the further power to restrict in the course of commerce the transportation from State to State of such products, and it has done so; it had power, after such product was received from another State, to restrict its sale in the original package, and it has done so. It did not, in my judgment, have power to restrict one from manufacturing in one State such product and removing it from that State to another for the purpose of personal use and not for sale, or for use in connection with the manufacture of other articles to be legally branded when so manufactured. The Government's inspector was entirely justified in concluding that this shipment in these original package casks was a violation of this act, because they were consigned for shipment by Parke, Davis & Co., of Detroit, Mich., to the Knowlton Danderine Company, at Wheeling, W.Va., and they were not branded. It was reasonably to be assumed that Parke, Davis & Co. were the owners and sellers, while the Knowlton Danderine Company was the purchaser. From the agreed statement of facts, however, it is apparent that the formula of the preparation is a trade secret; that Parke, Davis & Co. were not the owners of this formula, but only the manufacturing agents, under contract, of the owner, the Danderine Company, and only acted as agent for the owner in directing such shipment to the owner itself of its own property; that such owner did not, "having so received" such product, either "deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person," the same; nor did it "sell, or offer for sale in the District of Columbia or the Territories of the United States."

It seems clear that the transportation of this liquid was solely to the bottles made in Wheeling instead of the transportation of the bottles from Wheeling to the liquid manufactured in Detroit, and that it was so bottled in Wheeling and properly branded before any sale or disposition of it was attempted. Under such circumstances I am constrained to hold that the six casks must be surrendered to respondent, and the libel dismissed.

UNITED STATES EX REL. ALSOP PROCESS CO., PETITIONER, v. JAMES WILSON, SECRETARY OF AGRICULTURE, RESPONDENT

(Court of Appeals, District of Columbia, June 1, 1909)

33 App.D.C. 472

Appeal from the Supreme Court of the District of Columbia. Order affirmed.[17]

ROBB, *Justice:* This is an appeal from the Supreme Court of the District overruling the demurrer of the relator to an answer of the defendant, appellee here, to a rule to show cause why a mandamus should not be issued against him.

In its petition the relator states that it is a corporation of the State of Missouri engaged in the manufacture of flour-bleaching machinery, which is sold throughout the United States and elsewhere and is extensively used by millers for bleaching flour. The process for which this machinery is designated is known as the "Alsop Process" and is covered by patent which is owned by the relator. The bleaching of flour by this process is accomplished by the passage of pure air through a flaming discharge of electricity and the application of the resultant gaseous medium to the freshly milled flour as the latter passes through an agitator. The flour thus treated, the relator states, has no substance mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength, is not deprived of any valuable substance, nor has it been mixed, colored, or treated in any manner whereby inferiority is concealed, and contains no deleterious ingredient or other element injurious to health. The relator further states that prior to November 18, 1908, the Secretary of Agriculture inserted, or caused to be inserted, in certain milling journals and other periodicals throughout the country a notice to the effect that a hearing would be held on the subject of bleached flour at the Department of Agriculture on November 18, 1908, at which time the relator says it was present by a duly authorized officer and by an attorney, and that the hearing was also attended by many millers from various parts of the country; that this hearing was continued five days, and testimony for and against said process was introduced; that the attorney for the relator conducted the case for the millers favoring the bleaching process; that the relator's managers gave extended testimony at this hearing; that the entire proceedings were transcribed by a stenographer and made accessible to the public generally. This hearing, the relator avers, was without color of authority of law. The petition further states that on the 10th of December 1908 the said Secretary of Agriculture unlawfully, arbitrarily, and oppressively, and without color or right of law, issued the following bulletin:

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[17] Affirming judgment of Supreme Court of District of Columbia in *United States ex rel. Alsop Process Co., Petitioner,* v. *James Wilson, Secretary of Agriculture, Respondent,* p. 37, *ante.*

[Food Inspection Decision 100]

BLEACHED FLOUR

Flour bleached with nitrogen peroxide, as affected by the Food and Drugs Act of June 30, 1906, has been made the subject of a careful investigation extending over several months.

A public hearing on this subject was held by the Secretary of Agriculture and the Board of Food and Drug Inspection, beginning November 18, 1908, and continuing five days. At this hearing those who favored the bleaching process and those who opposed it were given equal opportunities to be heard.

It is my opinion, based upon all the testimony given at the hearing, upon the reports of those who have investigated the subject, upon the literature, and upon the unanimous opinion of the Board of Food and Drug Inspection, that flour bleached by nitrogen peroxide is an adulterated product under the Food and Drugs Act of June 30, 1906; that the character of the adulteration is such that no statement upon the label will bring bleached flour within the law; and that such flour cannot legally be made or sold in the District of Columbia or in the Territories; or be transported or sold in interstate commerce; or be transported or sold in foreign commerce except under that portion of section 2 of the law which reads:

"* * * *Provided*, That no article shall be deemed misbranded or adulterated within the provisions of this act when intended for export to any foreign country and prepared or packed according to the specifications or directions of the foreign purchaser when no substance is used in the preparation or packing thereof in conflict with the laws of the foreign country to which said article is intended to be shipped"; * * *

In view of the extent of the bleaching process and of the immense quantity of bleached flour now on hand or in process of manufacture, no prosecutions will be recommended by this department for manufacture and sale thereof in the District of Columbia or the Territories or for transportation or sale in interstate or foreign commerce, for a period of six months from the date hereof.

JAMES WILSON,
Secretary of Agriculture.

WASHINGTON, D.C., *December 9, 1908.*

The promulgation and circulation of this bulletin, the relator states, has worked irreparable harm and injury to it, and in effect deprived it of its property without due process of law "in that since the issuance and promulgation of said unlawful decision aforesaid by the respondent herein, and by reason thereof your petitioner has been unable to sell its patented process and apparatus aforesaid, the prospective purchasers of said patented process and apparatus aforesaid, refusing to buy and install the same for fear that they or their customers will, upon the recommendation of the Secretary of Agriculture, be prosecuted for manufacturing or selling an adulterated food product in violation of the provisions of said Food and Drugs Act, June 30, 1906." The petition closes with a prayer that the writ of mandamus issue to compel the Secretary of Agriculture to withhold recommendations of prosecutions against manufacturers of and dealers in flour bleached by said Alsop process; to revoke, cancel, and annul said decision of said Secretary, and not to deliver or circulate additional copies thereof, and that the Secretary of Agriculture be commanded to proceed relative to the subject of bleached flour in strict conformity with said Food and Drugs Act and the regulations of the Department promulgated thereunder.

A rule to show cause was issued. In the answer filed by the Secretary he states "that it does not appear by the said petition that the said relator has any right, title, or interest in the matters affected by the judgment and action of your respondent referred to in the said petition, and is not a party to nor legally interested in the proceedings in which said judgment and action of your respondent have been

made." He admits the relator owns the patent known as the "Alsop Process" for bleaching flour, but claims that its patented rights are wholly collateral to the right of said Secretary of Agriculture to decide whether flour bleached by the use of nitrogen peroxide is deleterious and adulterated within the meaning of said Food and Drugs Act; that the patenting of said process confers no right on relator and gives it no status to compel the respondent to change or revoke his decision that flour so bleached is adulterated. The answer denies that the effect on flour by the use of said process is as stated in the petition; on the contrary, the answer states "that the flour which is bleached is reduced and lowered in its quality and strength; that the said flour is so artificially colored as to conceal inferiority, and that it contains a poisonous and deleterious ingredient which has been added, and that the said flour is deleterious and injurious to health." The respondent in his answer further says "that the bleaching of the said flour is effected by nitrogen peroxide, and that the resultant product is deleterious and is adulterated within the meaning of the aforesaid Food and Drugs Act approved June thirtieth, 1906"; that for many months prior to November 18, 1908, the respondent had made an exhaustive inquiry into the character, composition and purity of bleached flour and had caused the matter to be investigated exhaustively by the Bureau of Chemistry of his department, and "that from all the evidence adduced it was conclusively established that flour bleached with nitrogen peroxide was adulterated within the meaning of said Food and Drugs Act"; that in the exercise of abundant caution, however, the Secretary decided to renew the investigation and to consider the matter more fully before finally deciding under the authority of said act whether said bleached flour was adulterated; that accordingly he issued a notice for said public hearing; that this hearing was entirely advisory; and that the millers and manufacturers and others who attended did so voluntarily. The result of this hearing, the Secretary says, was to put him in possession of further and additional evidence relative to the subject; that this hearing was authorized both impliedly by the provisions in said Food and Drugs Act and expressly by the provisions of the Agricultural Appropriation Act of Congress of May 23, 1908; that after due consideration he decided that flour bleached by the use of nitrogen peroxide is adulterated within the meaning of said Food and Drugs Act and forbidden by the terms of said act, and that he thereupon announced and published said decision of December 10, 1908; that this decision in no wise mentioned or in any way relates to the relator, and that, therefore, it has no status to seek any relief or redress in connection therewith. The Secretary in his answer denies the averments of the petition that his action was without right or color of law, denies the jurisdiction of the court to grant the writs, and states that he "passed no judgment upon the machinery of the relator, and has no jurisdiction over the same, nor concern therewith. The said relator is not an owner of bleached flour nor a manufacturer of the same. The judgment of the said respondent has to do only with the bleached flour, the product itself, and has no jurisdiction over or concern in one of the kinds of process by which the said product may be secured. And respondent submits that the claims of the said relator are wholly collateral, and that its petition fails to show any legal damage."

To this answer a demurrer was filed, which was overruled, and, relator choosing to stand upon its demurrer, final judgment was entered, and this appeal taken.

The first question to be disposed of is whether the interest of the relator in the subject matter involved is of such a nature as to entitle it to maintain this proceeding. The decision of the Secretary of Agriculture, which is here sought to be challenged, is to the effect that flour bleached by nitrogen peroxide is an adulterated product under said Food and Drugs Act. Neither the relator nor its process is mentioned in this decision. The relator is neither the owner nor the manufacturer of bleached flour. Its sole excuse for attempting to stay the hand of the Secretary is that since the promulgation of this decision by the Secretary it has been unable to sell its patented process and apparatus owing to the fear of prospective purchasers that upon the recommendation of the Secretary they will be prosecuted for manufacturing or selling an adulterated food product.

Whilst it is true that there is a distinction between cases where the extraordinary aid of mandamus is invoked merely for the purpose of enforcing or protecting a private right and cases where the purpose of the application is the enforcement of a purely public right, the people at large being the real party in interest (High on Extraordinary Remedies, par. 430; 26 CYC 404 and cases there cited), it has never been held, at least to our knowledge, that such an indirect and collateral interest as is here shown will sustain a petition for the writ.

Union Pac. R.R. Co. v. *Hall*, 91 U.S. 343, and *Board of Liquidation* v. *McComb*, 92 U.S. 531, in our opinion, do not sustain appellant's contention that it has a sufficient interest to entitle it to institute this proceeding. In the former case it was held that merchants in Iowa having frequent occasion to receive and ship goods over the Union Pacific Railroad Company might, without the intervention of the Attorney General of the United States, institute a proceeding under an act of Congress which conferred upon the proper circuit court of the United States jurisdiction to hear and determine all cases of mandamus to compel said railroad company to operate its road as required by law. It will thus be seen that a duty was laid upon the railroad company to operate its road in the interests of the public. Its failure in that regard wrought a direct injury to the merchants who were permitted to institute proceedings. The court went no further than to hold that the writ of mandamus may be issued at the instance of a private relator in all cases " where the defandant owes a duty, in the performance of which the prosecutor has a peculiar interest ", and also " in case of applications to compel the performance of duties to the public by corporations." In the latter case the relator was the holder of bonds directly affected by the funding act, the carrying out of which he sought to have restrained.

We have carefully examined the other cases cited by relator on this point, and find that they go no further than the cases above reviewed.

The relator as a corporate entity has no interest in the enforcement of duties owing by the Secretary to the public. It seeks to arrest the operations of an executive department of the Government solely because the indirect effect of the promulgation of an opinion

by the head of that department has been to cause millers to cease purchasing relator's machinery. In all the cases relied upon by relator mandamus was granted to secure to the relators rights which they were entitled personally to enjoy. Measured by this test, it is apparent that the relator has no such interest in the subject matter of this controversy as to entitle it to the writ. Being neither an owner nor a manufacturer of bleached flour, its legal rights were not involved or invaded by the action of the Secretary. It is a mere volunteer in this proceeding and as such is without standing.

There is some analogy between a suit in equity for the abatement of a public nuisance and the present case. Yet it is well settled that such a suit will not be sustained unless the complainant shows special, direct, and material damages; *Georgetown* v. *Alexandria Canal Co.*, 12 Peters, 91; *Irwin* v. *Dixon et al.*, 9 How. 9; *State of Penna.* v. *Wheeling Bridge Co. et al.*, 13 How. 518; *Miss. & Mo. R.R. Co.* v. *Ward*, 2 Black, 485. In the case last cited it was said: "A bill in equity to abate a public nuisance, filed by one who has sustained special damages, has succeeded to the former mode in England of an information in chancery, prosecuted on behalf of the Crown, to abate or enjoin the nuisance as a preventive remedy. The private party sues rather as a public prosecutor than on his own account; and unless he shows that he has sustained, and is still sustaining, individual damages, he cannot be heard."

The rule permitting private parties, whose rights are directly jeopardized, to maintain mandamus to compel a public duty is a salutary one, but it should not be enlarged to such an extent as to permit interference with the operations of the Government by those whose rights are only remotely and indirectly affected.

Having determined that the relator's interest in the subject matter involved is too remote to entitle it to institute this proceeding, it becomes unnecessary to consider any other question.

The order is, therefore, affirmed, with costs.

UNITED STATES v. 100 BARRELS OF CALCIUM ACID PHOSPHATE

(District Court, N.D. California, June 22, 1909)

N.J. No. 300

Libel under section 10 of the Food and Drugs Act. Hearing by court on libel and answer. Libel dismissed.

De Haven, *District Judge.* It is provided in subdivision 4, section 8 of the act of June 30, 1906 (34 Stat., 768), under which this action is prosecuted, that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

Second. * * *

It clearly appears from the evidence that the substance referred to in the libel, and sought to be condemned in this action, is compounded of calcium acid phosphate and cornstarch, the mixture containing about 33⅓ percent of cornstarch.

It also appears that the addition of cornstarch does not render the mixture deleterious or in any way dangerous to the health of persons eating food in the proportions in which said compound is used.

It further appears that said compound when first manufactured was known as and sold as "Cream Acid Phosphate"; that said name was thereafter condensed to the use of the arbitrary letters "C.A.P." and applied particularly to the substance or product referred to in the libel for the purpose of distinguishing it from other products; that the claimant herein adopted said letters C.A.P. as its trademark. In other words, the substance referred to is manufactured and sold under the distinctive name of "C.A.P."

It follows from the foregoing that the plaintiff is not entitled to recover in this proceeding; that while the article sold, under the trade name of "C.A.P." may be classed as an article of food, it does not contain any poisonous or deleterious ingredients, within the meaning of the statute above quoted, and the libel must therefore be dismissed.

So ordered.

UNITED STATES v. KOCA NOLA CO.

(Circuit Court, N.D. Georgia, Aug. 22, 1909)

N.J. No. 202

Informations alleging violations of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

NEWMAN, *Circuit Judge* (charge to the jury). The defendant, the Koca Nola Company, is charged in this information with the violation of what is known as "the Food and Drugs Act of 1906." This act provides first, so far as is material here, that "the introduction into any State or Territory or the District of Columbia, from any other State or Territory or the District of Columbia, or from any foreign country or shipment to any foreign country of any article of food or drink which is adulterated or misbranded under the meaning of this act, is hereby prohibited", and then that any person who shall violate this act shall be guilty of a misdemeanor and shall be punished as provided in the act.

You understand, of course, that this is a Federal statute, and consequently deals only with things between States and between States and the District of Columbia, and between the United States and foreign powers. The United States have no jurisdiction whatever with reference to anything occurring within the States or within any Territory. The States themselves have jurisdiction of such matters.

You are trying the defendant on two criminal informations which are consolidated for the purpose of this trial. The first information, no. 7594, charges that the defendant, the Koca Nola Company, shipped to New Orleans, in the State of Louisiana, from Atlanta, in

the State of Georgia, a package of Koca Nola syrup containing cocaine without having the same branded upon the label on the package containing the Koca Nola syrup.

The second count in that information charges the defendant with shipping the same package from Atlanta, Georgia, to New Orleans, Louisiana, and charges that it contained a deleterious ingredient, to wit: Cocaine, which, the information alleges, may render and which did render said Koca Nola syrup injurious to health.

You see the first count in that first information charges that they shipped the package from Atlanta to New Orleans without the same being properly labeled, and the second count in that information is with reference to the same package and charges that it contained a deleterious ingredient, injurious to health.

The other information, no. 7630, contains three counts. Only the first and third counts are insisted on by the Government. The second is with reference to drugs, and the United States, upon information, concedes now that this is not a drug, it is a food, and consequently they admit that the act applying to drugs is not applicable here, and only the first and third are insisted upon by the Government. The first charges the defendant with the shipping of a package of Koca Nola syrup from Atlanta, Georgia, to Anacostia, in the District of Columbia, and the same charges are made with reference to that as in the first count of the other information, that is to say, it was not properly labeled.

The third count charges the shipment of the same package from Atlanta, Georgia, to Anacostia, in the District of Columbia, and that it was adulterated and contained an added deleterious ingredient, namely cocaine, which may and does render the syrup injurious to health.

So you see you have really four counts, two in the first information and two, the first and third, which are insisted upon, in the second information.

You will express by your verdict which are the counts on which you find the defendant guilty, if you find it guilty at all.

The first count in each of the informations is under that provision of the act of Congress referred to which relates to misbranding of foods. The eighth section of the act provides that " for the purposes of this act an article shall be deemed to be misbranded ", so far as material here, and leaving out immaterial language and articles mentioned, " if it fail to bear a statement on the label of the quantity or proportion of any * * * cocaine * * * or any derivative or preparation " of cocaine or any derivative of the same.

To state it again " For the purposes of this act an article shall be deemed to be misbranded if it fail to bear a statement on the label of the quantity or proportion of any cocaine or any derivative of the same."

You will see from the act that a package containing any article of food, if it contain cocaine or any derivative or preparation of the same, must be so branded. In the opinion of the court, notwithstanding the fact that you may believe from the testimony that so far as cocaine was contained in this Koca Nola syrup shipped by the defendant it was in what are called " derivatives " of the same, still, if you believe that cocaine, in any appreciable quantity, was in the

syrup, it should have been so stated on the label. The object of the law is apparent, that is that the public shall be put distinctly on notice, and cocaine, among other things mentioned in the act, if it be in any preparation of food or drink, it must be so stated on the label. And it is immaterial also, in the opinion of the court, if it is a small quantity, if it is an appreciable quantity. This act says "any cocaine" and if it contained any appreciable quantity of cocaine, it should have been, in the opinion of the court, shown by the label.

The testimony of all of the witnesses for the Government, as I understand it, is to the effect that there was cocaine in both of these packages, the one shipped to New Orleans and the one shipped to Anacostia, and it is for you to say whether there would have been any difficulty about their stating exactly or approximately the proportion or quantity of cocaine contained in the syrup. Some of these witnesses, three I believe, have stated that they could have stated on the label the quantity contained, and while it was small, the fact that it was a small quantity would not render it, in the opinion of the court, any the less a violation of the law. It would be a matter of degree only.

The second count in the first information and the third count in the second information are based on the provision of the law that for the purposes of the act an article shall be deemed to be adulterated, leaving out immaterial language, "if it contain any poisonous or other added deleterious ingredient which shall render such article injurious to health."

You will inquire, in the first place, whether there was any cocaine or cocaine derivatives in this syrup and if so, if you believe that to be a deleterious ingredient, injurious to health. There has been testimony about that, and you will determine, in the first place, whether there was any cocaine contained in the syrup shipped to New Orleans and to Anacostia, and if it was labeled, as in the first counts in the informations, and if you believe it contained cocaine, was the same an article injurious to health, under the second counts in these informations.

Mr. Austin, who states that he is the president of the Koca Nola Company, Dr. Everhart and Dr. Heath have testified as you have heard on the stand. I understand their testimony was—first, Mr. Austin testified generally to the facts and his testimony you have heard. He claimed to be under the impression that it had no cocaine in it at all. And Dr. Everhart says he used these bottles, which were gotten here, offered for sale in the market, that the same had water already in it, and that it contained, so far as he could ascertain, no cocaine. Dr. Heath, I believe, said that he got the bottles for Dr. Everhart.

If you believe that the syrup shipped to New Orleans was misbranded and did not contain on the label on it that which it should have had, find the defendant guilty on the first count in the first information, no. 7594. If you believe that the same contained a deleterious ingredient, injurious to health, to wit: cocaine, find the defendant guilty on the second count in the first information.

If you believe that the package of syrup shipped to Anacostia in the District of Columbia was misbranded, as I have stated to you,

and that it contained cocaine and the same did not appear on the label, find the defendant guilty under the first count of the second information, no. 7630. If you find that this package shipped to Anacostia contained a deleterious ingredient, injurious to health, find the defendant guilty on the third count in that information, that is cocaine, as I have stated.

As I have stated to you before, you need not pay any attention to the second count in this second information.

Now, gentlemen, the evidence is before you and it is a matter entirely for you to determine. You understand the purpose of this act so far as branding and labeling articles of food is concerned and that is to put the public on notice that it contains in it certain ingredients which the lawmakers have believed the public should know before purchasing.

As to the other, of course, it will be apparent that it shall not, in any event, whether branded or not, contain deleterious ingredients, injurious to health.

If you believe the defendant not guilty under any or all of the counts in the informations, you will find the defendant not guilty as to that or those.

Consider all of the testimony and determine whether these two particular packages, those are the ones with reference to which the charges here are made, whether they contain cocaine or not.

You will see without difficulty, and I state again, that there are only four counts, two in the first and two in the second, leaving out the second count in the second information or that of the highest number. The first information refers to the package shipped to New Orleans and the first count to misbranding and the second to adulteration. The second information related to the package shipped to Anacostia, and the first count relates to misbranding and the second to adulteration.

Take the case, gentlemen; and express by your findings if you find the defendant guilty or not guilty, and if you believe it guilty express by your verdict under which counts you believe it to be guilty, whether under any or all of the counts.

UNITED STATES v. 68 CASES OF SYRUP

(District Court, E.D. Illinois, October 1, 1909)

172 Fed. 781; N.J. No. 283

Libel under section 10 of the Food and Drugs Act. Demurrer to libel sustained.

WRIGHT, *District Judge.* This is a libel presented by the United States against Sixty-Eight Cases of Syrup under the provisions of Food and Drugs Act, June 30, 1906, c. 3915, 34 Stat. 768. The libel charges that the cases of syrup were shipped from Cleveland, Ohio, to Danville, Ill., and that 48 of them contained each one dozen bottles, and 20 of them contained each two dozen bottles, of syrup; that the cases were branded and labeled "Western Reserve Ohio Blended

Maple Syrup, guaranteed absolutely pure, shipped by Western Reserve Syrup Company, Cleveland, Ohio"; and that the bottles were labeled and branded "Western Reserve Ohio Blended Syrup, Western Reserve Syrup Company, Cleveland, Ohio, Blenders of Fancy Maple Syrup and Maple Sugar." It is further charged in the libel that the cases and bottles were misbranded in violation of the act of Congress to which reference has been made, subjecting the property to condemnation as provided in said act, for the reason that the cases and bottles do not contain maple syrup, or a blend of maple syrup, but do contain a mixture or compound largely of refined cane sugar flavored with an extract of maple wood, and that the labeling before mentioned is misleading and false, so as to mislead the purchaser, and so as to offer the contents for sale under the distinctive name of another article. The goods were shipped to the Webster Grocery Company, doing business in Danville, Ill., and by this proceeding seized, and are now in the custody of the marshal. The Western Reserve Syrup Company, of Cleveland, Ohio, the manufacturer, shipper, and seller of the goods, has appeared by its attorney in this proceeding and filed its demurrer to the libel; and the court, having heard the argument of counsel, thereupon took the case under advisement and for future determination.

In the argument at bar of the case it was contended for the respondent that there is a distinct and substantial difference in the labeling upon the cases and that upon the boxes; that in the former the word "Maple" is used, and in the latter, the case of the bottles, that word is omitted, as a qualifying word in the description of the syrup. Without again quoting the words of the labeling, but referring again to them as above set out in this opinion, it will be seen that, while the word "Maple" is not used as a qualifying word to syrup, yet further on in the words of the label it is found that respondent describes itself as blenders of "Fancy Maple Syrup and Maple Sugar", so that, when all the words of the label put upon the bottles are seen, and its full meaning comprehended, I think the same meaning was intended in the use of both labels, and from either of them, that upon the cases and that upon the bottles, a person of ordinary intelligence, after reading them or either of them, would infer the same meaning that the bottles, as well as the boxes, contained blended maple syrup. So it seems to me that the contention of the respondent that the label upon the boxes, which alone was intended to induce the purchasers, even conceding this, is without force. It then being determined that the labeling upon the cases and upon the bottles mean the same thing, namely, that each contained blended maple syrup, it only remains to decide whether, in view of the other averments of the libel, a violation of the statute is shown.

If the brands or labels correctly or truthfully dislose the contents of the cases and bottles, and no poisonous or deleterious ingredients are apparent, there can, I am persuaded, be no violation of the law, and this action could not be supported. There is no claim that poisonous or deleterious ingredients entered into the compound. The libel avers its was not maple syrup. The labels do not purport to state that the contents of the boxes and bottles was maple syrup; but, as said before, both labels represent the same fact—that the con-

tents of the boxes and bottles was blended maple syrup. The libel avers that the cases and bottles do not contain a blend of maple syrup, and then specifically states they do contain a mixture or compound largely of refined cane sugar flavored with an extract of maple wood. The demurrer of the respondent to the libel admits all the facts well pleaded in the libel, and, while it is stated by the libel that the boxes and bottles do not contain a blend of maple syrup, the following statement in the libel, that the contents consisted of a mixture or compound largely of refined cane sugar flavored with an extract of maple wood, renders the previous negation of a blend of maple syrup nugatory as a fact stated, but leaves it as a mere conclusion of the pleader, that is not admitted by the demurrer. So it seems to me the case resolves itself to the single question whether a mixture or compound largely of refined cane sugar flavored with an extract of maple wood is blended maple syrup.

The plain and manifest object of the statute under consideration is to protect the purchasers and consumers of drugs and foodstuffs from fraud and imposition in the purchase or consumption of such articles under false representations, and to insure that the commodities are such as they are represented to be. If the brands or labels upon the goods in question were truthful, and such as the law permitted upon such goods as they actually were, then there was no violation of the law, and the goods were wrongfully seized, and should be returned to the person or persons from whom they were taken. The proviso to section 8 of the statute under which this libel is being prosecuted provides in legal effect, amongst other things, that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word " compound ", " imitation ", or " blend ", as the case may be, is plainly stated on the package in which it is offered for sale; and the term " blend " so used, shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only.

I have already said that the brands or labels in question plainly indicate that the article of food, the syrup in this case, was a blend of maple syrup, and the statute itself declares that the term " blend " shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients, used for the purpose of coloring and flavoring only. I think I may take judicial notice of all that an ordinarily intelligent person knows, and in doing this I know that food syrup is a saccharine solution of a superior quality, frequently called molasses, and it may be made of any of the various sugars of commerce, such as cane, beet, or maple. These sugars are alike, in that they are saccharine. The statute defines a blend of anything to be the mixture of like substances not excluding the flavoring. In the case presented the mixture is cane sugar flavored with extract of maple wood. It seems to me no argument is necessary to prove that all food sugars are of like substances, and to them or any of them add the flavoring extract of maple wood and thereby is produced the very blend contemplated by the exception of the statute I have endeavored to point out.

Even without this plain exception provided for by the law itself, no ordinarily intelligent person could be deceived by the labels in question into buying the articles so labeled for real maple syrup. The word "blend" is clearly used, both as to the articles and their manufacture, and of its own clear import indicates a mixture and imitation. Entertaining the views I have expressed, it follows that I am of the opinion the libel is insufficient in law, and the demurrer will therefore be sustained.

Let an order be prepared sustaining the demurrer, dismissing the libel, and awarding a return of the property, without costs.

UNITED STATES v. 779 CASES OF MOLASSES (Two cases)

(Circuit Court of Appeals, Eighth Circuit, Nov. 5, 1909)

174 Fed. 325; N.J. No. 270

Error to and appeal from the District Court for the Eastern District of Arkansas. Judgment in one case affirmed. Appeal in other case denied.

Before VAN DEVANTER, Circuit Judge, and CARLAND and POLLOCK, District Judges.

POLLOCK, *District Judge.* This is a libel of condemnation arising under the provisions of the pure food and drug law enacted by Congress June 30, 1906 (34 Stat. 768, ch. 3915), and the regulations of the Secretaries promulgated October 20, 1906, in pursuance of power conferred on them by section 3 of the act. The facts are:

One C. E. Coe, a merchant of the city of Memphis, Tenn., at various dates between March 18 and August 1, 1908, sold and shipped the 779 cases of molasses in controversy to certain wholesale jobbing houses in the city of Little Rock, Ark. Thereafter, on August 19, the district attorney for the District of Arkansas filed his libel of condemnation, in which it was charged the molasses was both adulterated and misbranded in violation of the provisions of the act. A writ of seizure was issued and executed by the marshal, seizing, as shown by his return, 685 cases of the molasses in question. Of the cases seized, as shown by his return, 464 were what is labeled "sugar glen" molasses, and 221 cases as "burro" molasses.

Thereafter, on September 21, 1908, by leave of court, an amended libel of condemnation was filed in which it was charged the molasses contained in the cases was adulterated by the use of commercial glucose, mixed and packed with the molasses to such extent as to injuriously affect the quality and strength in violation of the law. And it was further charged, in substance, the cases were so labeled and misbranded as to convey the impression the contents of the cases were pure sugar house molasses, whereas, in truth, they were a compound of sugar molasses and corn syrup.

Thereafter, Coe filed his affidavit as claimant of the molasses and answered, setting up his guarantee to the purchasers under the terms of the act, denied the charges of adulteration and misbranding, attached as exhibit to his answer a copy of the label of each brand of molasses sold and delivered by him, and demanded a trial by jury,

as provided by section 10 of the act, and gave a bond as provided in the act to secure possession of the molasses.

A trial by jury was had, at which, by direction of the court, the jury returned a verdict in favor of the claimant, on which a judgment was entered in his favor. From this judgment the Government, being uncertain as to its rights, prosecutes its appeal in case no. 3024 and also prosecutes error in case no. 3030.

From the statement made it would seem quite plain the proceedings on the trial cannot be reexamined by this court on the appeal taken. Section 10 of the act, among other matters, provides, as follows:

> That any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act, and is being transported from one State, Territory, district, or insular possession to another for sale, or having been transported, remains unloaded, unsold, or in original unbroken packages, or if it be sold or offered for sale in the District of Columbia or the Territories, or insular possessions of the United States, or if it be imported from a foreign country for sale, or if it is intended for export to a foreign country, shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. * * * The proceedings of such libel shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States.

The right to trial by jury granted by this act on demand of either party is absolute, and means a trial by jury according to the established practice in courts of common law. *Elliott* v. *Toeppner*, 187 U.S. 327, 23 Supp. Ct. 133, 47 L.Ed. 200; *Insurance Company* v. *Comstock*, 16 Wall. 258, 21 L.Ed. 493; *Parsons* v. *Bedford*, 3 Pet. 433, 7 L.Ed. 732; *Bower* v. *Holzworth et al.*, 138 Fed. 28, 70 C.C.A. 396; *Duncan* v. *Landis*, 106 Fed. 839, 45 C.C.A. 666. By article VII of the Constitution it is provided:

> No fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Mr. Justice Clifford, delivering the opinion of the court in *Insurance Company* v. *Comstock*, *supra*, in commenting on this provision of the Constitution, said:

> Two modes only were known to the common law to reexamine such facts, to wit: the granting of a new trial by the court where the issue was tried, or to which the record was returnable, or secondly by the award of a venire facias de novo by an appellate court for some error of law which intervened in the proceedings. All suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights, are embraced in that provision. It means not merely suits which the common law recognized among its settled proceedings, but all suits in which legal rights are to be determined in that mode, in contradistinction to equitable rights and to cases of admiralty and maritime jurisdiction, and it does not refer to the particular form of procedure which may be adopted.

As a jury trial was demanded by the claimant in this case, and as such trial was had, the appeal taken in case no. 3024 must be dismissed because such method is inappropriate to review the proceedings had. It is so ordered.

At the trial the charge of adulteration was abandoned by the Government, and it relied solely and alone on the charge of misbranding. As has been seen, at the conclusion of the evidence the court charged the jury neither of the labels under which the cases of molasses were

sold and shipped from Memphis to Little Rock was misleading, nor constituted a misbranding, as that term is employed in the act, nor in regulation 17 promulgated by the Secretaries under authority of the act. This action of the court constitutes the sole ground of error relied upon to work a reversal of the judgment rendered in the case.

The only evidence adduced on the trial was that of the marshal who executed the writ of seizure and that of Geo. B. Spencer, a Government chemist from the Department of Agriculture. The marshal testified the cases of molasses seized by him bore labels identical with those attached to and made part of the answer of claimant, which labels were offered and received in evidence at the trial, as Exhibits A and B.

The witness Spencer testified he made a chemical analysis of the brands of molasses seized in this case; that the sugar glen brand contained 30 percent and the burro brand 40 percent of commercial glucose; that pure molasses contains no commercial glucose, but does contain natural glucose; that neither natural nor commercial glucose is injurious or deleterious to health; that a large number of syrups on the market contain as high as 80 percent or 90 percent commercial glucose; that according to the practice and rulings of the Bureau of Chemistry of the Department of Agriculture the labeling or branding of commercial glucose as "made from corn syrup" is permissible.

The provisions of the act prescribing what shall constitute a misbranding, within its meaning as applied to food products, are as follows:

> If it be labeled or branded so as to deceive or mislead the purchaser * * * If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:
>
> First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.
>
> Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word "compound", "imitation", or "blend", as the case may be, is plainly stated on the package in which it is offered for sale.

Regulation 17 of the Secretaries (which has the effect of law) on the subject of misbranding, in so far as here thought applicable, provides:

> (a) The term "label" applies to any printed, pictorial, or other matter upon or attached to any package of food or drug product, or any container thereof subject to the provisions of this act.
>
> (b) The principal label shall consist, first, of all information which the Food and Drugs Act of June 30, 1906, specifically requires, to wit, the name of the place of manufacture in the case of food compounds or mixtures sold under a distinctive name; statements which show that the articles are compounds, mixtures, or blends; the words "compound", "mixture", or "blend", and words designating substances or their derivatives and proportions required to be named in the case of foods and drugs. All this information shall appear upon

the principal label, and should have no intervening descriptive or explanatory reading matter. Second, if the name of the manufacturer and place of manufacture are given, they should also appear upon the principal label. Third, preferably upon the principal label, in conjunction with the name of the substance, such phrases as "artificially colored", "colored with sulphate of copper", or any other such descriptive phrases necessary to be announced should be conspicuously displayed. Fourth, elsewhere upon the principal label other matter may appear in the discretion of the manufacturer. If the contents are stated in terms of weight or measure, such statements should appear upon the principal label and must be couched in plain terms, as required by regulation 29.

(c) If the principal label is in a foreign language, all information required by law and such other information as indicated above in (b) shall appear upon it in English. Besides the principal label in the language of the country of production, there may be also one or more other labels, if desired, in other languages, but none of them more prominent than the principal label, and these other labels must bear the information required by law, but not necessarily in English. The size of the type used to declare the information required by the act shall not be smaller than 8-point (brevier) capitals: *Provided*, That in case the size of the package will not permit the use of 8-point type, the size of the type may be reduced proportionately.

(d) Descriptive matter upon the label shall be free from any statement, design, or device regarding the article or the ingredients or substances contained therein, or quality thereof, or place of origin, which is false or misleading in any particular. The term "design" or "device" applies to pictorial matter of every description, and to abbreviations, characters, or signs for weights, measures, or names of substances.

If the labels in question be now compared with the provisions of the law above quoted, we find the first panel of each, and that contended by the claimant to be the principal label, to contain, first, the name of the substance or product; second, the place where manufactured or canned; third, words showing the article to be a compound; fourth, the words "compound and ingredients"; fifth, the name of the manufacturer or canner of the product; sixth, that it contains sulphur dioxide; seventh, that it is guaranteed under the pure food act, serial no. 13,905, all as required by clause "b" of regulation 17 above quoted. From a further examination of the labels, it is found each in three places distinctly states the product to be a compound of molasses and corn syrup.

As shown from the evidence, this compound contains no substance deleterious or injurious to the health; and, as it further appears from the evidence, under the practice of the Department, commercial glucose may be properly labeled and sold under the name of "corn syrup", we are of the opinion there is nothing in the manner in which the cases of molasses involved in this controversy were labeled that is false or untrue, or which would tend to mislead or deceive a purchaser of ordinary prudence, and there is no evidence found in the record tending to show any one was so deceived or misled by the labels employed.

The authorities relied upon by the Government to make out the charge of false branding, as shown by an examination, are cases in which it was determined the labels contained false statements as to the contents of the receptacle labeled. Such cases, for the reasons given, are not applicable to the facts in the case at bar.

The direction of the court to return a verdict in favor of the claimant was right and must be affirmed.

UNITED STATES v. EDWARD WESTEN TEA & SPICE CO.

(District Court, E.D. Missouri, Nov. 30, 1909)

N.J. No. 194

Informations alleging violations of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

DYER, *District Judge* (charge to the jury). The act of Congress under which these informations have been filed, went into effect on the 1st day of January 1907. It is, therefore, quite a recent statute.

The States in their separate capacities may have undertaken to regulate the sale of food products, but until this act was passed Congress had taken no effective action to prevent the adulteration and misbranding of articles of drugs, food, etc.

Here we have only to deal with congressional acts.

The court has nothing to do with State statutes applying to the same thing. This court gets jurisdiction only by virtue of an act of Congress conferring upon the court the jurisdiction to try such offenses as these.

Congress has the power to legislate for the Territories, including the District of Columbia. The laws passed by Congress with reference to the manufacture and sale of articles in the Territories and the District of Columbia, is exclusively with Congress.

Under the interstate commerce laws, Congress has undertaken to say what shall and what shall not be proper shipments in interstate commerce between States. It has undertaken to say in the act to which I have referred, what is an adulteration and what is a misbranding of articles manufactured and sent to other places within the State proper. Under the Constitution Congress had full and complete authority to do that.

The first section of this act refers to the District of Columbia and the Territories.

The second section prohibits the sending in interstate commerce, from one State to another, articles of food that are adulterated or articles of food that are misbranded, and they have announced a penalty in the statute against those things.

In view of what has been said by counsel in reference to this recent act of Congress, it will probably not be unprofitable for the court to say something in reference to the matter.

The second section of the statute, to which I call your attention, provides:

> That the introduction into any State or Territory, or the District of Columbia, from any other State or Territory, or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this act, is hereby prohibited. And any person who shall ship, or deliver for shipment, from any State or Territory or the District of Columbia, or to any other State or Territory, or the District of Columbia, or to a foreign country; or who shall receive in any State or Territory or the District of Columbia, from any other State or Territory or the District of Columbia, or foreign country, and having so received shall deliver in original, unbroken packages, for pay or otherwise, or offer to deliver to any other person any such article so adulterated or misbranded, within the meaning of this act; or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any

such adulterated or misbranded foods or drugs; or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor and for such offense be fined not exceeding two hundred dollars ($200) for the first offense; and upon conviction, for each subsequent offense not exceeding three hundred dollars ($300), or by imprisonment not exceeding one year, or both, in the discretion of the court.

So as to acquaint you, as the court has tried to acquaint himself, with the modus operandi provided by this statute for finding out and ascertaining whether or not this law has been violated, the third section provides that the Secretary of the Treasury, the Secretary of Agriculture and the Secretary of Commerce and Labor, shall make uniform rules and regulations for carrying out the provisions of this act, including the collection and examinations of specimens of food and drugs manufactured or offered for sale in the District of Columbia, or any of the Territories of the United States; or which shall be received from any foreign country, or intended for shipment to any foreign country; or which shall be submitted for examination, or at any domestic or foreign port through which said product is offered for interstate commerce.

There is the authority conferred upon these members of the different departments, to make regulations for the gathering of testimony or evidence, so to speak, of any violation of these laws. Then it was provided, and was read here in this stipulation:

That the examination of specimens of food and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, under the direction and supervision of said Bureau, for the purpose of determining from such examination whether such articles are adulterated or misbranded, within the meaning of this act.

You will see by the testimony in this case, that in each of these cases a Government officer went to the place of business of the parties named and bought from them the bottles containing this mixture, and he sent them to the laboratory—one to the Boston and the other to the Chicago laboratory, all passed upon by the Government authorities and by them found to be adulterated.

Then what follows? The Government does not put a defendant to trial because of that inquiry alone, but it goes further and says: If that be found to be so from the examinations made of this product (and you will remember that the officers of the Government, who bought these articles, testified here that they sent two bottles to one place, two bottles to another place, and the remaining two bottles were left with the person from whom they were taken), as shown in those bottles, that they had been adulterated, and that they had been misbranded, then they were required to go further, after that was ascertained.

Finding that they were adulterated or misbranded, within the meaning of the act, the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such samples were obtained.

So this defendant was notified by the Secretary of Agriculture that these articles had been bought and that they had been found to be adulterated; but before authorizing any action to be taken by the district attorney, a hearing was had, at which the defendant was authorized to appear; and after that hearing (the Department being still satisfied, from the hearing, that the articles had been adulterated or misbranded), it became the duty of the Secretary under this act

of Congress, to transmit to the district attorney instructions to begin the proceedings, together with a copy of the analysis made at the time of the examination.

From the evidence in these cases, and from the stipulation filed, it appears all of that was done, and these proceedings commenced. This act provides that:

> For the purpose of this act an article shall be deemed to be adulterated in case of food, first, if any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength; second, if any substance has been substituted wholly or in part for the article; third, if any valuable constituent of the article has been wholly or in part abstracted; fourth, if mixed, colored, or powdered in a manner whereby damage or inferiority is concealed.

That is in reference to the article itself. Then in the same article, section 8, it says:

> That the term "misbranded" as used herein shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such articles or the ingredients or substances contained therein, which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to such territory or country in which it is manufactured or produced.

So you will see what the purpose of Congress was, that no one who is desirous of knowing what the law is in that regard may make any mistake about it. The law requires the manufacturer to be honest in his statement of the contents of the package; it requires him to be honest in stating the truth upon the labels put upon it. That is all there is to the act. That is what the act is intended to accomplish, and which, if properly enforced, in my judgment, will accomplish.

It is the duty of you and of this court to obey the law and to enforce it; to enforce this statute as you would enforce every other statute. But it is not out of place for me to say here that in the judgment of the Court, no act of Congress has been passed in recent years of more importance than this one.

In dealing in foodstuffs, the seller should, and ought to know, what he is selling, and, on the other hand, the buyer should know what he is buying.

This statute is not to be evaded by a mere subterfuge. It is to be enforced according to its letter and its spirit, and when that is done no one suffers by it.

Now I have said that much in reference to this statute because, as it has been said, it is a recent statute, and it may be proper that the statute should be given a fair interpretation, and I repeat that the statute is so plain as to the purpose and intent of Congress that there is no excuse for its violation.

There were three separate informations filed against this defendant in this court. They are numbered, respectively, 5394, 5427, and 5400. You are to consider only the two, 5427 and 5394; 5400, as I will direct you, is not supported by the testimony in this case, because the witness that was here from Oklahoma was not sufficiently able to state with positiveness that the article that the inspector found in his store was in the shipment made in 1907 or in 1906; and upon that information (the only count of which is for misbranding), you will be directed to find a verdict of not guilty. Let us see what, in effect, the remaining two are.

If they had been filed at the same time, it would have been perfectly proper for the United States attorney to have included in one information each of the counts that are embraced in these two; but they were filed at different times, and hence, when the cases were called they were consolidated for the purpose of trial. There is no question about the shipments; no question about them having been sent from here to the places mentioned; that is all supported and agreed upon. The first count, no. 5427, charges that shipment was made by this defendant from the city of St. Louis, of articles for sale in interstate commerce—

then and there labeled "Puritan Brand Flavor of Lemon for flavoring ice cream, pastry, etc. Edw. Westen Tea & Spice Co. of St. Louis" (band around the neck labeled "Strictly Pure"), which bottle was part of a larger consignment consisting of one box of bottled extracts shipped by Westen & Company, from St. Louis, to M. M. Smith, Holdenville, Indian Territory; that the contents of said bottle were adulterated, in violation of the act of Congress of June 30th, 1906; that said bottle contained a liquid which was not flavor of lemon; that true and genuine flavor of lemon, or lemon extract, is a solution of not less than 5 percent by volume of oil of lemon in grain alcohol; and that the liquid contained in said bottle contained no oil of lemon; that another substance, to wit, a highly diluted alcoholic solution of citral had been substituted wholly for the article, all of which was to the defendant well known.

That is the first charge in the first count of this information, and the second count charges that the article was misbranded. You have in the first count the allegation and charge that this was an adulteration within the meaning of the statute. The second count charges that it was misbranded.

The other information charges substantially the same thing, only that it was shipped to a different person, in Kansas, instead of the Indian Territory, and the charge in the first count of this information is as to the same article—

That the contents of said bottle were adulterated in violation of the act of Congress of June 30th, 1906, in this, that the said bottle contained a liquid which was not pure lemon flavor; that true and genuine lemon flavor, or lemon extract, is a solution of not less than five percent (5%) by volume of oil of lemon in grain alcohol and that the liquid contained in said bottle contained about two-tenths of one percent by volume of oil of lemon, and that another substance, to-wit, a two-tenths of one percent solution of oil of lemon, had been substituted wholly for the article, and that other substances had been mixed and packed with the liquid contained in said bottle, so as to reduce and lower and injuriously affect its quality and strength.

That is the first count of that. The second count is for misbranding, charging that this article so sent was misbranded by calling it a "Superior Quality of Wyandotte Pure Lemon Flavor for flavoring ice cream, pastry", etc.

These are the four counts with which you have to deal. A great deal of testimony has been offered here as to whether the words "lemon extract" and "lemon flavor" are used in the trade as synonymous terms. It is not my purpose to comment upon that testimony, although I have a right to do so. I prefer not to do so. I propose to submit these questions to you as business men and as intelligent men, able to judge well as the court, the value of the testimony that has been given here before you. It is for you to determine from the evidence whether or not the terms "lemon flavor" and "lemon extract" are synonymous and mean one and the same thing. The contention of the Government is that "lemon extract" and "lemon

flavor" both mean the same article, while the defendant contends that they do not. It is for you to determine whether by "lemon extract" and by "lemon flavor" is meant the same thing in the business world—in the trade, and whether or not the brand upon this bottle of "lemon flavor" would indicate to the purchaser that it was an article like or equivalent to "lemon extract."

This statute imposes a penalty for its violation and to that extent is what we call a criminal proceeding against this defendant. In this case, as in all cases of a criminal character, the defendant is entitled to the benefit of any reasonable doubt arising in the minds of the jurors touching the inquiry that they have in hand. By a reasonable doubt is meant not a mere suspicion, but a doubt, arising from the evidence in the case, that would lead you to have a doubt as to whether or not the party is guilty of the offense as charged, and I may give in that connection an instruction that is asked by the defendant, to wit:

> The court instructs the jury that it is the duty of the Government to satisfy them beyond a reasonable doubt, of all the facts necessary to convict the defendant, on each and every count, of each and every information; and if, in respect to any of said counts the jury entertain a reasonable doubt, it will be their duty on such count to return a verdict in favor of the defendant.
>
> The court does not mean, however, that such doubt may be a mere suspicion of doubt or a mere conjecture, but if the evidence fairly leaves the jury in a state of uncertainty as to the guilt of the defendant on any of the counts, they should return a verdict thereon on not guilty.

You have heard the testimony of various witnesses as to what the rule was that obtained prior to the passage of the pure food law. Some witnesses have said that before the passage of that act there was no difference, to the trade, between the words "extract" and "flavor"—that they were used synonymously; that since the pure food act was passed there has arisen some question as to whether a diluted extract of lemon may be considered a flavor—whether a percent less than five would still make a lemon flavor. All of these matters I submit to you. You have seen the witnesses on the stand and you have observed their manner and demeanor. If you think anyone has sworn falsely, you are at liberty to discredit the entire testimony of such a witness.

The marshal will have a form of formal verdict prepared by the clerk, for your consideration. I may also say, and I should have said at the time, that the hearing had before the Secretary of Agriculture, or before the officer of the Department of Agriculture as to whether there was any adulteration of this product, or misbranding, is not to be considered as any evidence whatever against this defendant. I have only mentioned the law as providing certain things to be done, and certain things that the Secretary must do, after he in his own mind is satisfied, but none of those things has any binding effect upon you or the defendant here in this trial. I may also say that no regulation (if there be such a regulation) made by any officer of the Government, is binding upon the defendant. You are to determine this case from the facts as charged in the information, as to what was understood in the trade and commerce of the meaning of these two terms.

UNITED STATES v. 50 CANS OF PRESERVED WHOLE EGGS

(District Court, S.D. Illinois, Dec. 10, 1909)

N.J. No. 508

Libel under section 10 of the Food and Drugs Act. Trial before the court. Decree in favor of the United States.[18]

HUMPHREY, *District Judge.* This cause having regularly come on to be heard on the 10th day of December, A.D. 1909, at the city of Peoria, and it appearing to the court that in accordance with the prayer of the libel filed herein the United States marshal for the Southern District of Illinois, under the authority of a writ of monition duly issued, seized upon the premises of Thomas and Clarke, a corporation, doing business in the city of Peoria, State of Illinois, 52 cans of preserved whole egg, prepared by the Hipolite Egg Company, of St. Louis, Mo., and thereupon gave due notice of said seizure and publicly advertised the same as required by law in such cases, and has since held in his custody said preserved egg so seized, and the said Thomas and Clarke having entered its appearance specially and having waived all right and title to said seized egg, and having consented that the Hipolite Egg Company might appear as the claimant and defend both in its own right as well as in behalf of the said Thomas and Clarke, and the said claimant having filed its answer and issue having been joined, and the libelant appearing by W. A. Northcott, United States attorney, and Henry A. Converse, assistant United States attorney, and the claimant appearing by Thomas E. Lannen, Esq., and all parties interested having first stipulated in writing that the cause might be tried by the court without the intervention of a jury, and the evidence having been presented and the argument of counsel heard, the court finds:

That said preserved whole egg is a food product intended for the consumption of human beings.

That said food product was shipped from the city of St. Louis, in the State of Missouri, to the city of Peoria, in the State of Illinois, and remained within this jurisdiction unsold, and in the original and unbroken package.

That said food product is adulterated within the meaning of the act of June 30, 1906 (34 Statutes at Large, 771), in that it contains 2 percent of boric acid added as a preservative.

That said boric acid is a deleterious ingredient which may render said article of food injurious to health.

That said food product is illegally held within the jurisdiction of this court and is confiscable and liable to condemnation as provided by said act of June 30, 1906.

Now, therefore, it is ordered, adjudged, and decreed that 30 days after the filing of this decree the United States marshal shall take said 52 cans of preserved whole egg and totally destroy the same and that judgment be entered against the claimant for the costs in said case and execution issue therefor, and that the United States

[18] Judgment affirmed, *Hipolite Egg Co.* v. *United States,* p. 223, *post.*

marshal shall make due report of how he has executed this order of this court, and shall report his bill of costs for said seizure, drayage, storage, advertising, destruction, and all other necessary expenses incurred by him in and about said seizure, which said costs of the United States marshal shall be included in the court costs of this case.

The court also made the following special finding as to the facts in the case:

Now on this day come again the parties hereto by their respective attorneys and this cause now being submitted to the court upon the pleadings and proof adduced the court finds the facts in this cause as follows:

SPECIAL FINDING OF FACT

The court finds the facts to be:

1. This libel is filed by the United States of America in its own right and prays seizure for condemnation of certain articles of food contained in 50 cans, more or less, purported and represented to be "Preserved Whole Egg" as hereinafter particularly set forth, in accordance with the act of Congress approved June 30, 1906, and more commonly known as the Food and Drugs Act. This proceeding is brought under section 10 of said act.

2. The court finds that on or about May 14, 1908, Thomas & Clarke, an Illinois corporation, with its place of business in the city of Peoria in this district and engaged in the business of conducting a so-called crackers bakery in said city, entered into a written contract with the Hipolite Egg Company, a Missouri corporation, doing business in St. Louis, Mo.; by the terms of which contract the Hipolite Egg Company was to put up and preserve a certain quantity of preserved whole egg.

3. Under the terms of this contract the Hipolite Egg Company prepared the eggs in question in this suit and on or about the 21st day of May 1908 placed said eggs in a cold-storage warehouse at St. Louis, Mo., in the name of Thomas & Clarke, and a warehouse receipt covering said eggs was issued to Thomas & Clarke and forwarded to them by the Hipolite Egg Company, together with an invoice for the contract price of said eggs. Thereafter, on or about June 1, 1908, Thomas & Clarke paid said invoice to the Hipolite Egg Company.

4. In the early part of November 1908, Thomas & Clarke sent a written order on the warehouse where said eggs were stored to the Hipolite Egg Company for the eggs in question to be delivered to Hipolite Egg Company for shipment to Thomas & Clarke. Hipolite Egg Company thereupon presented said order to the warehouse and obtained said eggs and delivered same to a common carrier for shipment to Thomas & Clarke, at Peoria, Ill.

5. Thomas & Clarke paid all storage charges on said eggs while in storage at St. Louis as aforesaid. Thomas & Clarke also took out insurance in its own name on said eggs while in storage at St. Louis as aforesaid, and paid all premiums thereon. Thomas & Clarke also paid the freight on said eggs from St. Louis to Peoria. Hipolite Egg Company received no extra compensation for taking said eggs from the warehouse and delivering same to the common carrier.

6. The court finds that said eggs were transported from St. Louis, State of Missouri, to Peoria, in the State of Illinois, as aforesaid and were received by Thomas & Clarke at Peoria on or about November 16, 1908.

7. The said shipment consisted of 130 cans, each can containing about 42 pounds of eggs. Each can was a separate sealed package. The eggs in the cans were whole eggs, minus the shells, that had been broken out of the shells into these cans.

8. The court finds that the said eggs were an article of food and contained added to it a deleterious ingredient known as boric acid which may render such article injurious to health, and that the said eggs were in fact injurious to health, and the court further finds that the amount of boric acid contained in said eggs was approximately 2 percent. And the court finds that said eggs were adulterated within the meaning of the act of June 30, 1906.

9. Thomas & Clarke did not know at the time of shipment that said eggs contained boric acid. At the time of making said contract Thomas & Clarke did not know by what process Hipolite Egg Company would preserve said eggs, but did know that the eggs were to be preserved by having added thereto some kind of a preservative, in addition to being sealed in air-tight cans.

10. At the time of the seizure of said eggs they were stored in the storeroom of Thomas & Clarke in their bakery factory at Peoria, along with their bakery supplies. About 80 cans of said shipment had been used by opening said cans and pouring said eggs into a mixture of flour and other ingredients and thereby making a dough. This dough was baked into pastry, such as vanilla wafers, and this pastry was sold to the public. The 50 cans of eggs, more or less, seized by the marshal were intended and about to be used for baking purposes as aforesaid at the time of seizure, and said eggs were not intended to be sold as eggs in the original unbroken packages, or otherwise, but were to be used only as above set forth and were transported as aforesaid only for such purpose, but at the time of seizure said eggs were in unbroken original packages, as originally shipped and were then on the premises of Thomas & Clarke unsold.

The Hipolite Egg Company, claimant, sued out a writ of error and also appealed from the aforesaid decree to the Supreme Court of the United States on the ground that the trial court was without jurisdiction in the case. The jurisdictional questions involved are set forth in the trial court's certificate, which is as follows:

CERTIFICATE OF JURISDICTIONAL QUESTIONS

The District Court of the United States for the Southern District of Illinois hereby certifies to the Supreme Court of the United States that on the 18th day of December, A.D. 1909, a decree was entered in the above-entitled cause confiscating said 50 cans more or less of preserved whole eggs and assessing the costs of said case against Hipolite Egg Company, claimant in the above-entitled cause.

And this court further certifies that in said cause the jurisdiction of this court is in issue; and that said question of jurisdiction was raised in the following manner;

1. The libel in this case was a proceeding in rem under section 10 of the act of June 30, 1906 (34 Stat. 771), against 50 cans more or less of preserved whole egg, the libel alleging that said eggs were transported in interstate commerce from St. Louis, Mo., to Peoria, Ill., and were adulterated within the meaning of said act.

2. It appeared from the evidence on the part of the libelant on the trial of this cause that said eggs before the shipment alleged in the libel had been stored in a warehouse in St. Louis, Mo., for about five months, during all of which time the said eggs were the property of and owned by Thomas & Clarke, an Illinois corporation engaged in the bakery business at Peoria, Ill., in this district.

3. On or about November 1, 1909, Thomas & Clarke procured the shipment of these eggs from St. Louis, Mo., to themselves at Peoria, Ill.; and upon receipt of said eggs Thomas & Clarke placed the shipment in their storeroom in their bakery factory at Peoria along with their other bakery supplies.

4. These eggs were intended for use by Thomas & Clarke for baking purposes, and were not intended for sale by them in the original unbroken packages or otherwise, and were not so sold.

5. Hipolite Egg Company, a corporation of Missouri, appeared as claimant of said eggs and intervened and filed an answer to said libel and defended this case, but did not enter into any stipulation to pay the costs of this case.

6. Upon the close of libelant's evidence and again at the close of all the evidence counsel for claimant moved the court to dismiss said libel on the ground that it appeared from the evidence that this court as a Federal court had no jurisdiction to proceed against or confiscate said eggs, because said eggs were not shipped in interstate commerce for sale within the meaning of section 10 of said Food and Drugs Act, and for the further reason that the evidence showed that said shipment of eggs had passed out of interstate commerce before the seizure of said eggs in this case, because it appeared that said eggs had been delivered to Thomas & Clarke and were not intended to be sold by them in the original unbroken packages or otherwise.

7. This court overruled said motions, to which rulings counsel for claimant then and there duly excepted, and this court then proceeded to hear and determine said cause and entered a decree finding said eggs adulterated and confiscating the same and assessing the costs of this case against the claimant, Hipolite Egg Company.

8. Counsel for claimant excepted to the rendition and entry of said decree on the ground that this court is without jurisdiction in rem over the subject matter and on the further ground that this court is without jurisdiction to enter a judgment in personam against said claimant Hipolite Egg Company for costs of said case as aforesaid.

And this court therefore certifies to the Supreme Court of the United States the following questions of jurisdiction raised as aforesaid:

First: The question of whether this court had jurisdiction in rem over said eggs transported as aforesaid.

Second: The question of whether this court had jurisdiction to render and enter a decree for costs against the claimant, Hipolite Egg Company, in personam.

UNITED STATES v. JOHN A. TOLMAN & CO.

(District Court, N.D. Illinois, Dec. 23, 1909)

N.J. No. 271

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty. Motion for new trial and in arrest of judgment overruled.

LANDIS, *District Judge* (charge to the jury). This is a case which is governed by the rules of the criminal law. The paper filed by the United States formally charging the offense against the defendant is not an indictment; it is called an information. But the rule which guides you, which you must observe, is the same rule that would be in force if, instead of an information, it were a grand jury indictment. Now, in this case, it is by this rule of the criminal law that it devolves upon the United States to establish this charge against the defendant beyond all reasonable doubt as distinguished from establishing the charge by the preponderance of the evidence, as has been the rule in some civil cases which you gentlemen have served in. You will recall that in a civil case the court instructed you as to the rule governing in that case, namely, that that side in the litigation which had the greater weight of the evidence was entitled to your verdict. Not so here.

Now, by this expression of reasonable doubt is meant such a state of mind on the part of the jurors, and each juror, where that juror may say that he has an abiding conviction of the guilt of the defendant of the offense charged, that is to say, there is no hypothesis consistent with the defendant's innocence that you can reasonably arrive at. If you are in that frame of mind, the guilt of this defendant of this charge has been established beyond a reasonable doubt. It does not mean such a state of mind as a man may work himself up into in an endeavor to find a way out for somebody accused of crime. That is not a reasonable doubt.

Now, at the outset of this proceeding this defendant is presumed to be innocent, just as in the case of an indictment. It is presumed to be innocent of this offense. The making of the charge, the conducting of the inquiry, the analyses made by all of these witnesses prior to this hearing, the filing of the papers in the court, the issuance of the summons—all that counts for nothing as far as the matter of the guilt of the defendant is concerned, the point being that when you take your oaths here as jurors the defendant stands before you as innocent of this charge as you are; that is what the presumption of innocence means. It is not a form nor a conventional expression which has no color nor meaning. It is a real substantial right, a right of such substance that it has to be torn down and destroyed by evidence—evidence of such a character as to put your mind in that state where you may say, as I said before, you have an abiding conviction of the defendant's guilt. Now, it has been said that it is an important case for the United States. It has been said that it is an important case for this defendant—because it has been said there are people away from this court room interested in the outcome of this litigation. You have not anything to do with that—not a thing—

with that procession on the sidewalk moving by this building you have no concern whatever, save only that it may hear that you have answered your obligation under your oaths in this lawsuit between the parties litigant here in this court room. Now, there is the important thing in this situation, and if you discharge that obligation you have discharged your duty, regardless of what the consequences of your verdict may be.

Now, the charge in this case is that this defendant, the John A. Tolman & Company, on the 3d day of October 1907, delivered to the Chicago, Milwaukee & St. Paul Railway Company two packages for transportation over the rails of that company from Chicago, the place of delivery, to Algona, in the State of Iowa; that these packages contained 4 dozen 1-quart oblong tin receptacles filled with a preparation called "Topmost cane and maple syrup", and that to each one of these quart oblong tin receptacles—in plain language, a tin can; you have seen it here—were then and there attached, one upon the front, the other upon the back, labels; which said labels did then and there contain various printed matter; that these labels, that is to say, the one attached to the back of each of these tin receptacles, containing this commodity referred to as "Topmost cane and maple syrup", contained the following statement: "This syrup is composed of the following ingredients, and none other: Cane syrup 60%; Maple syrup, 40%. John A. Tolman and Company, Chicago." Then, the charge is in the information that that statement in the label is false and misleading in that the article contained in the tin receptacle contained little, if any, maple syrup. Those portions of the law for an infraction of which the defendant is sued in this case provide that the delivery for shipment of an article of food misbranded for transportation to another State than the point of delivery is prohibited and punishable. The term "misbranded" as related to food means, if the package containing the food product, or the label on the package containing the food product, bears any statement, design, or device regarding the ingredients or the substances therein contained, which statement, design, or device shall be false or misleading in any particular, then, in the case of a charge that—a charge involving the food section, there is a misbranding. So, the charge in this case is in substance that the defendant company, on the date named in the information delivered to the St. Paul road for transportation by that company over its road to Algona, to the addresses named in the information, the consignees named in the information, 2 boxes containing 4 dozen of these tin receptacles, each of which tin receptacles was misbranded in the respect indicated, namely, that the brands stated 40 percent maple syrup when, in truth and in fact, the commodity contained little, if any, maple syrup. The defendant pleads not guilty to this charge. And the charge with the plea, raise the issue, as I have stated, that you are to determine and express by your verdict: Did the defendant deliver to the St. Paul road at the time indicated, 4 dozen of these receptacles contained in these 2 boxes, consigned as the information states. Now, as to that phase of the inquiry, dealing with the question of the contents of those other receptacles in the 2 boxes, other than was examined by the chemists, these which it is

admitted by the stipulation were found on the shelves of the Algona merchant; I have this to say: You are authorized, if in your judgment the proof justifies it, having in mind the rule of presumption of innocence and reasonable doubt, as I have defined those expressions to you, you are authorized, if you believe the testimony shows a misbranding as to those receptacles referred to specifically in the evidence as having been analyzed, you have a right to infer, and the law authorizes you to infer from that proof as to the contents of the specific receptacles examined and analyzed, that all of the receptacles contained in those 2 boxes contained the same ingredients and were the same commodity. I say you are authorized to infer that considering the testimony of the witnesses as to what was contained in this and all the other evidence in the case, even with no evidence of a specific examination of the other receptacles that went with this receptacle in the box, if you say, if you can say, I have an abiding conviction that the other receptacles in those boxes other than the ones examined contained this same thing, then, on that phase of the case, you have no reasonable doubt, and in determining the question of what is proved here in that regard, as well as in all others, the rule is that in a criminal case, as in a civil case, you bring into the jury box with you your common sense judgment. You take the testimony of the witnesses here and the evidence in this stipulation of facts which the counsel in the case representing the two litigants have agreed to, and subject that testimony to the same kind of judgment that you would subject your important matters away from here to, at your home or in your business, with no purpose save only to answer the question, guilty or not guilty, as charged here, and, as I said a while ago, without any possible or remote regard to the fact that the United States of America or the defendant considers this a very important lawsuit. This is no more important than any other. Subject the testimony of these witnesses, the testimony of this stipulation, all of it together, to your common-sense judgment, to determine you in answering the question whether or not the contents of the receptacle is as charged in the Government's information, namely, does it contain little or no maple syrup? The facts in this case are for you and not for me. I have no inclination nor authority to control your determination of a matter of fact. Were I to do that, it would be an invasion of your rights and authority. You cannot shift that burden to me, if you want to. It is on your shoulders, and not mine. The law of this case is on me, and it is the law that you must take my word for the law, even though you disagree from me as to the law, even though you may think it is not a good law, that you could write a better law, or there should be no law on this subject. It is this thing here that binds you and me in this lawsuit, and this thing here that must be enforced in this case, if the facts of this case fit this law, no matter what your private view may be.

Now, coming to the question—and there does not seem to be much dispute in this case as far as you are concerned—matters for you to determine. There does not seem to be much dispute in this case to bother your minds, that is to say, dispute between witnesses. The difficulty here, if any there be, is in coming to a conclusion of the evidence of the witnesses introduced on one side, as to whether

or not that testimony reads within the meaning of this law, the delivery of a thing containing something that was enclosed in a thing misbranded, bearing a false and misleading brand. In other words, it is difficult, if any there be, in construing or interpreting, or analyzing and concluding whether or not these things come within this law—no dispute between the witnesses. The label, as I stated a while ago, and as you know, contains a statement that the contents, in substance the contents of this parcel contain 40 percent maple syrup, and, as I said a while ago, this law forbids the placing upon the parcel of a label containing that statement, if it is substantially untrue, or substantially misleading. So, the question for you to decide is whether or not this parcel contained a substance, one of the ingredients of which was maple syrup, and if so whether that ingredient, maple syrup, constitutes 40 percent of the commodity. That is the question for you to determine. And on that question you have had here the testimony of chemists, and I say to you in this kind of a case I suppose that that is about the best testimony we can get. I suppose you probably cannot take that can and determine the contents, the ingredients of the contents. That is a matter for chemical analysis; and yet you have a right, when you go to your jury room, to open that can and determine by your taste, if under your oaths in accordance with the rules I have laid down, you can do it and are satisfied to do it, you may open that can and by your taste determine this defendant to be not guilty. You have that power under the law, and three experts, nor a hundred experts, can take that power away from you, a power, however, to be exercised having regard to the nature of a function which under our system you here exercise, exercising it with no purpose in the world save only to arrive at the truth of the matter, always bearing that in mind.

Now, the dispute is between this prosecution and this defense as to whether or not there is any way of determining what is meant by the expression, " maple syrup ", or " pure maple syrup ", or " genuine maple syrup." For the United States the position is that the phrase " maple syrup " used on this label of this defendant is to be understood as meaning to him who put it there, and as having been intended by him to be read by him who saw it there, as meaning the result of boiling down the sap of the hard maple tree to a degree or state of consistency where it would be regarded and called maple syrup, excluding the addition to it of any outside substances, excluding putting into it anything in the way of an adulterate—the product solely of boiling down the sap of the hard maple tree. Now, my own judgment is that it is not a serious question, as you might suppose, having in mind that that is what it means—the product solely of boiling down the hard maple sap. It is my judgment that it isn't very important whether it was boiled down to a point where there was within the resultant product 34 percent of water or 36 percent of water, or 40 percent of water. It might very rationally and reasonably still be called maple syrup. The tests which these witnesses have gone by have been explained to you. One has been called the lead test. What that means the witnesses have told you. I will not undertake to repeat to you what they said to you [or what] they had in mind when they talked about that test. The ash test is

another way which they explained to you, and that test is as familiar to you as to me.

Now, their testimony is that, subjecting the contents of the can to those two tests, certain facts appeared, which facts have been detailed to you by the several witnesses as to the presence of ash and the condition shown by the lead test, and the witnesses have testified as to the amount of ash necessarily and essentially present in pure maple syrup, and you are dealing here, when you talk about maple syrup, you are dealing with pure maple syrup, as I have defined to you the meaning of maple syrup heretofore in these instructions; and by those tests the reasoning of the witnesses is that the contents of this tin receptacle contain the percentage (and it is a percentage per volume of contents)—the percentage of maple syrup within the can.

I do not know how I can any better explain to you the nature of this charge. It is a new field. There are questions involved which would be more satisfactorily disposed of by the court, after a better opportunity for consideration and reflection than is afforded in the trial of a case, the day after day trial of the case with sessions of the court separated by periods which are largely clogged with other business than the business which calls you here. I have done the best I can in defining to you what the issue is in this case. It is your duty to answer this question: Guilty or not guilty, to the best of your ability. If you find for the United States, the form of your verdict will be: We, the jury, find the defendant guilty; if you find for the defendant, the form of your verdict will be: We, the jury, find the defendant not guilty.

UNITED STATES v. CHARLES L. HEINLE SPECIALTY CO.

(District Court, E.D. Pennsylvania, Jan. 4, 1910)

N.J. No. 389

Information charging violation of section 9 of the Food and Drugs Act. Demurrer to the information overruled.

HOLLAND, *District Judge* (overruling demurrer). This is a demurrer filed by the defendant to an information lodged against it by the district attorney for the Eastern District of Pennsylvania for having sold an adulterated and misbranded article of food manufactured by it and in violation of the ninth section of the Pure Food Act of June 30, 1906, executed and delivered a false guaranty to the effect that the merchandise sold was not adulterated or misbranded within the meaning of the act. The dealer to whom this adulterated and misbranded food was sold by the defendant and to whom the false guaranty was given, sold the same in interstate commerce, and upon the discovery by the Government officials that the article was misbranded, it is alleged the dealer who sold the same in interstate commerce established the guaranty of the defendant; whereupon this information was filed.

The defendant's demurrer alleges that the information sets forth no charge or offense for which the defendant can be convicted and

punished under the act of Congress, approved June 30, 1906, because the ninth section, upon which the information is based, is unconstitutional. Under the second section of this act the introduction into interstate commerce of adulterated or misbranded foods is prohibited, and any person violating this provision is guilty of a misdemeanor; subject to certain fines and penalties.

The ninth section is as follows:

> That no dealer shall be prosecuted under the provisions of this act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this act, designating it. Said guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines, and other penalties which would attach, in due course, to the dealer under the provisions of this act.

The defendant in this case is charged in the information with having executed and delivered to the dealer who sold the adulterated and misbranded food in interstate commerce the following guaranty, which is alleged to be false:

> We, the vendors of the articles mentioned in the foregoing invoice, hereby guarantee and warrant the same to be in full conformity with the Federal act of June 30th, 1906, known as the "Food and Drugs Act," * * * in that the said articles are not adulterated or misbranded within the meaning of * * * the aforesaid act of Congress.

It is not contended by the defendant that Congress has no constitutional right to prohibit the introduction of adulterated and misbranded foods in interstate commerce, but the claim is that so far as the defendant's connection with the adulterated and misbranded goods was concerned, the entire transaction of manufacturing, selling and delivering by it was consummated within the State, as was the issuance of the false certificate, and as the defendant's connection with the article was entirely within the State, the fact that the certificate indicates that the adulterated and misbranded commodity was intended for interstate commerce can make no difference, because the Federal courts could have no jurisdiction, whatever the intention of the manufacturer might be, until such goods had been shipped or entered with a common carrier for transportation to another State, or had been started upon such transportation in a continuous route or journey; and cites *Kidd* v. *Pierson*, 128 U.S. 1.

There is nothing in the act to indicate that there is an effort on the part of Congress to regulate the manufacturing, selling, or delivering of any articles of food within the States. The act is intended to prevent adulterated and misbranded foods from being sold in interstate commerce, nothing more; and in order that this may be accomplished it prohibits the party who makes or manufactures the food and who knows what it contains from falsely assuring an innocent purchaser that its quality and dress lawfully entitles him to sell the commodity in interstate commerce. Such a certificate, made by a defendant, expressly under the provisions of the act, if false, could have been made with no purpose other than to defeat the object of the act. This prohibition is obviously essential to the enforce-

ment of one of the important powers with which Congress is intrusted, to wit: The regulation of interstate commerce.

To punish the dealer who sells the article in another State will not in all cases reach the evil sought to be remedied. He may be entirely innocent of any intention of selling an adulterated or misbranded food, because he may be unable to tell the difference between a pure article and one adulterated, and dealers cannot be expected to employ expert chemists to examine the great variety of commodities which enter into commerce and are dealt in by them; but the evil can soon be cured if the innocent dealer may shift the responsibility for the purity of the commodity to the manufacturer by requiring him to certify to the effect that the article is not adulterated or misbranded, when the manufacturer knows he will be subjected to punishment in case he gives a false certificate prohibited by the act.

In the case of *United States* v. *Fox*, 95 U.S. 670, 24 L.Ed. 538, in passing upon the provision in the bankrupt law which made it a misdemeanor, punishable by imprisonment, for obtaining goods under false pretense with intent to defraud, within 3 months of the commencement of bankruptcy proceedings, the court held that as this would be no offense under the act of Congress at the time of the commission of the false pretense, that any subsequent independent act by the party himself or a third party in instituting bankruptcy proceedings, could not make it a crime punishable in the Federal courts. In the discussion of the question, it was said by Justice Field, that "the criminal intent essential to the commission of a public offense must exist when the act complained of is done; it cannot be imputed to a party from a subsequent independent transaction. There are cases, it is true, where a series of acts are necessary to constitute an offense, one act auxiliary to another in carrying out the criminal design."

In this case the criminal intent essential to the commission of the offense existed at the time defendant gave the certificate specifying that it was under the Pure Food Act of Congress of June 30, 1906. With what purpose and intent was the certificate given other than for the purpose of evading the provisions of this act of Congress? It is averred defendant made and knew the goods were both adulterated and misbranded, and with this knowledge gave a certificate that they were not adulterated or misbranded in order that an innocent purchaser might sell them in interstate commerce, and, in this case, the purpose of the certificate was accomplished. The dealer did just what the defendant intended he should do; that is, the dealer, relying on the certificate, sold the articles in another State. "Any act committed with a view of evading the legislation of Congress, passed in the execution of any of its powers, or of fraudulently securing the benefit of such legislation, may properly be made an offense against the United States." *U.S.* v. *Fox*, *supra.*

Demurrer overruled.

UNITED STATES v. JOHNSON

(District Court, W.D. Missouri, Jan. 8, 1910)

177 Fed. 313; N.J. No. 266

Indictment charging violation of section 2 of the Food and Drugs Act. Motion to quash indictment sustained.[19]

PHILIPS, *District Judge.* The defendant has filed motion to quash the indictment, for the principal reason that it does not disclose an indictable offense. It is predicated of what is known as the "Pure Food and Drug Act", entitled "An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes." Approved June 30, 1906. Act June 30, 1906, c. 3915, 34 Stat. 768. It contains six counts. The first count, in substance, charges that the defendant shipped from one State to another certain articles designated as "Cancerine Tablets", "Antiseptic Tablets", "Blood Purifier", "Special No. 4", "Cancerine No. 17", "Cancerine No. 1", which constituted "Dr. Johnson's Mild Combination Treatment for Cancer." It charges that they were misbranded within the meaning of the act aforesaid, in that the broken packages, etc., of "Cancerine Tablets" were labeled and branded as follows, to wit: "Complies with the Food and Drug Act, June 30, 1906. Cancerine Tablets. Take two tablets in water every three hours during the day. Do not take more than four doses in twenty-four hours. Prepared for and distributed by Dr. O. A. Johnson, 1233 Grand Ave., Kansas City, Mo."—which said label or brand is alleged to be false and misleading in that it bears the name "Cancerine Tablets", which statement, regarding such articles and substances contained therein, is false and misleading, in that it implies that said tablets will cure, and are effective in bringing about the cure of, cancer, which was untrue, and that they were worthless and ineffective for such purpose.

The second count is predicated of packages containing "Blood Purifier", which were misbranded within the meaning of said act, in that they were labeled:

> Guaranteed under the Pure Food and Drug Act, June 30, 1906, Serial No. 18131. Contains not more than 20 per cent. Alcohol. Dr. Johnson's Mild Combination Treatment for Cancer. Blood Purifier. This is an effective Tonic and Alterative. It enters the circulation at once, utterly destroying and removing impurities from the blood and entire system. Acts on the Bowels, Kidneys and Skin, eliminating poisons from the system, and when taken in connection with the Mild Combination Treatment gives splendid results in the treatment of cancer and other malignant diseases.

This was followed with directions how to take the remedy. The charge is then made that said label was false and misleading in that it bears false statement that said drug is a part of the treatment for cancer, etc., whereby it held out and falsely claimed that said drug is efficacious in the treatment of cancer, etc., when in truth and fact the drug contained in said packages is worthless and ineffective for such purpose.

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[19] Affirmed, *United States* v. *Johnson,* p. 267, *post.*

The third count is predicated of packages under the name of "Blood Purifier", and is in effect the same as the preceding shipment, only to a different party.

The fourth count is predicated of packages and bottles under the name of "Special No. 4" with the label "Dr. Johnson's Mild Combination Treatment for Cancer. Special No. 4", with directions as to how it was to be applied and used, and its effect. This label is charged to be false and misleading in that it would not accomplish the results stated.

The fifth count is predicated of shipments of boxes, etc., containing "Cancerine No. 17", with directions as to how the same should be applied and used. The indictment charges that these were false and misleading in that said drug was offered as part of the treatment for cancer, holding out and representing that said drug will cure, and is effective in bringing about the cure of, cancer, when, in fact and in truth, it was not effective for such purpose.

The sixth count is predicated of a shipment of box or carton called "Cancerine No. 1", which is alleged to be misbranded within the meaning of the act, in that the label contained the following: "Dr. Johnson's Mild Combination Treatment for Cancer, Tumor and Other Chronic Diseases. Cancerine No. 1"—with directions as to how the same should be applied and used. Said label or brand is alleged to be false and misleading, in that it bears thereon the name "Cancerine No. 1", statements regarding such articles and substances contained therein which are false and misleading, in that said drug was represented as part of the treatment for cancer, and that it would cure, and is effective in bringing about the cure of, cancer, etc., when in truth and fact, it is wholly worthless and ineffective for the purposes recommended.

From which it is apparent that no charge is preferred by the indictment that the drug or medicine was adulterated, or that it contained anything that was poisonous or deleterious, or that it contained less than what was represented, or that in any respect there was any misbranding as to the contents and composition thereof. The substantive charge is that the articles manufactured and shipped by the defendant are and were inefficacious in producing the cures and remedies indicated by the label. The question, therefore, to be decided is whether this presents an indictable offense within the provisions of the Pure Food and Drug Act.

The very title of the act indicates its scope and purport. Its underlying purpose was to protect the public health against imposition upon the users of food, drugs, and medicines which were adulterated, misbranded, poisonous, or deleterious. To this end, the first section of the act makes it unlawful and an indictable offense "for any person to manufacture * * * any article of food or drug which is adulterated or misbranded, within the meaning of the act."

The second section forbids the introduction into any State, etc., or from any foreign country, or shipment to any foreign country, of any article of food or drug which is adulterated or misbranded within the meaning of the act, etc.

The third section directs that the Secretary of the Treasury, of Agriculture, and of Commerce and Labor, shall make uniform rules and regulations for carrying out the provisions of the act.

The fourth section declares that the examinations of specimens of foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of such bureau, "for the purpose of determining from such examinations whether such articles are adulterated or misbranded within the meaning of this act."

Section 5 declares the duty of district attorneys, to whom the Secretary of Agriculture shall report any violation of this act.

Section 6 declares that the term "drug", as used in the act, shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or animal.

Section 7 then specifies when an article shall be deemed to be adulterated. In case of drugs, if it differs from the standard of strength, quality, or purity, as determined by the test laid down in the United States Pharmacopœia or National Formulary: "Provided, that no drug defined in the United States Pharmacopœia or National Formulary shall be deemed to be adulterated under this provision if the standard of strength, quality, or purity be plainly stated upon the bottle, box, or other container thereof although the standard may differ from that determined by the test laid down in the United States Pharmacopœia or National Formulary", or if its strength or purity fall below the standard under which it is sold, or any substance has been substituted wholly or in part for the article, or any valuable constituent of the article has been wholly or in part abstracted, or if it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed, or if it contain any added poisonous or other added deleterious ingredient which may render such articles injurious to health (with a certain provision), or if it consist in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, etc.

Section 8 is as follows:

> That the term "misbranded", as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

It is conceded that the indictment is predicated of the words contained in the foregoing section 8:

> The package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular.

In other words, the contention is that the label on the bottle or container, as to the curative or remedial effect of the contents, is a misbranding within the meaning of the statute, if, in fact, the prescription be ineffectual for the purpose indicated. This, it seems to me, is an entire misconception of the term "misbranding" as used in the act. The language, "the package or label of which shall bear

any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular ", must be read and interpreted so as to have regard to its context, and is to be restrained by the subject-matter of the act.

Having regard to the intendment of the whole act, which is to protect the public health against adulterated, poisonous, and deleterious foods, drugs, etc., the labeling or branding of the bottle or container, as to the quantity or composition of " the ingredients or substances contained therein which shall be false or misleading ", by no possible construction can be extended to an inquiry as to whether or not the prescription be efficacious or worthless to effect the remedy claimed for it. Pretermitting any expression of opinion as to how far Congress may go in the direction claimed under this indictment, it is sufficient to say that this legislation, predicated of the commerce clause of the Federal Constitution, it must be conceded, presses the power of the general government close to the confines of limitation.

In the debates in Congress, when this measure was under consideration, it was never sought to be justified except on the ground of protecting the public health, as it might be affected by interstate shipments of food, drugs, etc. At no time was it asserted or pretended that it was proposed to reach the matter of holding the manufacturers and vendors of prescriptive or patented medicines, multitudinous and multiform as they are, to criminal liability for misstatements as to the curative or remedial effects of the prescription, which would necessarily depend upon the opinions of contending experts and the users of the nostrums.

As this is a criminal statute creating a new offense, it must be strictly construed and applied. It must be restrained to its expressed, reasonable intendment; otherwise, the courts, by mere construction, may extend its operation far beyond the legislative intent. If it had been the mind of Congress to make it an indictable offense for such manufacturers and vendors by their labels or brandings on bottles and packages to mislead the buyers as to the curative or healing properties of the drugs, as to the mere matter of commendation, apt words, both in the title and body of the act, could and should have been easily employed to indicate such purpose, and not leave it to the courts by strained construction to read it into the statute.

The motion to quash is sustained.

UNITED STATES v. BOECKMANN

(Circuit Court, E.D. New York, Jan. 15, 1910)

176 Fed. 382; N.J., No. 269

Indictment charging violation of section 2 of the Food and Drugs Act. Demurrer to indictment sustained.

Chatfield, *District Judge*. A demurrer has been interposed to an indictment charging the defendant with having shipped from the State of New York to the State of New Jersey, a certain article of food for man, labeled " Compound: Pure Comb and Strained Honey

and Corn Syrup"; that the label was false and misleading, and the contents of the jar misbranded, in that "the said label represented the principal ingredient of the said contents of said glass jar to be pure comb honey" when in fact the contents were "almost wholly glucose and starch sugar, and the said contents of the said glass jar in truth and in fact consisted of a very small percentage of pure comb honey."

It has been called to the attention of the court that under the authority of the statute of June 30, 1906 (Act June 30, 1906, c. 3915, 34 Stat. 768), certain regulations for the guidance of the public, and for carrying out the provisions of the law, have been made by the Secretary of Agriculture, and certain rulings or decisions by the Secretary of Agriculture have construed the language of the statute. For instance, Food Inspection Decision No. 75 provides that:

> When both maple and cane sugars are used in the production of syrup, the label should be varied according to the relative proportion of the ingredients, the name of the sugar present in excess of fifty percent of the total sugar content, should be given the greater prominence on the label, that is, it should be given first.

Also, Food Inspection Decision No. 87 provides that "Viscous syrup obtained by the incomplete hydrolysis of the starch of sugar" should be labeled "corn syrup with cane flavor", if a small percentage of the product of the cane is added thereto.

There is no charge of any violation of regulations, or refusal to comply with the rulings of the Commissioner of Agriculture, but the case presents an entirely distinct question, depending upon the provisions of the statute itself.

In the present indictment we have an allegation that the defendant has put upon the market, for interstate commerce, an article which is misbranded, in that the label is misleading, solely because the principal ingredient is alleged to be held out to the public as "pure comb honey", when in reality "glucose and starch sugar" made up almost wholly the actual "principal ingredient."

Under the decision *In re Wilson* (C.C.), 168 Fed. 566, such a label as is recited would not be contrary to fact, and this court agrees in the opinion that it is impossible to say what portion of the label as printed would signify greater percentage of the product.

The demurrer will be sustained.

UNITED STATES v. KNOWLTON DANDERINE COMPANY

(Circuit Court of Appeals, Fourth Circuit, Feb. 1, 1910)

175 Fed. 1022; N.J. No. 284

Appeal from the District Court for the Northern District of West Virginia. Affirmed.[20]

Before GOFF and PRITCHARD, Circuit Judges, and CONNOR, District Judge.

GOFF, *Circuit Judge.* The opinion of the court below, which contains a full statement of the facts, is found in 170 Fed. 449. Ap-

[20] Affirming judgment of District Court in *United States* v. *65 Casks of Liquid Extracts*, p. 47, *ante*.

pellant assigns as error, in substance, that the court below erred in holding that the 65 casks of liquid extracts were not prepared, used, or shipped in any manner contrary to the laws of the United States, and that the United States had no right through its officers to seize the said casks or any of them.

Under the facts disclosed by the record, we conclude that the court below properly found that, even if there was probable cause for making the seizure and filing the libel, the evidence made it plainly appear that the appellee shipped the said casks as its own product, made by its own agent, from the laboratory of said agent at Detroit, Mich., to the warehouse of the appellee at Wheeling, W.Va.; that said casks of extracts were not intended for sale as shipped, but were to be, at the warehouse mentioned, bottled, and labeled as the law requires before being offered for sale. No attempt to evade the law, either directly, indirectly, or by subterfuge, has been shown; it appearing that the manufacturer had simply transferred from one point to another the product he was manufacturing, for the purpose of completing the preparation of the same for the market. Under the circumstances disclosed in this case, having in mind the object of the Congress in enacting the law involved, we do not think the liquid extracts proceeded against should be forfeited. Reaching this conclusion, we do not find it necessary to consider other questions discussed by counsel, and referred to in the opinion of the court below.

We find no error.

UNITED STATES v. MAYFIELD ET AL.

(District Court, N.D. Alabama, Mar. 11, 1910)

177 Fed. 765; N.J. No. 326

Information charging violation of section 2 of the Food and Drugs Act. As no service of process was had on J. C. Mayfield, the case against him was not prosecuted. To the information the defendants J. P. Bradley, J. W. Altman, and J. F. Hawkins pleaded not guilty. Jury trial. Verdict of guilty as to J. F. Hawkins and J. W. Altman, and a verdict of not guilty as to J. P. Bradley.

GRUBB, *District Judge* (charging jury). The defendants in this case are charged with having violated certain provisions of what is known as the "Food and Drugs Act", an act passed by Congress in 1906 (Act June 30, 1906, c. 3915, 34 Stat. 768), the purpose of which was to protect consumers against impure and adulterated foods and drugs and also against the use of foods or drugs which do not show what they contain by the brands on the package. Congress did not have any power to make this law concerning matters relating to commerce entirely within one State, but only as to commerce between one State and another State. The States themselves have the exclusive power to regulate their own internal commerce. So the prohibition of this act is directed only against the introduction into interstate commerce of any article of food or drink, or of any drug, either adulterated or misbranded. These two acts—adulteration and misbranding—are made offenses when they occur in an article which

is introduced into interstate commerce. Now, you will see that the first proposition in this case will be whether or not this shipment was one of an interstate character. This proposition is simplified for your consideration, however, by the admission that this particular jug, which is made the subject of this prosecution, was shipped from Birmingham, Ala., to New Orleans, La. Therefore it is conceded that it was introduced into interstate commerce by some one.

Now, as I say, the prohibition is against the introduction into interstate commerce of any article of food which is either misbranded or adulterated. I charge you that the shipment in this case was a food product within the meaning of the act of Congress.

In order to make out a case under the first count of the information, which charges misbranding, three things would be necessary for you to believe from the evidence, and beyond a reasonable doubt. The first is that there was in the shipment some constituent which should have been, and was not, shown by the brand. The act itself defines what constitutes misbranding in some respects. If the article shipped contains cocaine, and that fact is not indicated by the brand, then the failure to so indicate its presence by the brand is defined to be misbranding. In order to convict on this count, you would have to find that there was cocaine in the jug which went to New Orleans, and that there was nothing on the jug which indicated that it contained cocaine, and that the defendants or some one or more of them were responsible for the introduction of that jug into interstate commerce. These three things you would have to be convinced of beyond a reasonable doubt to convict under the first count of this information.

Now as to the presence of cocaine in this liquid there seems to be little dispute. The Government experts testified that it was there, and there is no contradiction of this fact by the defendants. Therefore, if the testimony of the Government experts convinces you beyond a reasonable doubt of the presence of cocaine in this liquid—and you have no right to reject their testimony capriciously and without good cause—this fact is sufficiently established. It is conceded that this jug had no brand upon it indicating the presence of cocaine in the liquid in the jug.

Then, the next proposition for you to consider is whether or not these defendants were responsible for the introduction of this shipment into interstate commerce. It is admitted that this jug was introduced into interstate commerce by some one. The evidence shows that the order on which the jug was shipped was received by the Birmingham Celery Cola Company, and by it filled by shipping the jug from Birmingham to New Orleans. Clearly the Birmingham Celery Cola Company primarily introduced this shipment into interstate commerce. The corporation, however, is not informed against in this prosecution. A corporation acts only by agents. The law is that, if any agent does an illegal act on behalf of his principal, he makes not only the principal liable for his act, but himself as well. An agent cannot shift the responsibility for wrongdoing altogether from his own shoulders onto those of his principal. If the act was illegal, the manager who filled the order and shipped the stuff would be responsible, even though his responsibility was shared by his principal. The manager is not informed against in this prosecution,

however. The men who are informed against are stockholders and officers of the company. So far as the mere fact of their being officers and stockholders in the corporation is concerned, I charge you that it does not make them responsible in this prosecution; but their responsibility depends altogether upon whether or not they conferred on the manager the authority to ship Celery Cola from one State into another; and whether the shipment upon which this prosecution is based was made by the manager pursuant to the authority so conferred.

The question for you to inquire into is whether or not the defendants are shown by the evidence, to your satisfaction, to have given the manager the authority to do what he did in shipping this Celery Cola out of Birmingham to New Orleans. If, from the evidence, you are satisfied beyond a reasonable doubt that this authority was conferred upon him by the defendants, then they would be just as responsible as the manager or the Birmingham Celery Cola Company. The evidence tends to show that Celery Cola had been shipped during the time from January 1, 1908, until the date of the shipment on which was based this prosecution, which was some time in October of that year. It also tends to show that, when this company began to get into financial difficulty, the defendants secured the manager to take charge of the plant, operate it and sell its product. That much is conceded by both sides. There is also evidence tending to show that they told the manager expressly to sell the Celery Cola on hand. And I take it that the operation of the plant and the conduct of the business would imply the authority in the manager to sell its product of whatsoever kind. I think that it is to be fairly inferred that the authority conferred on the manager by the defendants was that he carry on the business and dispose of the product as it had been done according to the previous course of business. If the authority of the manager, so conferred, was not expressly restricted to sales made in Alabama, and according to the previous course of business sales had been made to other States, a fair inference would be that the manager was authorized by defendants to conduct an interstate traffic in Celery Cola. So, if the previous course of business had been to sell without branding the packages as containing cocaine, a fair inference would be that the manager was authorized by these defendants to conduct the business without such branding. The fact that the defendants in their testimony denied knowledge that Celery Cola contained cocaine is evidence that the previous course of business of the company had been to sell it without branding it as containing cocaine. If general authority was conferred on the manager by the defendants to sell Celery Cola, when he took charge, it would not be necessary that express authority be given him to fill each order. Until the authority was revoked, it would cover all shipments without renewal on the occasion of each shipment.

The Celery Cola extract was manufactured in St. Louis and shipped by the manufacturers to the company of which defendants were officers at Birmingham. The extract was shipped in barrels; each barrel stamped with the guaranty, signed by the manufacturer, that the extract was neither misbranded nor adulterated within the meaning of the Food and Drug Act. The Birmingham company

mixed the extract with a boiling syrup, composed of sugar and water, in the proportion of 1 part of the extract to 10 parts of the syrup, and it was the syrup, so compounded, that was shipped by the Birmingham company in the conduct of its business. The defendants testified that they had no knowledge, during the time the Birmingham company handled the extract, that it contained either cocaine or caffein, in any quantities, and rely on the ninth section of the act, which excuses the dealer, who buys the article from a manufacturer with the guaranty from him that the article is neither misbranded nor adulterated within the meaning of the Food and Drug Act. Proof of the absence of knowledge on the dealer's part that the article is obnoxious to some of the provisions of the act is only a defense when the article is purchased from a manufacturer, and a guaranty taken from the manufacturer that it complies with the requirements of the act. The second section of the act prohibits the introduction into interstate commerce of any article of food, or drugs, which is adulterated or misbranded. The ninth section provides that no dealer shall be prosecuted under the provisions of the act, when he can establish a guaranty, signed by the manufacturer from whom he purchased such articles, to the effect that the same article is not adulterated or misbranded within the meaning of the act; in which case, the manufacturer shall be amenable to the prosecutions, fines, and other penalties, which would otherwise attach to the dealer. The purpose of Congress was to place liability for the violation of the law upon some one in each instance. Primarily the liability is on the dealer who introduces the article into interstate commerce. The liability can be shifted from the dealer only by imposing the same liability upon the manufacturer. This can be done only by virtue of the manufacturer's guaranty to the dealer. If, for any reason, the guaranty is insufficient to impose liability upon the manufacturer, it remains where it primarily rested—upon the dealer. To have the effect of releasing the dealer from liability for the violation of the act, complained of in this prosecution, the guaranty must be of a character to impose liability for the same violation upon the manufacturer, if he were substituted for these defendants in this case; otherwise, both parties would escape liability, and the purpose expressed by Congress be defeated. The act says that the manufacturer who signs the guaranty shall be subject to the same prosecution and penalties as the dealer. If a conviction could not be sustained against the manufacturer upon its guaranty, if substituted for the defendants in this case, then the taking of the guaranty by defendants would be no defense to their violation of the law in reference to the shipment in question, though they had no knowledge that it was adulterated or misbranded. In order for the manufacturer's guaranty to be effective to impose any liability upon him for any violation of law as to the article, which is the basis of this prosecution, the guaranty must relate to the identical article introduced into interstate commerce by the defendants as dealers. Otherwise the answer of the manufacturer to the prosecution would be that he had never guaranteed the article shipped by the dealer, and the answer would be complete. Change of the original package might not constitute a change of identity. In this case there was more. The manufacturer furnished the dealer with the extract, and the dealer shipped the syrup.

Commercially, if not chemically, the two were different. The extract was a mere constituent of the syrup, and not the syrup itself. The manufacturer did not guarantee the article shipped by the dealer and on which this prosecution is based; could not be convicted for the violation of the act, charged against the defendants in relation to it, by reason of the guaranty, and for that reason the taking of the guaranty was not a protection to the defendants. When they changed the identity of the extract, they elected to abandon the protection of the manufacturer's guaranty, and were responsible for the character of the new article, the syrup, made and shipped by them or under their authority. Neither the defendants' want of knowledge of the presence of cocaine in the extract, nor the guaranty taken by them from the manufacturer, would excuse their failure to properly brand the jug, under this count of the information.

The second count of the information charges the defendants with having introduced into interstate commerce an article containing a deleterious ingredient, injurious to health, viz, cocaine; and the third count relies in the same way upon an article alleged to contain caffein. These counts are based upon adulteration, the statutory definition of which is the adding to a food product of a deleterious ingredient, injurious to health. The same principles as to the responsibility of these defendants for the acts of their manager, and with reference to the effect of the guaranty taken by them from the manufacturer, stated as relating to the first count, apply as well to the second and third counts. In order to convict on these counts, the jury must find further from the evidence, with the degree of certainty required in criminal cases, in the first place, that the Celery Cola shipped to New Orleans contained cocaine or caffein, under the respective counts, and then that either or both was deleterious and injurious to health. The presence of each of these substances in appreciable quantities in the jug of Celery Cola in question, is testified to by the Government chemists, and is not disputed by any evidence offered by the defendants. You are the exclusive judges of the credibility of witnesses, but it would not be proper for you to capriciously reject testimony which is uncontradicted in the case.

If you determine the presence of either or both of these substances in the shipment in question, it would then become your duty to determine from the evidence whether either or both, as used in Celery Cola, were injurious to health. As Celery Cola is intended for a beverage and not a drug, you would have the right in determining this question to consider the injury from the probable frequent and repeated use of the article as a beverage, rather than its rare and occasional use as a drug. You have heard the evidence of the Government witnesses, who are physicians, as to their opinion concerning the injurious qualities of both of these substances, in the quantities found in Celery Cola, when used as frequently as beverages are likely to be used. The defendants introduced no evidence to contradict that offered by the Government. You are also the exclusive judges of its credibility, but should not, without good reason, disregard evidence not contradicted.

It is your duty to take the law of the case from the court, as it has been given to you in this charge. Though your opinion might be that the law imposes a hardship upon these defendants in holding

them responsible for the contents of an extract of which they were ignorant, and which they had purchased with a guaranty from the manufacturer; this opinion, if you entertain it, should not operate to prevent a conviction in this case, if you are satisfied beyond a reasonable doubt of the facts necessary to constitute the offense, as I have defined it. If not so satisfied, it would be your duty to acquit the defendants, and the importance of the enforcement of the law should have no weight as against such a conclusion. The enforcement of no law is of sufficient importance to justify a conviction, except upon such evidence.

If you are satisfied to the degree required that the defendants are guilty of misbranding the jug of Celery Cola, exhibited to you, it would be your duty to find them guilty, under the first count of the information. If you are satisfied that they are guilty of adulterating it with cocaine or caffein, then it would be your duty to find them guilty under the second or third counts respectively, or both. If you are not so satisfied of their guilt in misbranding or adulterating the Celery Cola, which is the basis of the prosecution, then you should acquit them.

UNITED STATES v. SCHURMAN ET AL.

(District Court, W.D. Michigan, S.D., Mar. 24, 1910)

177 Fed. 581

Application by the United States District Attorney for leave to file an information against George Schurman and others for alleged violations of the Food and Drugs Act. Denied.

DENISON, *District Judge.* The district attorney presents a sworn information, accompanied by affidavits, supposed to show a violation of the Pure Food Act of June 30, 1906. It appears that the respondents are engaged in business at the city of Holland, in this district, manufacturing and shipping to different States an article of food called "Dutch Tea Rusk." The point of the complaint must be that the article is misbranded, because so "labeled or branded as to deceive or mislead the purchaser, or purport to be a foreign product when not so" (section 8, foods, second); and this conclusion is based on the fact that respondents mark their packages as containing "Genuine Dutch Tea Rusk", and say that it is "made in Holland, Mich., by the Michigan Tea Rusk Company, Holland, Mich.", having the word "Holland", where it first occurs, in type so large and prominent as to hold the attention and thus mislead purchasers into supposing that the article is a genuine importation from the country of Holland.

Obviously, a jury could not be affirmatively instructed that these markings did constitute a violation of the statute. Such tea rusk are largely used in the Netherlands, are popular among Hollanders, are manufactured in this State in a community that is largely made up of Netherlanders, and doubtless find their chief market in different parts of this country among people of the same nationality. The

respondents have a perfect right to call their product "Dutch Tea Rusk." This is no more misleading than to speak of English muffins, or French rolls, or German fried potatoes. If the article, in composition and manufacture, is identical with a similar article made in the Netherlands, it is, in one sense, "genuine." Whether the word "genuine" is here used in a true or in a misleading sense depends on the inferences to be drawn from all the circumstances. The undue prominence given to the name "Holland" would tend to strengthen the inference that a misleading was intended; but this inference would be only argumentative, and the most that can be said for the case made against the respondents is that it probably would require a submission to the jury, and that the jury would be quite at liberty to find that the article did not "purport to be a foreign product."

The motion papers also show that, at a hearing held under the rules of the Department of Agriculture, the respondents made a full statement of the circumstances, insisting that these markings were not misleading, but offering, if the Department should think otherwise, immediately to change the labels as might be directed by the Department. So far as the motion papers show, the conclusion of the Department that the label was improper has been in no way communicated to the respondents, nor have they been informed what changes, if any, the Department would require. In case of a clear violation of the statute, there is no occasion for such notice or opportunity to make a change in the label; but in a case like this, where the violation is doubtful, and where the respondents seem to have acted in good faith in being willing to comply with the law and the rules, if they could find out what the law and the rules were, it is extremely improbable that any jury would find, beyond a reasonable doubt, the existence of the essential misleading, and, upon the same principle which requires a grand jury not to indict unless it is reasonably probable that a conviction might follow, this information should not be filed.

The application will be denied, with leave to renew the same at any time upon a further showing that after notice from the Department of its conclusion, or after knowledge of this disposition of this motion, the respondents did continue or shall continue to use the word "genuine" upon their labels or to give undue prominence to the word "Holland."

UNITED STATES v. 420 SACKS OF FLOUR

(District Court, E.D. Louisiana, Mar. 29, 1910)

180 Fed., 518; N.J. No. 382

Libel under section 10 of the Food and Drugs Act. Exceptions to libel overruled. Cause heard ex parte. Decree in favor of the United States.

FOSTER, *District Judge* (overruling exception to libel). In this case a libel was filed by the United States against 420 sacks of flour alleged to have been brought into Louisiana by interstate shipment from Kansas, in violation of the Pure Food and Drugs Act. (Act June 30, 1906, c. 3915, 34 Stat. 768.)

The Aetna Mill & Elevator Company has claimed the flour and filed exceptions to the libel on the following grounds:

First. That the Food and Drugs Act of June 30, 1906, under the authority of which the libelant herein instituted these proceedings, is wholly invalid, unconstitutional, and void, in that said act in terms and by intendment is in violation of article 1, section 8, paragraph 3, of the Constitution of the United States, and is in further violation of so much of article 5 of the amendments to the Constitution of the United States as prescribes that no person shall be deprived of life, liberty, or property without due process of law; and is further in violation of article 10 of the amendments to the Constitution of the United States.

Second. That the said act, known as the Food and Drugs Act of June 30, 1906, is wholly illegal and void by reason of the fact that it is uncertain and indefinite, and that said uncertainty and indefiniteness apply to the whole of said law, and particularly in this: That the law itself does not define any standard of grade, quality, or purity, and in this regard delegates legislative functions to the court clothed with jurisdiction of cases of a civil or criminal nature brought under this law.

It is urged by claimant that Congress intended to enact, and in fact has enacted, a police regulation, and that, having such intention, the power vested in Congress to regulate interstate commerce is insufficient to validate the act.

I cannot agree with this contention. To my mind it is immaterial what the intention of Congress was, if it had the power to enact the legislation. That it did so have, I consider well settled. In the *Lottery case*, 23 Sup. Ct. 321, 47 L.Ed. 492, 188 U.S. 321, the Supreme Court upheld the validity of the law prohibiting the sending of lottery tickets from one State to another, and reasoning by analogy, it seems perfectly clear that Congress can prohibit the shipment in interstate commerce of food that has been adulterated, or labeled so as to defraud or mislead the public.

The second contention I consider equally without merit. While the act is necessarily broad in its terms, the courts can well protect the rights of parties in each particular case by requiring specific and properly drawn pleadings.

The exceptions must therefore be overruled.

The claimant thereupon asserted its intention to take appeal from the ruling of the court and declared in open court by its proctors no answer would be made by it to the libel. Thereupon, after the delays allowed by law had elapsed, the court pronounced the claimant in contumacy and default, adjudged the libel to be taken pro confesso, and proceeded to hear the cause ex parte. A commissioner was duly appointed, before whom the United States of America, libelant, presented its testimony. After the testimony was duly reported, the court rendered its decree of condemnation and forfeiture in form and substance as follows:

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA

United States of America, libelant, v. *420 Sacks et al. of Flour.* No. 14173

This cause came on before me for hearing on the 19th day of February 1910.

Messrs. Pierce Butler, Assistant Attorney General of the United States, and Charlton R. Beattie, United States district attorney, appeared for libelant.

There was no appearance on said day for the Aetna Mill & Elevator Company, owner of said flour, and the claimant herein.

And it appearing from the files, records, and proceeding herein that a libel for the seizure and condemnation of a car load of flour consisting of 16 bales of 24-pound sacks, 16 bales of 12-pound sacks, 420 98-pound sacks, and 20 barrels of flour shipped from Wellington, Kans., to, and into the State of Louisiana, was filed July 31, 1909; that a warrant of seizure was duly issued and said flour was pursuant thereto duly seized by the marshal while the same was within the jurisdiction of this court and being transported from Wellington, in Kansas, to New Orleans, in Louisiana, for sale, and while it remained unloaded, unmoved, and in original unbroken packages; that the Aetna Mill & Elevator Company of Wellington, Kans., duly appeared in said cause on August 11, 1909, and thereafter, on October 1, 1909, duly filed its answer to the libel herein, which answer, on the application of claimant, was pursuant to order of court duly withdrawn and claimant thereafter filed exceptions to said libel—which exceptions were after argument and due consideration overruled, and thereafter the court fixed a time within which the said claimant might make and interpose its answer to said libel; that said claimant refused and omitted to make or interpose any answer to the libel herein within the time so fixed and allowed by the court, or at all, and claimant having, by its proctors, in open court, declared that no answer would be made by it to the libel herein and all delays allowed by law having elapsed, and no other person having appeared to claim the property seized herein, or any part thereof, this court duly ordered, adjudged, and decreed that said Aetna Mill & Elevator Company and all other persons interested in the flour so seized, be, and it—the said Aetna Mill & Elevator Company was—and they were duly pronounced to be in contumacy and default, and the said libel was duly adjudged to be taken pro confesso against the said Aetna Mill & Elevator Company and all persons interested in said flour seized herein, and that the court proceed to hear the cause ex parte. And it was duly ordered that the cause be referred to Frank H. Mortimer, commissioner, to take testimony herein and report the same to the court; that said commissioner has duly taken the testimony offered in behalf of said libelant, the United States of America, and has duly reported the same to the court.

Now, after due consideration and upon all of the testimony, records, files, and proceedings herein—

The court finds, that there is testimony and evidence tending to prove the allegations of the libel, and accordingly,

That all of the flour described in said libel was and is liable to be proceeded against in this court and seized, condemned, confiscated, and destroyed as adulterated and misbranded and deleterious food within the meaning of the Food and Drugs Act, approved June 30, 1906, in this, to wit: That all of said flour was, by the claimant herein, the Aetna Mill & Elevator Company, before shipping the same from Kansas into Louisiana, bleached and whitened by treating all of the same by a process known as the "Alsop Process" whereby and by means and reason thereof

(a) A substance known as "nitrites" has been and is mixed and packed with said flour so as to reduce and lower and injuriously affect its quality and strength;

(b) That said flour was and is mixed, colored, and stained in a manner whereby damage and inferiority is concealed;

(c) That said flour contains added poisonous and added deleterious ingredients, to wit, nitrites, which renders the same injurious to health.

And that said flour was and is misbranded within the meaning of said act, in this, to wit:

(a) That it was offered for sale under the distinctive name of another article—that is to say, the said flour was offered for sale as "High Patent Flour", whereas, in truth and in fact, it was inferior to "Patent Flour" and was a mixed flour consisting of "Straight Flour" mixed with "Clear Flour."

(b) That it was labeled and branded so as to deceive and mislead the purchaser, that is to say, each of said sacks and other packages containing said flour was labeled and branded in substance as follows: "Aetna Mills—Aetna Silk—High Patent—Aetna Mills and Elevator Company, Wellington, Kansas," whereas in truth and in fact none of said flour was "Patent Flour", but, on the contrary, all thereof was and is a mixture of straight flour made in July 1909 out of a mixture of hard and soft new winter wheat, to which "Straight Flour" there was added and mixed a quantity of "Clear" old wheat flour, amounting to 15 or 20 percent of said mixture.

It is therefore, ordered, adjudged and decreed that said flour (except that which has been released by order of court), be, and all of same is hereby, condemned and confiscated to the United States of America, as being a food adulterated, misbranded, and of a poisonous and deleterious character, and that all of the same be destroyed by the marshal, and that the said libelant, the United States of America, have and recover of and from the Aetna Mill & Elevator Company, the owner and claimant herein, the costs and charges allowed by law.

UNITED STATES v. ONE BARREL DESICCATED EGG PRODUCT

(District Court, E.D. Pennsylvania, Apr. 1, 1910)

N.J. No. 544

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict in favor of the United States.

McPherson, *District Judge* (charge to the jury). I dare say you all have some general idea, at all events, about the pure food act, although you may not have come into contact with it quite as closely as you have the last day. This proceeding is somewhat unusual. It is not a suit against any particular person, although, in substance, in one of its aspects, it amounts to that; but it is directly a proceeding against a particular article of goods for the purpose of forfeiting it—for the purpose of condemning it. The United States declares that it is a kind of article which is forbidden to be transported in commerce between the States by the Pure Food Act, and, therefore, it may be forfeited, condemned, and destroyed; and the Pure Food Act in one of its sections confers such power upon the

courts of the United States; but, of course, before a remedy like that can be enforced—a very drastic remedy—you see it is taking a man's property from him and destroying it, even although he has a trial to justify his right to it—his right to retain it—I say a remedy like that, of course, calls for clear and satisfactory proof on the part of the United States. This is not a criminal trial, strictly speaking, because there is nobody charged with crime, but it is a suit to enforce a penalty, and a severe penalty, as I just said, and, therefore, while the burden of proof is upon the United States, it is not the ordinary burden of proof such as exists in a civil suit between two individuals. In that case, as you no doubt know from your previous service upon juries, all that is necessary is that there shall be a fair balance of evidence in favor of one party or the other. It is not required that there should be, for example, as in a criminal case, proof beyond reasonable doubt, and that degree of proof is not required in this case either—proof beyond a reasonable doubt; but a higher degree of proof than a mere preponderance, a mere balance of evidence in favor of the Government, is required. It is necessary in a case like this that the Government should establish by clear and satisfactory evidence that its case has been made out. These terms are necessarily somewhat indefinite, but I cannot do any better with them.

Now, has the Government laid before you evidence of that kind and quality? That is the question for your determination. The only part of the act to which your attention need be directed is contained in this language: "If the article complained of" [in this case it is a barrel of egg product—dried egg] "consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, then it may be condemned." Now, of course, this is an animal substance. It is made from eggs. It is composed wholly of that substance, as I understand. There is no evidence that there is any admixture, so that we may assume that it is wholly composed of animal substance. Now, is it, therefore, filthy, decomposed, or putrid. Either one of these adjectives, if applied to this substance and established by proof, would be sufficient to justify the jury in condemning it. Now, of course, there is a certain difficulty in dealing with language always, namely, the difficulty of getting at the exact meaning which it is intended to convey; and some words—indeed, a great many words—are incapable of precise definition. Words, as you know, very often mean what we choose to have them mean. They bear the meaning that we put into them, and that meaning varies from time to time, and varies under different circumstances, and that is true about a great many words. Without troubling you longer with general remarks, it is certainly true with regard to these particular words, filthy, decomposed, or putrid. Now, if any one attempts to make a scientific definition of these words, so as to give a precise and accurate meaning to each of them, I think he will find that he has undertaken a very difficult task. "Filthy", for example, might be said to be in the superlative degree of a word like soil. You speak of an article soiled. It conveys to our minds a sufficiently accurate meaning. Then if you say it is dirty, you go a step further, of course. It is pretty hard to say just what the limits are which shall describe an article as dirty, within which it may be properly described as dirty. Then when you say it is filthy, you are at once

conscious that you have gone a step further; but just how far, I think it will be very difficult to say—I mean to know accurately and precisely, so that there should be no doubt at all about the limits you have.

And take the two words that I will speak of together, decomposed and putrid; I think it is fair to say that they represent steps in the same direction. If we take the word rotten as expressing the general idea to which these two words may be referred, decomposed would probably represent a less advanced stage than putrid. I think there could not be any doubt about the word putrid, and yet there certainly would be some doubt as to where you would properly apply the word decomposed. It was said by one of the witnesses yesterday, and I thought very accurately said, that through our common experience there are certain kinds of cheeses, for example, which are eaten, and eaten extensively, but to which, certainly, the world decomposed, in some of its meanings, may properly be applied; and no doubt it is true with regard to certain other products, which I need not speak of, animal and vegetable. The process of fermentation is a process of decomposition. If fermentation goes on long enough the article falls to pieces. Sugar, when it is fermented, begins to break up; and decomposition means, of course, to break up; to decompose, to resolve into its elements. So that when fermentation has proceeded far enough, it becomes decomposed, and to say just precisely where fermentation ceases and decomposition begins would be a very difficult task. I have been speaking to you in a very general way about the effort to assign a precise meaning to such words as these, but it is not necessary for you to trouble yourself, I think, about that matter. It is a general rule, with regard to all statutes passed by the legislature, or by Congress, that the meaning which the words bear is the usual and ordinary and everyday meaning which language is given in its common use among men. Laws are addressed to the community, and, therefore, they properly are construed in accordance with the sense which their language bears among the people that compose the community. Therefore I say, as I have just said, I think you will have very little trouble in assigning a sufficiently accurate meaning to these words. Filthy and decomposed and putrid, I think you will agree, convey a sufficiently definite meaning to the ordinary mind, and particularly—and this is what concerns us now—in relation to the subject matter about which they are applied, namely, food. It is an act with regard to food. It is an act with regard to pure food, and that is the effort of the statute, to see that the people get pure food; and, therefore, when a substance which professes to be food is to be condemned because it is filthy, decomposed, or putrid, necessarily those words are to be applied to the subject matter of the act, the substances that are offered for food; and, therefore, as I say, when you come to deal with that subject, as you are dealing with it, and attempt to apply these words to it, it requires the jury to say what is the condition of this substance, considered as food, offered for that purpose. Would it properly, in the ordinary use of these words, be condemned as filthy, or would it properly be condemned as decomposed or putrid? Now, I have no doubt—or, at least, I trust—you get my meaning with regard to that. You are not required to assign scientific definitions to these words at all. You are simply required

to give them their ordinary and usual meaning, and then apply that to the evidence in this case, and determine whether, in their respect, this substance can be said to offend against the statute. The Government's case, as I understand it, depends solely upon the presence of these minute vegetable existences in the product. I am right about that, am I not?

Mr. DOUGLAS. No; animal existences.

The COURT. They are not always animal. Some of them are and some of them are not. Most of them are vegetable.

Mr. SHERN. Organisms.

The COURT. They are organisms, but the vast majority of them are vegetable. There are a few that are animal, but only a few. But, at all events, it is the presence of these organisms on which the Government relies.

Mr. DOUGLAS. Yes, sir.

The COURT. Now, you have heard a good deal of testimony with regard to the presence of these bacteria or bacilli, I do not know exactly which word is the precise and proper word to apply, but, at all events, these very minute miscroscopic creatures, which, within a comparatively few years, have become of great importance. Now, you have a great deal of testimony about it from these gentlemen who have made the subject a study, and I commend their testimony to you for your careful consideration. We are, necessarily, in a subject like this, obliged to rely upon the testimony of expert witnesses, and their testimony is to be given a great deal of attention, and it is for the jury to say what its value is, and how far it may safely be relied upon. It may, perhaps, be difficult for the jury to come to a conclusion upon that matter, and yet there is not any other tribunal to whom that subject can be left, and especially is that the case where, as here, there is a difference of opinion among the experts with regard to the conclusion that ought to be drawn. That is not at all an uncommon situation, and it is not at all a situation—or, at least, it is not a situation that need be dwelt upon with any degree of reprobation. It is comparatively common, I may say, to speak of expert testimony with a subdued sneer, at all events, and sometimes with an open sneer. I do not think it is justified in a great majority of the cases. These gentlemen are, there is no possible reason to doubt—I am not speaking especially about the witnesses in this case, but expert witnesses generally—they are almost always entirely honest and desirous, to the last degree, to give the best evidence they can upon the subjects concerning which they are asked questions. But they are human, like other people; they have their own theories; they sometimes have their own biases and prejudices, which color their views, and in that subject, like the one that is before us, you can see there is a great deal of room for difference of opinion. The subject matter is one that is difficult to have accurate information on, although you may have approximate information that is substantially sufficient; and then besides, in an examination of these substances, if a sample were taken from one part of this large package it might be of one quality, and then beside that there may be a sample that would be of a very different quality. So that one witness examining one sample and one examining another—they might come to what seemed to be widely different conclusions, and are, if you regard the two samples

as of the same quality; yet, if they are of different quality, of course the differences in their testimony is accounted for. I do not think it would be either necessary or desirable for me to comment upon their testimony. Counsel have already done that sufficiently, and besides their testimony was not difficult to understand, and I have no doubt you all understand it sufficiently for all purposes.

From their testimony, I repeat, the question for you is whether this substance was, at the time it was seized, either filthy, decomposed, or putrid, with special reference to the fact that it was offered and intended as food, not whether it was going to be in the future, or whether it might be in the future, owing to the presence of these creatures—these organisms in it—but whether it was at that time of that description, because it is to that time that the Government necessarily is confined.

Now, that is the case, and I do not believe I can assist you any further in the matter. I have endeavored to give you what I think is the proper method of the construction of this statute, and, as you will see, the question is a very narrow one, it is one for you to determine very largely, or in large part, by the aid of your common sense and common knowledge with regard to the meaning of these words. I cannot say to you definitely what they mean. It is for you to say what they mean, the kind of words I have given you. Of course, you have not any arbitrary right on that subject, but what their meaning is is what they mean to the ordinary citizen to whom they are addressed. They have not, as I conceive in this statute, a precise and scientific definition. Their meaning must be determined by a consideration of the subject matter about which they are dealing, namely, pure food—as pure food as possible—and in that light, the jury, with the instructions I have given them, must determine the question. Your verdict in the case would simply be in favor of the United States, if you find that this substance should be condemned, or in favor of the claimant if you find that the Government has not made out its case, tested by the rule with regard to the burden of proof to which I have referred.

UNITED STATES v. BUFFALO COLD STORAGE CO.

(District Court, W.D. New York, Apr. 30, 1910)

179 Fed. 865; N.J. No. 482

Indictment alleging violation of section 2 of the Food and Drugs Act. Demurrer overruled. Jury trial. Verdict of guilty.

HAZEL, *District Judge* (overruling the demurrer). The demurrer of the defendant, Buffalo Cold Storage Company, to the indictment is predicated upon the claim that the statute (act June 30, 1906, ch. 3915, 34 Stat. 768) entitled: "An act for preventing the manufacture, sale, or transportation of adulterated, misbranded or poisonous or deleterious foods, drugs, medicines and liquors, and for regulating traffic therein, and for other purposes", was intended solely to apply to a manufacturer or dealer, and, as it is not charged in the indictment that said defendant was either a manufacturer, owner, or

dealer in the commodity, the indictment is fatally defective and must be dismissed. With this contention I do not agree. The statute forbidding the act provides that: "Any person who shall ship or deliver for shipment from any State or Territory, etc., to any other State or Territory any such article so adulterated or misbranded shall be guilty of a misdemeanor." Concededly the shipment and delivery of the commodity for transportation from Buffalo to Pittsburgh in adulterated or impure condition is within the letter of the statute. It is unquestionably true that the inhibition of an act may be so plainly expressed by a statute that he who runs and thinks may comprehend its complete import and still not be within the contemplation of the law makers, but the provision under consideration does not fall within this class. Congress by its enactment intended to promote honesty and fair dealing in trade and secure to the public pure and wholesome food and drugs, and manifestly there must be a reasonable construction of the act to carry out the intention of Congress in this regard. There is nothing in the act which will result in any absurdity or lead to injustice or oppression, as was the case in *Church of the Holy Trinity* v. *United States* (143 U.S. 457, 12 Sup. Ct. 511, 36 L.Ed. 226), and other cases of similar description cited in defendant's brief.

I have carefully read the excerpts of the debates in Congress on the subject prior to the passage of the act, and I think from what was said by Senators Heyburn and Money that the prohibition was expressly couched in broad language to include those who ship or deliver for transportation commodities of the character forbidden by the statute. It is quite true that warehousemen who deliver such commodities for transportation may not have knowledge of the deleterious character of the food and may be wholly innocent of criminal intent; but this is a question which may be safely left to the trial jury. The indictment charges the offense in the language of the statute and particularizes the nature of the offense in such a way as to apprise the defendant as to what he will be required to meet on the trial, and under the authorities this is sufficient. *Ledbetter* v. *United States*, 170 U.S. 606, 18 Sup. Ct. 774, 4 L.Ed. 1162; *Armour Packing Co.* v. *United States*, 209 U.S. 56, 28 Sup. Ct. 428, 52 L.Ed. 681; *Burton* v. *United States*, 202 U.S. 344, 26 Sup. Ct. 688, 50 L.Ed. 1057.

The demurrer is overruled.

BRINA v. UNITED STATES

(Circuit Court of Appeals, Second Circuit, May 2, 1910)

179 Fed. 373; N.J. No. 473

In error to the Circuit Court of the United States for the Southern District of New York. Judgment affirmed.

This cause comes here on writ of error from a judgment of the Circuit Court, Southern District of New York, imposing a fine of $100, entered on a verdict of a jury finding defendant guilty of a violation of the Food and Drugs Act of June 30, 1906. The offense

charged was the shipment from New York City to Newark, New Jersey, of cotton-seed oil contained in cans labeled (the Italian words in large type and the English words in small type) as follows: "Olio per Insalata, Sopraffino Vival Brand, Cotton Salad Oil extra quality."

It was charged that the oil was misbranded in that the label failed to disclose to Italian purchasers ignorant of the English language that the oil was a cotton-seed oil, and that it was calculated to mislead the purchaser and induce him to believe the cans contained Italian olive oil.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, *Circuit Judge* (after stating facts as above). The section declared on (section 2) imposes a penalty on "any person who shall ship or deliver for shipment from any State * * * to any other State * * * any article of food or drugs so * * * misbranded." It was proved that the words "Olio per Insalata" mean "oil for salad" or "salad oil" and the trial judge held, and so charged the jury, that "as a notorious fact salad oil prima facie means olive oil", but allowed the defendant to show if he could that "it means something else because of recent events which have perhaps rendered olive oil more difficult to obtain, or that other food elements have come to be known as salad oil." No such proof was introduced and the ruling is assigned as error. The Century Dictionary, Worcester's, Stormonth's, Imperial, and the Encyclopedia all define "salad oil" as "olive oil"; Webster's does not give any definition. We are satisfied that the trial judge quite properly charged, in the absence of any testimony of the sort suggested, that "salad oil prima facie imports olive oil; that is what the world has been accustomed to regard as salad oil."

The evidence showed that the articles complained of were sold and shipped by the "Standard Trading Co." of which defendant was an employee—its "manager." He negotiated the sale. It did not appear whether the concern was a corporation, or a firm, or an individual trading under this corporate name, nor whether the defendant had any interest in the concern other than as employee. It is contended that the circuit court should have directed a verdict of not guilty at the close of the case on the ground that there was not sufficient proof to sustain a finding that he personally shipped the goods or caused them to be shipped. The plaintiff in error is in no position to make such contention in this court. At the close of the Government's case motion was made to dismiss the information upon several grounds, one of which was "that it has not been shown that the defendant Brina shipped these goods to any place out of the State." The motion was denied and exception reserved. Testimony was thereafter introduced by the defendant on the various issues in the case, part of it being directed to the matter of shipment. At the close of the case defendant renewed his motion to dismiss the information, but only "on the ground that it has not been shown by any evidence that the can which was used in this case deceived any of the public." This motion was denied, the court stating that it was "the only question for the jury." No objection was taken on the ground that shipment was not proved. nor was there any request to go to

the jury on that question. There is, therefore, no exception in the case which raises the point now relied upon.

The judgment is affirmed.

SHAWNEE MILLING CO. v. TEMPLE, U.S. DIST. ATTY., ET AL., AND UPDIKE MILLING CO. v. SAME

(Circuit Court, S.D. Iowa, C.D., May 10, 1910)

179 Fed. 517; N.J. No. 497

In equity. Bills to enjoin seizure of flour under the Food and Drugs Act. Bills dismissed.

McPherson, *District Judge.* Each of these two cases is by a bill in equity, practically the same. One of complainants, Updike Milling Company, is a corporation under the laws of Nebraska, there engaged in the business of manufacturing wheat into flour both for domestic use and for shipments into Iowa and other States for sale and consumption. The other complainant, Shawnee Milling Company, is a corporation under the laws of Kansas, there engaged in a like business, sales, and shipments.

The defendants are the United States attorney and marshal for this district, and the relief sought is to enjoin the respondent officers from having issued, or serving process for seizing complainants' flour in interstate shipments under the national pure food statute of June 30, 1906 (act June 30, 1906, ch. 3915, 34 Stat. 768).

The allegations are that complainants' flour is whitened and aged by a process, and that the same is not harmful, but is more nutritious, wholesome, and attractive for making bread. It is not alleged in the bill of complaint in terms that the flour is bleached by the Alsop process as covered by certain English and American patents, as set forth by the Circuit Court of Appeals for this circuit in the case of *Naylor* v. *Alsop Process Company*, 168 Fed. 911, 94 C.C.A. 315; but all the arguments, both by briefs and orally, were on that state of facts. Counsel for the United States have appeared for the defendants, thereby in effect making the cases controversies between the United States Government, on the one side, and western flour mill owners, on the other, who bleach their flour by the agency of nitrogen peroxide gas under the Alsop patent process.

A literal reading of the bills of complaint will show that they are fairly subject to criticism; that the allegations as to the aging, whitening, and improving the flour are largely by the use of adjectives and adverbs, instead of reciting just what is done, how the flour is aged, how whitened, how made more nutritious, why not harmful, and why better by the use of some agency not named nor described. But this criticism need not be elaborated. The cases are now for determination on demurrers to the bills of complaint, and sufficient allegations appear to cover the rulings now to be made.

A bill in equity in which the writ of injunction can issue to enjoin the enforcement of a criminal or penal statute is allowable only when—

(1) Such statute is unconstitutional or otherwise invalid;

(2) In the attempt to enforce such invalid statute, rights of property are invaded and trampled on; or,

(3) The often repeated attempts to enforce such invalid statute creates a multiplicity of actions which are of themselves oppressive.

The important and recent case of *Ex parte Young*, 209 U.S. 123, 28 Sup. Ct. 441, 52 L.Ed. 714, 13 L.R.A.(N.S.) 932, illustrates this, in which case it was held that a bill in equity would confer jurisdiction because of the oppressive penalties if an effort should be made to protect the rights of property. In *City of Hutchinson* v. *Beckham*, 118 Fed. Rep. 399, 55 C.C.A. 333, the Circuit Court of Appeals for this circuit held that an injunction should issue against the prosecution of cases under an invalid ordinance requiring an illegal license, which would be followed by many criminal prosecutions. In *Dobbins* v. *Los Angeles*, 195 U.S. 223, 241, 25 Sup. Ct. 18, 22 (49 L.Ed. 16), the holding was clearly and tersely stated:

> It is well settled that, where property rights will be destroyed, lawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity.

But if property rights are not invaded, then a court of equity ordinarily will not interfere, because the defense as to the invalidity of the statute can be urged in the criminal or penal action or special proceeding. Thus, in the case of *In re Sawyer*, 124 U.S. 200, 8 Sup. Ct. 482, 31 L.Ed. 402, it was held that proceedings for the ouster of a city officer could not be enjoined for the alleged invalidity of the law under which the proceedings were being conducted. And of like holdings are the cases of *Harkrader* v. *Wadley*, 172 U.S. 148, 19 Sup. Ct. 119, 43 L.Ed. 399, and *Fitts* v. *McGhee*, 172 U.S. 516, 19 Sup. Ct. 269, 43 L.Ed. 535. And if the proceedings for seizure are to be regarded as civil, then section 723, R.S., will prohibit the filing of a bill in equity to enjoin the enforcement of a valid statute.

In the one case now before the court, the bill of complaint recites that several seizures of flour were made in this judicial district, and, after a number of efforts by the complainant to have the cases submitted to the court with or without a jury for a hearing on the merits, the government dismissed the case after the flour thus seized had deteriorated in quality and value. In the cases now before the court, as property rights are involved, bills in equity will be entertained, provided the statute under which the Government claims the rights to proceed is not a valid one. Herein is the question in the case. That is to say, Is the pure food statute of June 30, 1906, a valid enactment? Did Congress have the power to enact it? Is it within the commerce clause of the Constitution, or it is a mere police regulation, garbed and cloaked as a regulation of commerce?

Good, sound wheat of the best variety, properly and timely harvested, put through the "sweat" in the stack, well ground and bolted, makes nutritious, wholesome, and white flour. This fact is so generally known that courts will take judicial notice of the fact. It is said that flour made from new and poorer wheat, not "sweated", and made by the process covered by the English patent of Andrews, or the American patent of Alsop as illustrated in the patent decision hereinbefore referred to (168 Fed. 911, 94 C.C.A. 315), will also be equally white. This is quite likely true. But is it equally pure, equally nutritious, or is it adulterated and poisoned?

This court in these cases is not to decide those questions. Nitrogen peroxide gas under the Andrews patent is produced by combining nitric acid with a metallic compound. Under the Alsop patent it is produced by subjecting atmospheric air to a flaming electric arc. It is claimed by some that nitrogen peroxide is the agent for bleaching flour under both patents, while others claim that it is the ozone that does the effective work, while the nitrogen peroxide is a by-product when the ozone is thereby created.

Whatever the truth is as to what does the bleaching, it is both claimed and denied, by chemists who ought to be able to agree, that the flour is poisoned by such process. But it is known that, after the air is thus subjected to continuous flaming electrical discharges, the resultant gas is conveyed by means of pipes to a compartment and there is commingled with the flour agitated or in a cloud, and thus subjected to said treatment it becomes dry and white. The result of it all is that new wheat and of an inferior quality is converted into flour with the appearance of flour from a better wheat that has been aged by time.

The Government contends that flour thus bleached is flour in the language of the statute "whereby inferiority is concealed", and that "it contains added poisonous ingredients which may render such article (flour) injurious to health." The patentees and the millers deny this.

Here is a question for determination by a jury, or by the court if a jury is waived, and not to be determined in this case if the statute is valid.

Several of the States within the past few years have enacted pure food statutes. Congress, June 30, 1906, enacted the statute in question. All these statutes were enacted to cure evils wellnigh intolerable that had grown up during this age of greed and avarice and commercialism that has made money-getting the prime object of life with so many. The evils were such that much of the foods we ate, whether meats of any kind, including fish and poultry, or fruits in all forms, and breadstuffs, were so adulterated and "loaded" or "doctored" as to deceive the consumer. And the same was true of flavors and condiments. The evil as to confectionery and extracts was as great. Still greater was the evil as to drugs and medicines. In fact, the evils were everywhere present, as to food and medicine, and other things. And to eliminate some of these evils, and to enable the purchasers to receive what they ordered and paid for, many States passed statutes aimed at those frauds. But it was soon found that the States in some instances were disposed to condone as to some articles of local manufacture, and in many other instances the States were powerless to work out a remedy. Thereupon Congress, acting upon the theory that the evil was of national concern, enacted the statute in question. The debates in Congress show that the measure was earnestly fought as being one of paternalism, and a police regulation with which the States only could act.

The Secretary of Agriculture, Mr. Wilson, performed his duty both in letter and spirit when he submitted the question as to flour bleached by nitrogen peroxide to the Board of Food and Drug Inspection; and that Board, the Secretary concurring, after a hearing given to all parties in interest, found that such flour is in contraven-

tion of the statute. Such finding is not binding as against the parties thus bleaching flour. But it is conclusive as against all criticism for making the seizures and bringing the question before the courts for determination.

Congress is given the power to provide for the general welfare of the United States. But without doubt, if this legislation is sustained, it is because of that provision of the Constitution that provides that the Congress shall have the power to regulate commerce among the several States. That provision is the life of the Nation, and to adopt which was the great concern of the convention of 1787. Important as it is, it is ever before the courts. It gives great comfort to all who believe in one common country, and yet is antagonized oftener than any other provision of the Constitution, by those whose shield of defense is articles 9 and 10 of the amendments, as to the reserved power of the States.

No one claims that Congress can be the sole judge of its powers. All thoughtful persons concede that any court having jurisdiction in the first instance must pass upon the question of the powers of Congress, and that it is for the Supreme Court in the end to finally set the matters at rest. But so careful have our Congresses and Presidents been, that for the first hundred years of our Government the Supreme Court found it necessary to hold that Congress had exceeded its powers in only twenty instances (see appendix to 131 U.S. ccxxxv); and of those twenty statutes thus held void not one related to commerce. Since then, the Supreme Court has held three congressional enactments void. One was a statute making a judgment of conviction conclusive evidence against a party in another case. *Kirby* v. *United States*, 174 U.S. 47, 19 Sup. Ct. 574, 43 L.Ed. 809. Another was the income tax case. *Pollock* v. *Farmers' Loan Co.*, 157 U.S. 429, 15 Sup. Ct. 673, 39 L.Ed. 759, and 158 U.S. 601, 15 Sup. Ct. 912, 39 L.Ed. 1108. The other, and only one from the organization of our Government to date as to commerce, is that of the employer's liability statute, enacted under the claim that the commerce clause would sustain it Employer's Liability Cases, 207 U.S. 463, 28 Sup. Ct. 141, 52 L.Ed. 297. If other enactments of Congress have been held void by the Supreme Court, such cases have been overlooked, and it is believed there are none other. There are almost innumerable decisions touching the power of the States with reference to commerce. It would be to no purpose to discuss many of these authorities. And it would be a needless waste of energy to discuss the many decisions relating to the use of the mails, for the obvious reason that a distinct clause of the Constitution empowers Congress to control our postal system, and there is not the slightest difference whether the mails thus carried are State or interstate.

Neither the court nor the parties are aided by a review of those matters. It must be and is conceded that police regulations alone are for the State, and not for Congress, to deal with.

But it does not follow that, if the subject matter to be regulated is one of commerce, it is for the State alone to deal with, because such subject matter is also one that pertains to the morals, health, or good order of the community.

Thus, when the question arose as to the inspection of meats for food, legislatures claiming that they alone could determine when and

to what extent police regulations should be carried, the Supreme Court decided that such inspections also impinged upon the rights of commerce and were therefore void. *Minnesota* v. *Barber*, 136 U.S. 313, 10 Sup. Ct. 862, 34 L.Ed. 455; *Brimmer* v. *Rebman*, 138 U.S. 78, 11 Sup. Ct. 213, 34 L.Ed. 862.

It will serve no purpose to discuss the principle upheld in *Wilson* v. *Blackbird Creek Company*, 2 Pet. 245, 7 L.Ed. 412, that the State can regulate certain interstate commerce of a local character, if Congress has not acted, nor of that other principle upheld by Congress that the State can legislate with reference to liability of a party when doing an interstate business when Congress has not acted. *Sherlock* v. *Alling*, 93 U.S. 99, 23 L.Ed. 819. The complete answer to those suggestions is that in the matter now before the court Congress has acted. The question now for consideration is not as to the power of the States relating to commerce, as held in *Smith* v. *Alabama*, 124 U.S. 465, 18 Sup. Ct. 564, 31 L.Ed. 508, upholding a State statute requiring a locomotive engineer even though operating an interstate train to submit to tests for color blindness.

The question here is as to the power of Congress over articles of interstate commerce, even though such articles in the end become subject to State statutes. No one doubts but that wheat and flour, as well as all articles of food, are subjects of commerce, and, when carried over and across State lines, are subject to be regulated by Congress. And it is no answer to say that when adulterated, or wrongly labeled, because in the end they will fall under a State statute, they when being shipped cannot be covered by a congressional enactment. The liquor cases illustrate this, because of all the subjects of commerce there is no one thing more peculiarly and distinctly and appropriately subject to regulation by the State, even to the extent of prohibition, than are intoxicating liquors. And yet Congress legislates with reference to liquors. The Wilson Act of 1890 (Aug. 8, 1890, ch. 728, 26 Stat. 313) provided that when liquors arrived in a State they should be subject to State laws. This statute was upheld in the case *In re Rahrer*, 140 U.S. 545, 11 Sup. Ct. 865, 35 L.Ed. 572, thereby modifying the practical effect of the holding in *Leisy* v. *Hardin*, 135 U.S. 100, 10 Sup. Ct. 681, 34 L.Ed. 128, that the State could not interfere by legislation as to liquors shipped interstate as long as the liquors were in the original packages; while in *Rhodes* v. *Iowa*, 170 U.S. 412, 18 Sup. Ct. 664, 42 L.Ed. 1088, it was held that the liquors must be in fact and actually delivered to the purchaser before the State laws became effective as to such interstate shipment. No one should doubt but that legislation by Congress can control the interstate subject of commerce for a time at least, and then the State by a police regulation can control.

If liquors do not sufficiently illustrate the question, lottery tickets will. The Louisiana lottery was conducted by men of high repute and much renown. But it became a national scandal. It was struck at by denying it the use of the mails. The legislature of the State gave it encouragement, even its life. But Congress provided in addition that it should be a crime to carry lottery tickets from one State to another by means other than through the mails. Can any person doubt but that the Louisiana lottery was or could have been made subject to the laws of Louisiana? And yet this congressional enact-

ment was upheld in the *Lottery case*, 188 U.S. 321, 23 Sup. Ct. 321, 47 L.Ed. 492. But little need be said of that case. It was argued by counsel of great eminence. It was argued upon two separate occasions. It received the fullest consideration by the Supreme Court. Apparently no other case that was ever before that court received more attention and fuller consideration. Counsel for complainants herein concede all these things. And the only answer that has been made, or that can be made to that case, is in the statement that the case was decided by a divided court, four justices dissenting. It may be, or it may not be, that that weakens the case as an authority. It is barely possible that later on, that court changing as to its personnel, the decision may be overruled. But such reasoning is a mere speculation. On the other hand, the fact that the court was so divided emphasizes the fact that the court gave great consideration to the question. But be these things as they may, it is not for this court to usurp the prerogative by blindly declining to follow that decision. That decision stands, and as long as it stands, it is the law of the country, and this court not only must, but does, cheerfully observe it in all its phases.

Much more could be said. Cases commencing with *Gibbons* v. *Ogden*, and then to date, could be reviewed. The question could be illustrated in many ways. But all that would be to no purpose; it would be academic.

Congress has enacted a safety appliance law for the preservation of life and limb. Congress has enacted the antitrust statute to prevent immorality in contracts and business affairs. Congress has enacted the livestock sanitation act to prevent cruelty to animals. Congress has enacted the cattle contagious disease act to more effectively suppress and prevent the spread of contagious and infectious diseases of livestock. Congress has enacted a statute to enable the Secretary of Agriculture to establish and maintain quarantine districts. Congress has enacted the meat inspection act. Congress has enacted a second employer's liability act. Congress has enacted the obscene literature act. Congress has enacted the lottery statute above referred to. Congress has enacted (but a year ago) statutes prohibiting the sending of liquors by interstate shipment with the privilege of the vendor to have the liquors delivered c.o.d., and to prohibit shipments of liquors except when the name and address of the consignee and the quantity and kind of liquor is plainly labeled on the package. These statutes, police regulations in many respects, are alike in principle to the act of June 30, 1906, under consideration. Can it be possible they are all void? This statute by its title, and by its every provision, plainly shows that it is with reference to commerce, and that it is not with reference to local police regulations.

It is also contended that so much of section 7 of the statute as relates to food is void, because no standard has been fixed. That argument is made because drugs are fixed by a standard recognized by the United States Pharmacopœia or National Formulary, and as to confectionery a standard is fixed by declaring what confectionery "shall not" contain, whereas as to foods no standard has been fixed. It is a fact most obvious that no standard could be fixed

other than was done by Congress. The one provision as to food is that it shall not be mixed so as to reduce or lower or injuriously affect its quality or strength. Another provision is that some substance shall not be substituted wholly or in part for the article. Another provision is that no valuable constituent of the article shall be abstracted. Another provision is that it shall not be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed. Another provision is that poisonous or other deleterious ingredients shall not be added. Still another provision is that filthy, decomposed, or putrid substances shall not be added. And so on more in detail than herein enumerated. These provisions present questions of fact as to every alleged contraband article. This objection is without merit.

This case was argued upon both sides with most signal ability, displaying much learning, and was argued at great length. The case has received from this court the fullest consideration, and the conclusions are that these bills in equity cannot be maintained, and therefore will be dismissed.

UNITED STATES v. 1,950 BOXES OF MACARONI ET AL.

(District Court, N.D. Illinois, E.D., May 16, 1910)

181 Fed. 427; N.J. No. 658

Libel under section 10 of the Food and Drugs Act. Trial before the court. Decree in favor of the United States.

LANDIS, *District Judge*. These libels seek the destruction of five interstate shipments of macaroni charged to have been adulterated by the addition of a coal tar dye known as "Martius yellow", alleged to be a poison rendering the food product injurious to health. Food and Drugs Act (act June 30, 1906, ch. 3915, section 7, paragraph 5, 34 Stat. 769). The question is whether the article proceeded against "contains any added poisonous * * * ingredient which may render it injurious to health".

The proof shows macaroni to be composed of wheat flour and water; that to change its natural color, and make its appearance more inviting, Martius yellow was added; that this coloring matter is not an ingredient of macaroni, serves no purpose other than to change its color, and is a poison which will kill.

It is the duty of the court to give the act a fair and reasonable construction for the accomplishment of its object. That object is the exclusion from interstate commerce of food products so adulterated as to endanger health. And where, as here, it clearly appears that a poisonous substance wholly foreign to the food product has been added to it solely to mislead and deceive, the court is under no duty to endeavor to protect the offender against loss from destruction of the adulterated article by indulging in hair-splitting speculation as to whether the amount of poison used may possibly have been so nicely calculated as not to kill or be of immediate serious injury. With a portion of our population macaroni is a staple article of food, and under the evidence here the cumulative

effect of the poison in the substance under examination would be injurious to health. Let there be a decree of condemnation and destruction.

UNITED STATES v. BAUMERT ET AL.

(District Court, N.D. New York, May 23, 1910)

179 Fed. 735

Information charging violation of section 2 of the Food and Drugs Act. Motion for process denied.

RAY, *District Judge.* The information, as to all material allegations, is made on information and belief, and charges the shipping, etc., in interstate commerce between Antwerp, N.Y., and points in the State of Pennsylvania, of misbranded cheese, in violation of the so-called "Pure Food and Drug Law" (act June 30, 1906, ch. 3915, 34 Stat. 768).

Annexed to the information, which is verified by the oath of Geo. B. Curtiss, United States attorney for the northern district of New York, to the effect that the allegations are true except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true, are: (1) Letter of Wade H. Ellis, Acting Attorney General of the United States, inclosing "copy of report and other documents transmitted to this department by the Secretary of Agriculture relative to the apparent violation of the Food and Drug Act by F. X. Baumert & Co., New York, in the shipment of misbranded cheese from Antwerp, N.Y., to Detroit, Mich., and directing that "immediate and proper action" be taken in the matter. Also, what purports to be a letter from F. X. Baumert & Co., under date of August 3, 1909, to the chief of the Food and Drug Inspection Laboratory, New York City, stating that the firm has been charged with making and selling a misbranded "Neufchatel cheese", but taking issue with and denying the charge as to misbranding, while admitting the firm made and sold the cheese of which the sample referred to was a part. There is no proof that the defendants, or the firm of which they are members, wrote or authorized this letter. Also, a statement signed by J. G. Riley, analyst, United States Department of Agriculture, in which he says he has examined a sample of cheese labeled: "Crown Brand Neufchatel Cheese. Made in the State of New York from partly skimmed milk"—and which he believes to be the sample purchased from McCann & Co. at Pittsburgh, Pa., on or about June 25, 1909, by Inspector C. A. Meserve, of the United States Department of Agriculture, and designated by him as "I.S. No. 26086-a"; and that he has made a careful analysis of same and found that "it is not Neufchatel cheese." This statement is not in the form of an affidavit, has no venue, but, after the signature of J. G. Riley, contains the following certificate: "Subscribed and sworn to before me at Washington, D.C., this 5th day of November, 1909." Signed: J. G. Shibley, notary public. The seal of the notary, bearing the words "J. G. Shibley, notary public", is attached. There is nothing to show that Shibley was a notary when

he certified the paper or that he was authorized to take affidavits or administer oaths in Washington, D.C. There is also attached a statement purporting to be that of McCann & Co. showing where that firm purchased the cheese, and what purports to be a letter of F. X. Baumert & Co., dated July 31, 1909, addressed to the chief of the United States Food and Drug Inspection Laboratory, Pittsburgh, Pa., referring to the specimen "I.S. No. 26086-a", and admitting the making of the cheese from which that specimen came and the selling of same to McCann & Co., but asserting that such firm would present proof that the finding of the analyst of the department was an error. There is no proof or even affidavit that the letter was written by the firm or authorized by it. The information expressly states that these letters are the sole basis of the information and belief of the United States attorney.

But assuming that the letters show they were written by the defendants' firm, they do not admit any offense against the law, but deny. At most they admit the making and sale in interstate commerce of the cheese while denying that same offends against the law. They assert it was and is just what the brand says, domestic made Neufchatel cheese; that is "Crown Brand Domestic Neufchatel Cheese. Made in the State of New York from partly skimmed milk."

We have, then, as the only evidence (if it be evidence) of the commission of the offense charged in the information on information and belief, this statement of Analyst Riley verified as stated, who says the cheese "is not a Neufchatel cheese."

This paper is filed with and attached to the information. On this information, supported by these papers and others, now referred to, can this court issue process and cause the arrest of the defendants accused?

A supplemental information on information and belief has annexed the affidavits of James W. Chesewright, made at Pittsburgh, Pa., and that of Charles A. Meserve, made at the same place, the last being taken before a United States commissioner, showing the sale and purchase of the sample of cheese referred to. It raises the plain question whether an information made solely on information and belief and giving as the sources of such information certain letters and affidavits taken out of court and outside the jurisdiction of the court which are attached to and filed with the information, such affidavits tending to support the charge, is sufficient. There is no substantial doubt that offenses against this act may be prosecuted by information duly filed.

It is clear that the court has no jurisdiction to direct the issuance of a warrant on an information filed, made on the information and belief of the United States attorney alone. It must be supported by proof establishing probable cause; that is, by legal evidence that a crime has been committed and that there is probable cause to believe the accused guilty of the commission thereof.

The Constitution of the United States (Amend. 4) has wisely provided that:

> No warrant shall issue but upon probable cause supported by oath or affirmation.

However convenient and inexpensive it might be to ignore this provision of the Constitution, a due regard for the rights of the

citizen and the danger of gross abuses of the old system which had its basis in the now exploded idea that the king—that is the government—can do no wrong, led to the adoption of this amendment to the Constitution. But it may be and is contended that this provision is complied with when an information setting forth on information and belief the facts claimed to exist is filed accompanied by the mere affidavits of third persons cognizant of the facts, taken out of court by any officer authorized by law to take and certify affidavits; that in such case the information is supported "by oath or affirmation"; and that it is not necessary that the evidence be given in court or before the officer issuing or directing the issuance of the warrant. In short, the contention is that affidavits taken in various States, judicial districts, and jurisdictions before United States commissioners, notaries public, and judges, may be filed with the information made solely on information and belief, and that the charge made in the information is then supported "by oath or affirmation." If this construction is to prevail, this information is sufficient, provided a mere signed statement with a certificate attached signed by some commissioner, notary, or judge, that it was sworn to on a certain day at a certain place, constitutes a legal affidavit.

Hughes, Federal Procedure, p. 43, says:

> A complaint to justify an information must show personal knowledge and probable cause.

On this point the author cites *Johnston* v. *United States*, 87 Fed. 187, 30 C.C.A. 612; *United States* v. *Tureaud* (*C.C.*) 20 Fed. 621, The *Johnston case* is not in point here, as there the affidavit of Dudley in support of the information, which was signed but not verified by the United States attorney, so far as appears, was taken before the judge of the district court who issued the warrant. The affidavit stated conclusions merely and not facts. The court said:

> The affidavit on which the information was based was wholly insufficient to warrant the arrest and trial of the plaintiff in error, and is altogether too general in terms as to the offense against the United States said to have been committed, and it shows no knowledge, information, or even belief on the part of the affiant as to the guilt of the party charged beyond the bare statement that "there is probable cause to believe that the said offense has been committed by P. T. Johnston." However false the affidavit may be, it would be next to impossible to assign and prove perjury on it.

While the case speaks of affidavits as the foundation of an information, it is silent on the question whether they must be taken before the court or judge issuing the warrant. *United States* v. *Tureaud* (*C.C.*) 20 Fed. 621, is in point on the question that an information on information and belief and supported by an affidavit or affidavits made on information and belief is sufficient, but is not in point on the question whether or not the affidavits must be taken before the judge or court granting the warrant, except as we might infer that an affidavit taken before a United States commissioner will be deemed sufficient. In that case the affidavit in support of the information was taken before a United States commissioner and not the judge; but the point was not raised, so far as appears, that it should have been taken by the judge holding the court, or directing the issuance of the warrant. In that case the court said:

> The procedure by information, therefore, after it was acted upon by this amendment, lost its prerogative function or quality. It could not thereafter be

the vehicle of preferring any arbitrary accusation—not by the king, because we have in the department of criminal law no successor to him, so far as he represented a right to institute, if it pleased him, unsupported incriminations; nor by the district attorney, nor by any other officer of the United States, for the Constitution has said, in effect, that in no way nor manner shall magistrates or courts issue warrants, except upon proofs, which are to be upon oath and make probable excuse. See *State* v. *Mitchell*, 1 Bay [S.C.] 267, and 1 Op. Attys. Gen. 229, where Mr. Attorney General Wirt holds that even the President is controlled by this amendment. All arbitrary information, all informations which spring into existence simply because the king and his attorney elected to present them, indeed all informations, except those supported by proof upon oath, which constitute probable cause, by this constitutional provisions were expunged from permissible procedures, and the learning about informations was left valuable only as showing what proofs were considered adequate in cases where proofs had to be presented in order to have them acted upon by the judicial discretion or mind.

The master of the crown, whose duties with regard to informations to be sustained by proofs correspond with the district attorneys' of the United States in the courts of the Union, was required to produce to the court "such legal evidence of the offense having been committed by the defendant as would warrant a grand jury in finding a true bill against the defendant, otherwise he will be left to his ordinary remedy by action or indictment." Cole, Crim. Inf. marginal paging 15, 54 vol. Law Library. This is the measure of proof which is held to be requisite by the courts of the United States under the fourth amendment. See *Ex parte Burford*, 1 Cranch, C.C. 276 [Fed. Cas. No. 2,148]. Cranch, J., whose dissenting opinion was adopted by the Supreme Court, said: "It (the warrant) ought to have stated the names of the persons on whose testimony it was granted, and the nature of the testimony, so that this court may know what kind of ill fame it was and whether the justices have exercised their discretion properly." When the case reached the Supreme Court (3 Cranch, 453 [2 L.Ed. 495]), "the judges of that court were unanimously of opinion that the warrant of commitment was illegal for want of stating some good cause certain, supported by affidavit."

In the matter of a Rule, etc., as to Informations, 3 Woods, 503, Fed. Cas. No. 12,126, Bradley, C.J., held that informations on information and belief were insufficient to justify the issuance of a warrant, and also said:

> It is plain from this fundamental enunciation, as well as from the books of authority on criminal matters in the common law, that the probable cause referred to, and which must be supported by oath or affirmation, must be submitted to the committing magistrate himself, and not merely to an official accuser, so that he (the magistrate) may exercise his own judgment on the sufficiency of the ground shown for believing the accused person guilty; and this ground must amount to a probable cause of belief or suspicion of the party's guilt. In other words, the magistrate ought to have before him the oath of the real accuser, presented either in the form of an affidavit, or taken down by himself by personal examination, exhibiting the facts on which the charge is based and on which the belief or suspicion of guilt is founded. The magistrate can then judge for himself, and not trust to the judgment of another, whether sufficient and probable cause exists for issuing a warrant.

This would justify the filing of an information supported by the affidavits, properly taken, of those knowing the facts taken out of court or before officers duly authorized to take affidavits, and not by the judge directing issuance of the warrant. Not much consideration seems to have been given to this point in either of these cases. Judge Bradley seemed to be of the opinion that the "probable cause" referred to is the sworn statement of the facts, and that the oath of the one knowing the facts and setting them forth is to be presented to the judge who is to issue the warrant, but that this may be done in the form of an affidavit taken before any person authorized to take oaths and affirmations, or by an oral examination before the judge

who takes down the facts sworn to on such personal examination. On reading the opinion we would infer that the affidavits, if presented to and filed by the judge in support of the information, may be taken before any officer authorized to take and certify oaths and affidavits.

In *United States* v. *Polite et al.* (D.C.) 35 Fed. 58, information was filed by the United States attorney; but same was not sworn to. It was based on and accompanied by the evidence taken before a United States commissioner who held a preliminary examination in the case. The evidence was not taken before the court or judge with which the information was filed and who directed the issuance of the warrant of arrest. The motion to quash was denied.

It seems to me that it would be a useless expense and formality to require witnesses, in cases where the charge may be prosecuted by information—all cases that may be punished by imprisonment in a penitentiary or state's prison are excluded—to travel long distances, and in many cases from one State to another, and it might be across the continent, for the simple purpose of signing and swearing to an affidavit before the judge holding court and who is to direct the issue of a warrant if the facts sworn to justify and require that it issue. I do not think that the Constitution requires that the oath or affirmation be taken in open court or before the judge holding the court and who is to be called upon to order its filing and the issuance of a warrant. If the information itself states with precision and clearness the commission of a crime which may be prosecuted by information, and charges some person with the commission thereof, giving time and place, and it is supported by the affidavits of persons who know the facts and set them forth, and such facts sworn to justify the allegations of the information, I think it all-sufficient, and that such affidavits may be subscribed and sworn to before any officer in any jurisdiction authorized to take and subscribe oaths and affirmations in criminal proceedings by the laws of the United States. I think the cases all indicate this. I find nothing in the statutes of the United States requiring that prosecution by information conform to the practice of the States respectively in preliminary examinations before committing magistrates. Section 148 of the Code of Criminal Procedure of the State of New York provides that:

> When an information is laid before a magistrate of the commission of a crime he must examine on oath the informant and prosecutor and any witness he may produce and take their depositions in writing and cause them to be subscribed by the parties making them.

But this relates to examinations before committing magistrates preliminary to a trial before them or upon which to base a holding for the action of the grand jury, and applies to all crimes of every grade. The information upon which the courts of the United States proceed is now unknown to the law of the State of New York. *People ex rel. Livingston* v. *Wyatt*, 186 N.Y. 383, 389, 79 N.E. 330, 332, 10 L.R.A. (N.S.) 159. The court says:

> Originally an information was a criminal proceeding at the suit of the king without a previous indictment or presentment to a grand jury. It could be preferred only by a responsible public officer when duly supported by affidavit, was limited to misdemeanors, and was a substitute for an indictment. In this sense it is unknown to the law of this State (New York).

In 22 Cyc. 271, 282, the question of verifying informations and supporting them by affidavit is quite extensively gone into; but I find no case holding that they or the affidavits filed in support thereof must be sworn to before the judge directing the issuance of the warrant. It goes without saying that when the matter is regulated by statute, and a particular officer is named before whom the information or affidavit must be sworn to, the statute must be followed. But Congress has not specified any officer or class of officers before whom such affidavits must be taken. If in the District Courts of the United States held in New York the practice prescribed by the Code of Civil Procedure is to be followed, the judge, before directing the issuance of a warrant, must examine on oath the informant and prosecutor and all witnesses produced and reduce this examination to writing and cause such deposition to be subscribed by such persons. This would be too cumbersome as well as an expensive proceeding in cases of misdemeanors, and I do not think it was contemplated by Congress when it authorized the prosecution by information of the minor offenses.

In *People* v. *Vasalo*, 120 Cal. 168, 52 Pac. 305, the defendant was prosecuted by information in the superior court of Los Angeles County which was verified before the clerk of the police court of the city of Los Angeles. The point was raised that such clerk had no authority to administer oaths; but it was held that he had such authority, and the information was held good. The statutes of California did not require that the depositions be taken before the magistrate issuing the warrant. This would indicate that, in the absence of a statute demanding that the oath to an information be taken before the judge or court issuing the warrant, it may be taken before any officer authorized to administer such an oath. 1 Bishop on Criminal Procedure, p. 431, sec. 604, etc., devotes a chapter to informations; but it is not suggested that the same or the affidavits in support thereof must be sworn to before the judge or court issuing the warrant. See, also, Dig. Law of Cr. Proc., Stephen, 126; "Criminal Information", Wharton Law Dictionary. In Connecticut nearly all crimes are prosecuted by information, and it is common in Indiana. 1 Bishop, Cr. Proc. 38, book 6. In *Miller* v. *State*, 122 Ind. 355, 24 N.E. 156, it was held that such an affidavit may be sworn to before a notary public; but in that case the information was quashed for the reason the acts of the notary were void because he had not procured a seal as required by statute.

People v. *Nowak*, 52 Hun. 613, 5 N.Y.Supp. 239, was a case arising before the committing magistrate, and was controlled by section 148, Code Cr. Proc., already quoted.

I do not think section 1014 Rev. St. has anything to do with regulating prosecutions by information. That section relates to preliminary examinations before a justice, judge, or United States commissioner for the purpose of issuing a warrant and holding to bail for appearance at court to answer to an indictment presented by a grand jury or to an information filed by the United States attorney, and in such cases, conforming to the practice prescribed by the New York Code of Criminal Procedure, it would be necessary to file a complaint or so-called "information", and for the judge or commissioner to

examine the witnesses and reduce their statements to writing and cause them to be subscribed. But an indictment may be found and presented by a grand jury without any preliminary formal complaint or prior arrest, whereupon the arrest follows. So prosecutions for crimes of the nature before referred to may be instituted by the United States attorney who presents to and files with the court when in session an information which must be supported by oath or affirmation and show probable cause and which, in such cases, takes the place of an indictment and thereupon the warrant issues. Under the common law the information was not necessarily verified; but, as stated, this led to abuses and the adoption of the fourth amendment to the Constitution, which in legal effect demands that no warrant shall issue upon an information filed by the United States attorney, unless it states facts, a crime, etc., and is supported by the oath of the officer filing it, who must speak from personal knowledge, or by the oaths or affirmations of others who speak from personal knowledge.

Congress might have provided, when it enacted section 1022, Rev. St., stating that certain crimes and offenses "may be prosecuted either by indictment or by information filed by a district attorney", that such information shall be supported by the oaths or affirmations of witnesses taken in open court or before the judge issuing the warrant, or directing its issuance; but it did not, and I do not think the language of the Constitution, above quoted, can be construed to require this. The information is supported by oath or affirmation where it is accompanied by the evidence of witnesses sworn before a United States commissioner on a preliminary examination, if taken in due form and certified by him, or when accompanied by the affidavits made on oath of witnesses sworn before any officer authorized by law to take and subscribe such oaths or affirmations. In my judgment it would be a strained construction to hold that, after a preliminary examination held in due form before a commissioner, where the facts are fully disclosed and the examinations are reduced to writing and sworn to, the United States attorney cannot file an information based on and supported by such evidence and prosecute by information, instead of indictment, without again producing the witnesses in open court on filing the information. I am of the opinion that on filing an information supported by the evidence taken before a commissioner a new warrant would properly issue; that this is true even if such examination were held before a commissioner in another district. If this be true, the Constitution is satisfied when information is filed supported by affidavits duly taken and subscribed before officials authorized to take oaths and affirmations.

But the information presented in this case does not meet these requirements. Letters do not prove themselves. There must be an affidavit showing that the defendants wrote or authorized the letters annexed to the information. The affidavits must contain a venue and, if sworn to before a notary public, must have a certificate attached showing that the person certifying them was at the time a notary public and authorized by the laws of the State or district to take and certify oaths and affirmations, and that same is taken and subscribed as required by the laws of the State or district. If taken

before a State judge or justice of the peace, there must be a like certificate, and so of commissioners outside the district where the affidavit is to be used.

For these reasons, I must decline to direct the issuance of a warrant on the information presented.

DISTRICT OF COLUMBIA v. COBURN [21]

(Court of Appeals, District of Columbia, May 26, 1910)

35 App.D.C., 324

In error to the police court of the District of Columbia. Judgment affirmed.[22]

Mr. Justice Robb delivered the opinion of the court.

This is a writ of error to the police court of the District of Columbia, involving the question whether the provision of the act of February 17th, 1898 (30 Stat. at L. 246, ch. 25), relating to the sale of adulterated or process butter in the District of Columbia, is superseded by the act of June 30th, 1906 (34 Stat. at L. 768, ch. 3915).

On August 25th, 1909, an information against the defendant in error, Henry C. Coburn, was filed in behalf of the District of Columbia, charging the said Coburn with selling, and offering for sale, "a certain adulterated article of food, to wit, butter, contrary to and in violation of the act of Congress approved February 17th, 1898, and constituting a law of the District of Columbia." A motion was made to quash the information which was granted, whereupon a writ of error was allowed. Section 3 of said act of 1898 provides, *inter alia*, that an article of food shall be deemed to be adulterated within the meaning of that act, "if it is colored, coated, polished, or powdered, whereby damage is concealed; *or if it is made to appear better or of greater value than it really is.*" Section 7 of said act of 1906 provides, *inter alia*, that an article of food shall be deemed to be adulterated *for the purposes of the act*, "if it be *mixed*, colored, coated, or stained in a manner whereby damage or inferiority is concealed."

Process butter is produced from rancid or deteriorated butter by melting such butter, removing the curd, brine, and scum, blowing air through the butter fat remaining, and then churning the melted fat with an admixture of milk. The mixture is then chilled, ripened, worked, and salted. While the act of 1898 is local in character, and the act of 1906 general, the latter act prohibits the sale within the District of Columbia of any article of food *mixed* in a manner whereby damage or inferiority is concealed. Clearly this provision is sufficiently comprehensive to include the offense herein described; and this being the case, we are constrained to hold that it supersedes the provision of the earlier act covering the same subject. While repeals by implication are not favored, where there is a clear repugnancy between the later and the earlier statutes, they cannot subsist together, for that would amount, in a case like the present, to

[21] Not arising under Food and Drugs Act, June 30, 1906.

[22] See also *District of Columbia* v. *Burns*, 32 App.D.C. 203, in which the same question was raised but not decided.

prescribing two rules to govern a single offense. *Weigand* v. *District of Columbia*, 22 App.D.C. 569. Under the act of 1898, this information was required to be brought in the name of the District of Columbia, and the conviction was punishable by a fine of not less than $5 or more than $100. The act of 1906 requires the prosecution to be brought by the United States attorney, and the penalty provided in that act is much more severe than the penalty provided in the earlier act. The repugnancy, therefore, of the provisions of the two acts relating to this subject is clearly apparent. It is not likely that the public interests will suffer by this ruling, since the later act apparently affords ample protection against the illegal sale of process butter.

Our attention has been directed to the act of Congress approved May 18th, 1910, entitled "An act making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year", etc., in which an appropriation is made to enforce said act of February 17th, 1898. This appropriation, however, merely indicates that it was the intent of Congress to repeal said act of 1898 only insofar as its provisions were repugnant to the provisions of the later act.

The decision must be affirmed, with costs.

Affirmed.

FRENCH SILVER DRAGÉE CO. v. UNITED STATES

(Circuit Court of Appeals, Second Circuit, June 14, 1910)

179 Fed. 824; N.J. No. 543

Error to the Circuit Court of the United States for the Southern District of New York. Judgment reversed.[23]

Writ of error to review a judgment convicting the plaintiff in error (hereinafter called the defendant) of a violation of Act June 30, 1906, ch. 3915, 34 Stat. 768, known as the "Pure Food Act."

The indictment alleged the interstate shipment of a quantity of confectionery claimed to be adulterated in that it contained "a certain mineral substance, to wit, metallic silver."

The confectionery in question is sold under the name of "silver dragée", and is a small article made of sugar and thinly coated with pure silver. It is used principally by confectioners for decorating boxes of candy. The object of the silver coating is to be conspicuous and the silver is not employed for any purpose of deception. So, for the purposes of this case, the silver coating must be considered as being in no way deleterious or detrimental to health.

The trial judge ruled as follows: "I assume that it has no effect on the result of this case if it were overwhelmingly proved that the administration of pure silver into the human system in quantities such as are attached to these dragées was perfectly inoperative, and to that statement of what I conceive to be the effect of its action you can take an exception."

Section 7 of the act under which the indictment was framed—the section here in question—is printed in full in the margin and the especially relevant portions thereof follow: "That for the purposes of this act an article shall be deemed to be adulterated: * * *

"In the case of confectionery:

"If it contains terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detri-

[23] Reversing *United States* v. *French Silver Dragée Co.*, p. 43, *ante*.

mental to health, or any vinous, malt, or spirituous liquor or compound or narcotic drug. * * *"

The rulings of the trial court were based upon the interpretation of the statute that all it was necessary for the Government to establish—interstate traffic being admitted—was that the confectionery in question contained silver, it being a mineral substance.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, *Circuit Judge* (after stating the facts as above). In interpreting the provisions of the act now in question—the Pure Food Act—it is of importance to ascertain at the outset the objects which Congress sought to accomplish by its enactment and the evils intended to be remedied by it. If we go outside the act itself and consider the circumstances surrounding its adoption, we find a congressional committee report urging that the objects of the bill were:

(1) To protect the purchaser of food products from being deceived and cheated by having inferior and different articles passed off upon him in place of those which he desired to obtain.

(2) To protect such purchaser from injury by prohibiting the addition to foods of foreign substances poisonous or deleterious to health.

Or, briefly stated, "that which is forbidden is the sale of goods under false pretenses, or the sale of poisonous articles for food."

Turning now to the act itself: An examination of the title indicates its purposes. It is entitled: "An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors." And, examining the particular section now in question, we find the purpose all through it to protect the public from deceit and injury. Drugs are declared to be adulterated if their strength or purity fall below certain standards. The intent to prevent both deceit and injury are here apparent. So food is deemed to be adulterated:

(1) If its quality or strength is reduced by the mixture of other substances;

(2) If one substance has been substituted for another;

(3) If a valuable ingredient has been abstracted;

(4) If it is mixed or colored so that damage or inferiority is concealed;

(5) If poisonous ingredients or ingredients making the article injurious to health are added;

(6) If the article consists of decomposed or putrid animal or vegetable substances.

The obvious purpose of provisions (1), (2), (3), and (4) is to protect the public from deceit and false pretenses; of provisions (5) and (6), from injury to health.

Other sections of the act also indicate the same object. The terms "false", "misleading", "deceive", "poisonous", "deleterious", appear in many places. Indeed, a careful examination of the whole act clearly shows that its object is, as already indicated:

(1) To prevent deceit and false pretenses in food and drugs;

(2) To safeguard the public health.

Bearing these objects in mind, we must now examine the subsection of the act especially relating to confectionery. If we find upon such examination a possible construction of the provision which would not afford protection to the public from deceit or injury, and

would merely stop traffic in an article neither injurious nor capable of deceiving, we should seek to avoid it. General language should not be so construed as to ruin a legitimate business, and yet remedy none of the evils the statute was designed to remove. In the language of the Supreme Court of the United States in *Holy Trinity Church* v. *United States*, 143 U.S. 457, 459, 12 Sup. Ct. 511, 512, 36 L.Ed. 226:

> It is a familiar rule that a thing may be within the letter of the statute, and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.

The interpretation given to the statute by the trial court was that the words "or other mineral substance", following the phrase "in the case of confectionery: If it contain terra alba, barytes, talc, chrome yellow"—broadly included every mineral substance including silver. The defendant, on the other hand, contends that the different clauses of the subsection in question should be construed together and that, so construed, they embrace only those substances which are deceptive or are detrimental to health.

Interpreting the provision as embracing in the phrase "or other mineral substances" all mineral substances whatsoever, it is apparent that the use of the mineral substances, salt, sulphur, and baking soda, in the manufacture of confectionery—and it appears that they are so used—would render the product adulterated within the meaning of the statute and its sale unlawful. Similarly, the use of silver to coat these dragées would violate the act. But the product in which the salt, sulphur, baking soda or silver was used would not be unhealthful, nor would there be any element of deceit present. The provision so construed would arbitrarily prohibit the use of all mineral substances in confectionery, would accomplish thereby none of the purposes of the act, and would apply a different standard in the case of confectionery than in the case of food or drugs. Unless the language of the statute imperatively requires such construction it should not be adopted by the courts.

The construction of the provision contended for by the defendant is in accordance with the *ejusdem generis* doctrine. The rule that, when general words follow the enumeration of particular things, such words will be held to include only such things as are of the same kind as those specifically enumerated is, of course, well settled. It is unnecessary to refer to more than one case to illustrate its application. Thus in *Cundling* v. *City of Chicago*, 176 Ill., 340, 52 N.E. 44, 48 L.R.A. 230, the court said:

> The articles, meats, poultry, fish, butter, and lard, which are expressly enumerated in the above paragraph, and the power expressly given therein to regulate the sale thereof, are articles of food for man, and include by the express enumeration of articles only provisions to be used by man. The term "other provisions," by a familiar canon of construction, can extend only to articles of the same character as those especially enumerated. When general words follow an enumeration of particular things, such words must be held to include only "such things or subjects as are of the same kind as those specially enumerated."

We think the *ejusdem generis* rule especially applicable in this case for the reason, as already pointed out, that any broad construction would arbitrarily interfere with legitimate business and in no way promote the accomplishment of the objects of the statute. Indeed, the Government in its brief in this court seems not to seriously controvert the proposition that the *ejusdem generis* rule should be applied. It states at the outset:

> The only question is whether metallic silver is included in the class "other mineral substances." Is metallic silver *ejusdem generis* with the mineral substances which precede it?

Now, it appears that terra alba, barytes, and talc are used to mix with confectionery and cheapen it. There is nothing in the record to show that they are injurious to health. They are well-known adulterants, using that term in its ordinary sense. They increase bulk and weight at the expense of quality. Confectionery containing them is really sold under false pretenses. Chrome yellow is a cheap coloring matter, and is poisonous. Silver, as used in these dragées, and as considered in connection with this statute, is not the same kind of mineral substance as terra alba, barytes, or talc. It is used to attract attention, not to deceive. Of course, like those minerals it may be insoluble and inert; but the comparisons to be made must have in view the objects of the statute. Thus similarity within the rule would not be established by showing that the substances were all of the same color. So the silver upon these dragées has no similarity to chrome yellow. Unlike that mineral substance it is not poisonous.

In our opinion the clauses "or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health", following the enumerated substances, should be taken and interpreted together and mean:

(1) That the use in confectionery of terra alba, barytes, talc, or any other mineral substance, whether injurious to health or not, for purposes of deception, makes it unlawfully adulterated;

(2) That the use in confectionery of chrome yellow or other poisonous mineral substance or poisonous color or flavor, makes it unlawfully adulterated;

(3) That the use in confectionery of any ingredient whatsoever which is deleterious or detrimental to health makes it unlawfully adulterated.

It is true that under this construction the third class of cases would include the second. "Any ingredient detrimental to health" undoubtedly includes all poisonous substances. But the clauses do not conflict, and redundancy is not unusual in statutory provisions.

Stated in another way, we think that the history of the act, the objects to be accomplished by it, and the language of all its provisions require that it should be so interpreted that in the case of confectionery, as in the cases of food and drugs, the Government should establish, with respect to products not specifically named, that they either deceive, or are calculated to deceive, the public or are detrimental to health; and, as no proof was offered in this case tending to show that the confectionery in question was either deceptive or injurious, the defendant was improperly convicted.

The judgment of the Circuit Court is reversed.

UNITED STATES v. 10 BARRELS OF OLIVES

(District Court, E.D. Pennsylvania, June 21, 1910)

N.J.No. 649

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict in favor of the United States.

J. B. McPherson, *District Judge* (charge to the jury). The attempt of the Government in this case is to forfeit this property, and the method of procedure is, for the Government, if it supposes it has sufficient grounds for believing the act to have been violated, to take possession of the property. Any person who has an interest in that property has a right to come forward and claim it, and claim that the Government's proceeding was not justified; and so we have a case such as is brought before us. While in form it is between the Government and this property, in substance it is between the Government and the man who claims it; so that your verdict in the present case will be for the Government, in case you find that this property should be forfeited, and for the claimant if you find that it ought not to be forfeited. You will not have any money verdict to render, nor anything to do with the value of this property at all. The verdict will simply be, I repeat, in one case for the Government or, in the other case, for the claimant.

One section of this statute provides that articles intended for food may be condemned and forfeited "if, either in whole or in part, they shall be filthy, decomposed or putrid", and the Government claims that, in this particular case, the articles in question were both filthy and decomposed. We will leave the word "putrid" out of the case. There is no averment that they were putrid. If the Government has offered evidence which satisfies you that they were either filthy or decomposed, the case is made out. The Government is not bound to prove that they were both filthy and decomposed.

Now you see that what you have to do is, as a question of fact, to determine from the evidence laid before you whether these olives can fairly and properly be said to be filthy or decomposed. That requires you to consider what meaning we can properly apply to the words which I have emphasized, namely, filthy and decomposed, and then apply the meaning to the evidence as you have heard it. Right there we are confronted with the difficulty that so often confronts us, of determining just exactly what the meaning of a particular word is. You know, in the ordinary affairs of life, how difficult it often is to get at the precise meaning which a person who may be talking intends his words to bear, and he may have the same difficulty in getting at what your words may mean. It is a common difficulty that confronts the business man. Language, as you also know, very often means what we intend it to mean. There are very few words which have a precise, technical meaning, always the same. Sometimes they have one meaning and sometimes another. That is a common situation, and we simply have to do with our speech as best we can and endeavor to ascertain what it means in the particular situation in which the words are being used. Sometimes a word may mean one thing in a particular set of circumstances, and have an entirely dif-

ferent meaning, or, at all events, a somewhat different meaning, when applied to another subject.

You must bear in mind that these two words, "filthy" and "decomposed", are used in this case before us with reference to food, with reference to articles that are offered for food and, therefore, you must view the evidence in the light of the subject matter to which your attention has been directed; because it is quite clear that a situation which might justify a jury in finding a food was decomposed might not justify them in finding that some other substance was either filthy or decomposed.

Now the word "filthy" is capable of a variety of meanings. I suppose it is not unfair to say that it is the superlative degree of such a condition as we refer to as "soiled." When we speak of an article as soiled, that would be a sufficiently accurate statement, I suppose, in your minds and mine. Then if you say an article is "dirty", I think you go a step farther. Perhaps you might call that the comparative degree, for our purposes. It certainly goes a little farther, I think, than the word "soiled." Then, if you use the word "filthy", I think you are all conscious that we have gone a step farther than that. An article can hardly be said to be filthy unless it has gone somewhat further than the word "dirty."

Now what have the witnesses said in regard to these articles? Were they filthy, regarded as articles of food? The point to which the Government directs your attention, and the only point to which the Government directs your attention, in that respect, is the alleged presence of worms and the excreta of worms, which are said to have been found in these barrels. What are the facts in that regard? I do not intend to go over the evidence at all, or to direct your attention to what any particular witness may have said. You have heard the evidence and you must determine what the facts were, to what extent worms, or the excreta of worms, were found in these olives, and, when you have determined this fact, it may justify you in finding that you can properly regard them as filthy.

So in regard to the word "decomposed." That is a word with quite an extensive scope. Scientifically, it is quite clear that, the moment a chemical change takes place in any article it begins to decompose. Take sugar, for example. The moment sugar begins to change its character—and it may change into a good many substances—it begins that moment to decompose, to break down, to form other combinations, and that is scientifically called the process of decomposition. It does not follow, however, that the scientific meaning is to be applied to this case. It is quite clear to all of us that it is not intended in this statute to bear a strict scientific meaning; that it should mean simply a change of the chemical constituents of a substance. It is allied, if I may use a general word, to the idea that is connoted by the word "rotten." "Putrid" goes a step farther; but, as I say, we are not concerned with the stage to which the word "putrid" may be properly applied. The sense in which "decomposed" is used in this act means that stage which, if carried somewhat farther, would bring you to the state of a particular substance which would properly be called rotten. I do not think it goes as far as rotten.

Now you can see at once that the word "decomposed", when applied to food—and that is the subject, I call your attention again, to which you must apply these words—the word "decomposed", as applied to food, may have different meanings. What you would call a decomposed food product may have one meaning in one set of circumstances and a different one in another. Take certain cheeses which are used extensively as articles of food. I think on some of them—I shall not name any—there would be a general agreement that they could be properly spoken of as decomposed to some extent; and certainly with regard to some kinds of game that are eaten—eaten, at all events, by epicures—they are undoubtedly decomposed. "High", as you know, is often used for game when it reaches a certain stage. People sometimes do not like it, and sometimes go so far as to call it rotten. In that connection I may say that the act of Congress is not concerned with the question as to whether some people will eat foods that are decomposed or dirty. That is not the test that is applied to them. It is quite true that some people are willing to eat articles that to others would be disgusting, and there is no standard that can be applied generally. In a statute which has been passed by Congress, any word, speaking generally, is to have the ordinary and general meaning which is given to it in common speech. Statutes, speaking generally, you know, are addressed to the people. They are commands to the people, telling them what they shall do or omit to do, and, therefore, it is the ordinary and natural, general, meaning which the words bear, that those words have.

Those are the rules, or principles of construction, of the words with which we are concerned in this case. Their scope and meaning are to be determined as applied to the subject matter of this statute, namely, with reference to articles of food, and you must apply these rules to the evidence in the case and determine whether these olives, about which we have heard this evidence, are properly to be spoken of as filthy, or properly to be spoken of as decomposed. If they are either one of the two; if either one of the two words is properly applicable to them; if they are filthy, or decomposed, then the Government has made out its case.

This is a proceeding which, as I have said to you, would forfeit this property, that is, take it away from the owner and transfer it to the United States, or authorize the United States to condemn and destroy it; at all events, to deprive the owner of the property. It is, therefore, a severe remedy. It is a penalty, strictly speaking, and, while these proceedings are not criminal proceedings, they are not very far removed in their nature from criminal proceedings. Therefore, a higher degree of proof is required from the United States in a proceeding such as this than would be required of it were it an ordinary money suit on an obligation to the United States. It is not only required that there should be a fair weight of the evidence in favor of the United States, but there is a requirement that the United States should make out its case by evidence that is of a higher quality; evidence that may properly be described as clear, convincing and satisfactory. You now must determine whether, judged by that standard, the United States has made out its case in reference to the articles to which I have referred.

I shall not say anything about the evidence in the case, as it has been given to you by the various witnesses, except to say a word about two of the witnesses who testified for the Government. I refer to the testimony of the two young women who were heard yesterday. Their testimony has been held up before you to ridicule, and I do not think it was justified. There is no reason why the testimony of any witness should not be attacked by any person opposed to it, and it is for the jury to determine what weight is to be given to the testimony of any witness—and the weight to be given to the testimony of these witnesses is entirely for the jury; but I am sure the jury will agree with me that their testimony was not ridiculous, or properly capable of being held up to ridicule. They certainly were highly intelligent witnesses, they certainly were careful witnesses, and I am sure the jury will agree with the court that they were intending, at all events, to give you as much light and as much satisfactory light as was possible for them to do on this subject. Just how far their testimony is to have weight with you, is wholly for you. With that, in connection with all the other evidence in the case, I leave the case for your consideration.

If the jury desire to have any of these samples for inspection, and will let us know, we will be glad to send them out. We will not trouble you with that just now, but if, when you come to consider the case, you would like to have any of these samples, please send us word and we will let you have anything you want.

UNITED STATES v. NINE BARRELS OF OLIVES

(District Court, E.D. Pennsylvania, June 30, 1910)

179 Fed. 983; N.J. No. 648

Libel under section 10 of the Food and Drugs Act. Trial before the court. Decree in favor of the United States.

J. B. McPherson, *District Judge.* The food products under inquiry in this case is black olives imported from Greece. The shipment was seized under the authority of section 10 of the Food and Drugs Act of 1906 (act June 30, 1906, c. 3915, 34 Stat. 771). The importer appeared and claimed the goods, and a trial was had before the court without a jury, in which witnesses were examined and other evidence was produced.

The claimant objects to the jurisdiction of the court on the ground that no preliminary hearing was had by the Secretary of Agriculture in accordance with the provisions of section 4. To this it is enough to reply that section 10 of the act, under which the present seizure was made, is independent of section 4. This has already been decided by Judge Norris in *United States* v. *50 Barrels of Whisky* (D.C.), 165 Fed. 966, and by Judge Dayton in *United States* v. *65 Casks, etc.* (D.C.), 170 Fed. 449, and I agree with the result of these decisions. The precise scope of section 4 need not now be determined; it is enough to say for the present that it does not apply to a libel for forfeiture. Under section 10 provision is made for a hearing in court under the well-known process according to the practice of the district

court in admiralty, and a preliminary hearing going over the same ground would be superfluous. Of course, if the act required such a hearing, the court would obey the statute; but in my opinion the procedure under section 10 is complete in itself, and is not a mere continuation of the proceeding referred to in section 4.

Another defense is that the claimant has given the bond required by section 11, and that the acceptance of this bond by the Government is equivalent to an official declaration that the olives had been found to comply with the act. I do not so understand the section, which reads as follows:

> The Secretary of the Treasury shall deliver to the Secretary of Agriculture, upon his request from time to time, samples of food and drugs which are being imported into the United States or offered for import, giving notice thereof to the owner or consignee, who may appear before the Secretary of Agriculture, and have the right to introduce testimony, and if it appear from the examination of such samples that any article of food or drug offered to be imported into the United States is adulterated or misbranded within the meaning of this act, or is otherwise dangerous to the health of the people of the United States, or is of a kind forbidden entry into, or forbidden to be sold or restricted in sale in the country in which it is made or from which it is exported, or is otherwise falsely labeled in any respect, the said article shall be refused admission, and the Secretary of the Treasury shall refuse delivery to the consignee and shall cause the destruction of any goods refused delivery which shall not be exported by the consignee within three months from the date of notice of such refusal under such regulations as the Secretary of the Treasury may prescribe: *Provided*, That the Secretary of the Treasury may deliver to the consignee such goods pending examination and decision in the matter on execution of a penal bond for the amount of the full invoice value of such goods, together with the duty thereon, and on refusal to return such goods for any cause to the custody of the Secretary of the Treasury, when demanded, for the purpose of excluding them from the country, or for any other purpose, said consignee shall forfeit the full amount of the bond: *And provided further*, That all charges for storage, cartage, and labor on goods which are refused admission or delivery shall be paid by the owner or consignee, and in default of such payment shall constitute a lien against any future importations made by such owner or consignee.

In other words, if an examination is in progress before the Secretary of Agriculture, the importer may take the risk that the result will be what he desires, and may obtain possession of the goods by giving bond to return them in case the result should be adverse. This section does not appear to be so connected with section 10 as to present any obstacle to the remedy by forfeiture.

It only remains to add that, having heard and considered the evidence and the arguments of counsel, I am of opinion, and so find, that the olives in question consist in whole or in part of a decomposed vegetable substance, and should therefore be condemned.

An appropriate judgment may be entered in favor of the United States.

UNITED STATES v. 625 SACKS OF FLOUR

(District Court, W.D. Missouri, July 6, 1910)

N.J. No. 722

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict in favor of the United States.[24]

[24] Reversed by Circuit Court of Appeals, *Lexington Mill & Elevator Co.* v. *United States*, p. 443, *post*. Judgment of Circuit Court of Appeals affirmed by Supreme Court, *Lexington Mill and Elevator Co.* v. *United States*, p. 577, *post*.

SMITH MCPHERSON, *District Judge* (charge to the jury). April 9, 1910, Arba S. Van Valkenburgh, the then United States attorney for this judicial district, in his official capacity as such officer filed with the clerk of this court a pleading designated by law as a libel. Later on, to wit, May 19, 1910, Mr. Van Valkenburgh as such officer as aforesaid filed an amended libel in the name of the United States of America, which in effect charged that the said claimant, the Lexington Mill and Elevator Company, April 1, 1910, sold and shipped from Lexington, in the State of Nebraska, to a grocer by the name of B. O. Terry at and of Castle, in Sullivan County, Missouri, a shipment of flour containing six hundred and twenty-five (625) sacks of flour of 48 pounds of flour to the sack. The said libel charges the route of shipment, namely, over two or more connecting railroads between the two said points. The said Terry buying said flour and receiving said shipment for the purpose of retailing said flour to consumers at the said town of Castle and to his customers in the vicinity thereof, and for said purposes the said Lexington Mill and Elevator Company made said shipment.

It is further charged in the said libel, that is to say, that the flour in question was treated by a process for bleaching flour known as the Alsop process, which process consists of the generation by means of electricity of nitrogen peroxide gas which is mixed with atmospheric air, and the mixture brought into contact with the flour in a state of agitation, and that the flour was thereby caused to be adulterated in certain particulars, namely:

(*a*) In that substances known as nitrites or nitrite-reacting material has been mixed and packed with the flour so as to reduce and lower and injuriously affect its quality and strength in these respects among others, to wit, that the capacity of the said flour to change and improve as it would have changed and improved if aged by natural processes has been destroyed. That by direct action the elasticity of the gluten has been lessened and impaired so as to injuriously affect the bread-making qualities of the flour; that other constituents of the flour have been injuriously affected so as to reduce, lower, and impair its bread-making qualities.

(*b*) In that by the treatment of the flour by the Alsop process it has been mixed, colored, and stained in a manner whereby damage and inferiority is concealed in these respects among others, to wit: That the inferiority of freshness or newness, an inferiority which is present in flour freshly milled and which manifests itself, among other things, in inferiorities of color, of elasticity, of gluten, and of the quality of other ingredients which affect its value for bread-making purposes, is thereby concealed; that said flour has been caused to simulate the appearance of flour which has been properly aged and conditioned by natural processes after being milled; that this treatment by the Alsop process has concealed the inferiority of said flour and has given it the appearance of a better grade of flour than it really is, and further that the flour was when milled, when bleached, and now is, of a grade of flour inferior to the flour made from the first quality of hard wheat, and that by the Alsop bleaching process it has been caused to have the appearance of a patent flour and of a flour made from the first quality of hard wheat, and that thereby the infe-

riority of said flour was and is concealed and that in other respects also the inferiority of said flour was and is concealed.

(*c*) In that by the treatment as aforesaid the said flour has been caused to contain added poisonous or other added deleterious ingredients, to wit, nitrites or nitrite-reacting material, which may render said flour injurious to health.

The amended libel further charges that said flour is misbranded in substance as follows:

(*a*) That the bags and sacks containing such flour were labeled as follows: "L. 48, Lexington Cream XXXXX Fancy Patent. This flour is made from the first quality hard wheat."

That in truth and in fact a patent flour is, and is known and recognized to be, the best grade of flour, and which consists only of that portion of the flour content of the wheat known as the "middlings." But that the flour contained in said sacks is not patent flour, but is a grade and quality of flour inferior to patent flour, being a mixture of middlings together with a commercially inferior grade of flour, and a flour which before bleaching was darker in color than a patent flour and inferior in grade, quality, and strength to patent flour, and that this mixture was shipped into Missouri labeled under the distinctive name of another article, and was labeled so as to deceive and mislead the purchaser, in the respect that it purported to be a patent flour, whereas in truth and in fact it is not a patent flour.

(*b*) That the label on each sack contained a statement, "This flour is made of first quality hard wheat", whereas in truth and in fact the flour was not made of first quality hard wheat, but was milled in the whole or in part from a grade or grades of wheat inferior to first quality hard wheat, namely, "yellow berry", and other inferior wheat, and was sold under the distinctive name of another article than itself, and that the flour seized purported to be made from the first quality of hard wheat, whereas in truth and in fact it was made in whole or in part of wheat inferior to the first quality hard wheat, namely, "yellow berry" and other inferior wheat and therefore was sold under the distinctive name of another article than itself and was misbranded within the meaning of the act of Congress.

To this amended libel which contains the Government's charge and a statement of the alleged cause of action, the Lexington Mill and Elevator Company, claimant, herein, has filed its answer which in substance and meaning states:

That the Lexington Mill and Elevator Company is interested in the flour seized; that the same was manufactured at its mill in Lexington, Nebraska, and sold to B. O. Terry, of Castle, Missouri, and was shipped from Lexington, Nebraska, to Terry at Castle, Missouri, under a guaranty that the same was not adulterated; that the claimant has not been paid for the flour, but that after the seizure was required to and did furnish Terry other flour in lieu of the flour seized; that if the flour seized be condemned, claimant will suffer loss to the extent of its value, namely seven hundred and fifty ($750) dollars; it admits the shipment of the flour by the route alleged in the libel, and that the flour was branded as indicated by an amendment to the amended libel.

It admits that the flour was treated by a process known as the Alsop process, but denies that the same was adulterated within the

meaning of the act of Congress, and denies that any substance known as nitrites or nitrite-reacting material has been mixed or packed with the flour or any part thereof so as to injuriously reduce or lower its quality or strength in any respect whatever, and denies that the flour has been mixed, colored, or stained in a manner whereby damage or inferiority is concealed in any respect whatsoever, and denies that the same has been treated in any manner whereby the grade or the quality of the flour has been concealed, and denies that the treatment of the flour has given it the appearance of a better grade of flour than it really is, and denies that any of the flour is inferior to a patent flour, and denies that any of the same was when milled or now is of a grade of flour inferior to a grade of flour made from the first quality of hard wheat, and denies that the quality of said flour or wheat from which it was made was in any manner concealed, and denies that the same or any portion thereof has been caused to contain any added poison or other added deleterious ingredient which may render said article injurious to health.

It admits and alleges that the flour was labeled as the evidence shows it to have been labeled, but denies that so-called patent flour is known or recognized to be a grade of flour consisting only of that portion of the content of the wheat known as "middlings", and says that it is not true that the flour contained in said sacks is not a patent flour, or that it is of a grade or quality inferior to patent flour, or that it is a mixture of middling together with a commercially inferior grade of flour, or of a flour which was of a darker color than a patent flour, or inferior in grade, quality, or strength to a patent flour, and denies that the flour was mixed and shipped into Missouri and sold under the distinctive name of another article than itself, or that the same was labeled in any manner so as to deceive or mislead the purchaser, or that it did deceive or mislead the purchaser in any respect whatever.

It admits that the sacks were labeled as the evidence shows them to have been labeled, but denies that the flour was made in whole or in part from grade of soft wheat, or that it was sold under the name of an article different from what it really was, or that it was in any respect misbranded.

It admits that the flour was treated by the Alsop process and in that connection alleges that the process consists of generating, in rapid succession, a flaming electric discharge in a current of air in proximity to such electric discharge, and in conducting the air, as modified by such discharge, into the presence of the flour as it is being continuously passed through a revolving reel or agitator, but denies that the flour was in any way adulterated, or that by the process any poisonous or other deleterious ingredient has in any manner been added thereto or imparted thereto, or that the flour is in any way injurious to health or contains any added deleterious ingredient, or that the same is adulterated in any manner, or that by such process any damage or inferiority is in any manner concealed, or that the quality or strength of the flour is in any manner reduced or lowered.

To this answer the Government by its counsel has filed a reply.

On the issues thus outlined as contained in the amended libel, and the answer and reply, this case is to be determined.

By reason of the libel heretofore referred to, a writ of seizure was issued by the order of this court commanding the United States marshal for this district to seize the said shipment of flour and the marshal still holds the same subject to the further orders of the court herein.

The statute under which this proceeding was brought and the case now being tried is an enactment of the Congress of the United States approved by the then President June 30, 1906 (four years ago). This statute as to its validity is challenged by the claimant herein. But with that question you have no concern other than to observe it, because the court holds that the Congress of the United States, with the approval of the President, had the power under the Constitution of the United States to enact the statute that was enacted and under which we are proceeding, and the court holds and so directs you that the statute is a valid enactment, and to be enforced in any and all cases where the evidence and the facts come within the wording of the statute.

The statute is named "The Food and Drugs Act", and is an act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes. It will be observed that the statute deals with drugs, medicines, liquors, and foods. A part of the statute is with reference to drugs, medicines, and liquors, and likewise confectionery, but with which in this case we are not concerned except as the same has a bearing with reference to foods. That part of the statute with reference to foods reads as follows:

> That for the purpose of this act an article shall be deemed to be adulterated in the case of food:
>
> First: If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.
>
> * * * * * * *
>
> Fourth: If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.
>
> Fifth: If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health * * *.

The statute further prohibits the misbranding of articles of food and provides in substance as follows:

> That the term "misbranded," as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular * * *.

Any statement or expression of opinion by the court during the trial of this case with reference to any fact or alleged fact or any criticism by the court of any witness or party or counsel on either side are each and all withdrawn, and you will treat and consider the case as if such statements or criticisms by the court were not made. And I charge you to give no consideration to the same or any part thereof.

You are the sole judges of the facts in this case. Much testimony in this case was given by scientists and experts who testified before you. The testimony of the experts as to their opinion is not binding upon the jury and is merely advisory and may be given such weight

by the jury as the jury may deem proper in view of all the facts and circumstances in evidence or such expert testimony may be wholly disregarded by the jury in arriving at their verdict.

While you are the judges of the facts and of the testimony, and what weight shall be given thereto regardless of expressions of opinion by me, it is my belief that I can be of substantial aid to you in stating some facts which in my opinion are so well established by the evidence as that you ought to have but little or no argument with reference thereto, and take the same as established facts.

However, notwithstanding my statements or expressions of opinion with reference to any fact in the case, you are to remember that you are the sole judges of the facts in the case, and of all deductions to be made therefrom.

It is an established fact and concerning which there is no conflict in the testimony that the flour in question in this case was transported from Lexington, Nebraska, to Castle, Missouri, in interstate commerce and was subject to seizure for confiscation, if it is adulterated or misbranded in any respect or particular alleged in the amended libel.

It is also an established fact in the opinion of the court that the flour seized and in question was made from wheat of a 1909 crop grown in the State of Nebraska and known by the name of No. 2 Turkey wheat, and that the wheat was ground at the claimant's mill at Lexington, Nebraska, on the night of March 31st, 1910, and shipped the next day to the said Terry at Castle, Missouri, by whom it was received in about 7 days.

It is also an established fact in the opinion of the court that the wheat from which the flour was made contained a percentage of what is called yellow berry wheat. The witness, Mr. Tucker, the head miller of claimant, testified that the yellow berry was about or approximately 10 to 25 percent of the entire amount of the entire wheat used to make the flour in question that has been seized in this case, and the testimony of other millers in Nebraska and Kansas shows that the wheat called "yellow berry" is frequently, indeed commonly, found mixed with Turkey wheat as it is grown in those States, and that the percentage of such yellow berry varies, frequently running higher than 50 or 75 percent of the Turkey wheat produced in various places and communities in said States. And there is evidence to the effect that but a small part, probably about 1 percent of the Turkey wheat produced, in the various places in these States which are referred to in the testimony, that is wholly free from the yellow berry wheat. And it appears that it is the common practice of millers in Kansas and Nebraska to mill Turkey wheat mixed with this yellow berry.

It is admitted that the flour seized in this case was treated by the Alsop process for the purpose of bleaching and whitening the same; that that process employs a gaseous substance referred to in the testimony as nitrogen-peroxide gas—NO_2 or N_2O_4.

It appears that nitrogen-peroxide gas is—in concentration—a brownish or yellowish gas heavier than atmospheric air, of offensive odor, corrosive in character, and a poison and deleterious substance, and if taken by a human being in sufficient quantities will produce poisonous action and death.

It appears that when nitrogen-peroxide gas is brought into contact with water or moisture, there is by chemical change produced nitrous acid and nitric acid in equal quantities, and it also appears that each of these acids so produced is a poisonous and deleterious substance which if taken by a human being in sufficient quantities will produce poisonous action and death.

It appears that the water or moisture content of flour is equal to about 10 or 12 percent of the total weight of the flour, amounting to about 5 pounds of each of the sacks seized or about 20 pounds in a barrel of flour.

It appears that nitrous acid readily combines chemically with other substances such as are contained in wheat flour and thereby forms nitrites of various kinds, depending upon the character of the substances with which the acid chemically combines.

It appears that such nitrites as may be formed by the introduction of nitrous acid into flour are poisonous and deleterious substances, and that if taken by a human being in sufficient quantities will produce poisonous action and death.

It appears that nitric acid readily combines chemically with other substances such as are contained in wheat flour, and thereby forms nitrates of various kinds, depending upon the character of the substances with which the acid combines.

To enable the Government to obtain a verdict at your hands in its favor it is required to furnish such a measure of evidence as to sustain the allegations of the amended libel by a fair preponderance of the evidence. By a fair preponderance of the evidence is meant a greater weight of evidence, and it is sufficient if it satisfies your mind that the allegations which it supports are true without regard to which side produces the evidence or the witnesses giving the same. It is not incumbent on the Government to show that the allegations of the amended libel in a case like this are true beyond a reasonable doubt. Proofs beyond a reasonable doubt are only exacted in a criminal case, and this is not a criminal case within the meaning of that rule, but it is an action in the nature of a civil action. You are the judges of the weight of the evidence, and of the credibility of the witnesses, and it is for you to say what the truth is.

It is incumbent on the Government to prove that the flour seized was adulterated and misbranded in *some* respect or particular alleged in the libel. But it need not prove that the flour was adulterated or misbranded in *all* of the respects and particulars alleged. If it appears from the evidence in this case that the flour was adulterated in *any* respect or particular alleged, then you must find for the Government that the same was adulterated, and if it appears in the evidence that the same was misbranded in *any* respect or particular alleged, then you must find for the Government that the same was misbranded. On the other hand, if you find that it was not adulterated in any respect or particular alleged, then you must find against the Government on that issue. And if you find that it was not misbranded in any respect or particular alleged, then you must find against the Government on that issue.

One of the issues submitted to you is the alleged violation of the first subdivision relating to food in section 7 of the act, which in substance declares an article of food to be adulterated if any sub-

stance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

Upon this point the substance of the charges made by the Government is, (*a*) that the capacity of the flour to change and improve as it would have changed and improved if aged by natural processes, has been destroyed by the treatment of the flour by the Alsop process, whereby substances known as nitrites or nitrite-reacting material have been mixed and packed with the flour; and (*b*) that by direct action of such process the elasticity of the gluten has been lessened and impaired so as to injuriously affect the bread-making qualities of the flour; and, (*c*) that other constituents of the flour have been by such process injuriously affected so as to reduce, lower, and impair its bread-making quality.

On the first branch of this particular issue it appears that wheat flour improves by lapse of time and processes of natural aging. I charge you that if the treatment of this flour by the Alsop process for the purpose of bleaching and whitening resulted in any injury to the capacity of the flour to change and improve as it would have changed and improved if aged by natural processes, that your finding must be for the Government that the flour is adulterated.

On the second branch of this particular issue, I charge you that if you find from the evidence that by the direct action and as a result of the treatment of this flour by the Alsop process the elasticity of the gluten has been lessened or impaired so as to injuriously affect the bread-making qualities of the flour, that your finding must be for the Government that this flour is adulterated.

On the third point of this particular issue, the Government claims that the treatment of this flour by the Alsop process caused substances known as nitrites or nitrite-reacting material to be mixed and packed with the flour so as to reduce, lower, and impair its bread-making qualities, and so as to render the same injurious to health. If you shall find from the evidence that the flour seized was by such treatment so injured, your finding must be for the Government that this flour was adulterated.

The substance of the charges of the Government that this flour is adulterated in violation of the fourth subdivision relating to food of section 7 of the law in question, is that by the treatment of the same by the Alsop process the flour has been mixed, colored, and stained in a manner whereby damage or inferiority is concealed in these respects, namely, (*a*) that the said flour has been caused to simulate the appearance of flour that has been naturally aged and conditioned by natural processes after milling; (*b*) that the treatment by the Alsop process has concealed inferiority in said flour, and has given it the appearance of a better grade of flour than it really is; (*c*) that the flour is of a grade inferior to patent flour and inferior to flour made from the first quality of hard wheat, and that treatment of the same by the Alsop process has caused it to have the appearance of a patent flour and of a flour made from the first quality of hard wheat.

It appears from the evidence in this case that wheat flour when freshly made is inferior to what that same flour will become by the lapse of time and the processes of natural aging and conditioning; that the inferiorities of freshness or newness manifest themselves in inferiority of color, of elasticity of the gluten, and of the quality of

other ingredients which affect its value for bread-making purposes; and it further appears that by the lapse of time and aging and conditioning by natural processes wheat flour will improve for a period of time, stated to be from two to four months, or thereabouts; and that such improvement increases the value of the flour and makes it lighter in color; and it further appears that this bleaching process makes the freshly milled wheat flour appear to be like and to simulate the appearance which that same flour will assume after natural aging and conditioning. And it further appears that this flour when seized was not naturally aged or conditioned, but was newly milled flour.

On this branch of this particular issue it is for you to say in the light of all these facts and all the evidence whether or not the inferiority of freshness or newness was concealed by the bleaching process.

On the second branch of this particular issue, I charge you that if treatment by the Alsop process has given to this flour the appearance of a better grade or quality of flour than it really is, you should find for the Government that it is so adulterated.

And upon the third branch of this particular issue, I charge you that if you should find from the evidence that this flour is of a grade of flour inferior to patent flour or is a flour inferior to flour made from the first quality hard wheat, and that bleaching by the Alsop process has caused it to have the appearance either of a patent flour—as that term will be explained to you in this charge—or the appearance of a flour made from the first quality of hard wheat, then you must find for the Government that this flour is adulterated.

The Government charges adulteration of this flour in violation of the fifth subdivision relating to food of the section of the statute under which we are proceeding. The words of that provision are as follows: "If it (in this case meaning flour) contain any added poisonous or other added deleterious ingredient which may render such article (in this case meaning flour) injurious to health."

The substance of the charge found in the amended libel is that by the treatment of the flour by the Alsop process it has been caused to contain added poisonous and other added deleterious ingredients which may render the same injurious to health, to wit: Nitrites, nitrite-reacting material, nitrogen peroxide gas, nitrous acid, nitric acid, and other poisonous and deleterious ingredients and substances.

It is the claim of the Government that if the flour contain any added poisonous or other added deleterious ingredient of a kind or *character* which may render (that is, which is capable of rendering) such article injurious to health, it is adulterated, and should be condemned for confiscation.

On the other hand, it is the claim of the claimant that even though the flour contain added poisonous or other added deleterious ingredients, it may not be condemned unless it shall further appear that such added substances are in such quantity that the flour shall be thereby rendered injurious to health.

This statute was enacted for the purpose of benefiting and protecting the consumer, which in this case means those who eat bread and cake and pastry and gravy and other products made from wheat flour. This was the purpose that Congress had in mind when it

enacted this statute. And in enforcing this statute in proper cases the fact that it will subject the millers to some expense or the fact, if it be a fact, that it will enable the millers to market their flour more readily or at a better price, is entitled to no consideration and will receive no weight at your hands.

It will be noted that the act does not say, " any added poison ", but does say, " any added poisonous ingredient." The word " poisonous " as an adjective conveys a descriptive meaning and is used in a qualitative sense, and not in a quantitative sense. That is, it refers to the kind of substance, and not to the quantity of the substance. This idea or meaning is further emphasized and rendered more certain by the qualifying clause " which *may* render such article injurious to health." It does not say, " which *does* render such article injurious to health ", but manifestly it was the purpose of Congress to include in this distinction all ingredients of a *poisonous character* to which, in their essential nature, might be ascribed the tendency to affect health injuriously.

This statute is essentially a remedial one, for the correction of known or supposed abuses with respect to the adulteration of food and other articles of human consumption. It is primarily a statute of prevention. Its meaning is made clear when its purpose is known and borne in mind.

It is not conceivable that the Congress of the United States, when it passed this act, intended that producers and vendors might continue to add poisonous and other injurious substances to food so long as the quantity added was not sufficient to produce observable poisonous or injurious effects upon the health of consumers, nor is it conceivable that Congress intended to require that the Government before proceeding to condemnation of an article of food as adulterated must prove that it contains added poisonous or other added deleterious ingredient in such quantity as *would* render such article injurious to health. It is known to everyone that there is no method of ascertaining or measuring the effect of the consumption of such substances in food upon the public health or upon the health of any particular individual.

It is clear that it was intended by Congress to prohibit the adding to food in any quantity of the prohibited substances.

The fact that poisonous substances are to be found in the bodies of human beings, in the air, in potable water, and in articles of food, such as ham, bacon, fruits, certain vegetables, and other articles, does not justify the adding of the same or other poisonous substances to articles of food, such as flour, because the statute condemns the adding of poisonous substances. Therefore the court charges you that the Government need not prove that this flour or foodstuffs made by the use of it would injure the health of any consumer. It is the *character*—not the *quantity*—of the added substance, if any, which is to determine this case.

The flour seized in this case is an article of food within the meaning of the act of Congress. And if the treatment of the same by the Alsop process caused it to contain any added poisonous or other added deleterious ingredient of a kind or character which may render the same injurious to health, then it is adulterated and must be condemned.

It is admitted that this flour was treated by the Alsop process for the purpose of bleaching or whitening, and the evidence establishes that nitrogen-peroxide gas was employed for that purpose and further establishes that that gas, nitrous acid, nitric acid, and nitrates of the kind which may be produced by such treatment are poisonous and deleterious substances, and that these substances when taken in sufficient quantities will produce poisonous action or death.

It appears from the evidence in this case that the bleaching process imparts and adds to flour substances referred to in the testimony as nitrites or nitrite-reacting material, and such substances were imparted to the flour seized in this case by the bleaching process. It further appears from the evidence that such substances so imparted or added to this flour are qualitatively both poisonous and deleterious, that is to say, that these substances are of a poisonous and deleterious character.

It is well known that wheat flour is not eaten raw. There is evidence in this case that tends to show that during the process of making bread nitrites or nitrite-reacting material contained in the flour is lessened and may be eliminated under some circumstances, but it is also well known that wheat flour is used for the making of other articles of food—biscuits, dumplings, pastry, cake, crackers, gravy, and perhaps other articles of food—which may be consumed by all classes of persons—the young, the old, the sick, the well, the weak, the strong; and I charge you that it is right for you in reaching your verdict to take these facts into consideration together with all the other proven facts and circumstances in the case.

With reference to the issue as to misbranding, the same divides itself under two heads, one with reference to quality of the flour, and the other with reference to kind of wheat from which it was made. The flour is branded as a fancy patent flour and it is also represented by label on each sack that the flour is made of first quality hard wheat.

There is much dispute in the evidence as to the meaning of the phrase "patent flour." Some of the witnesses for the Government testified in substance that the phrase had a well-defined meaning among millers, bakers, and in the flour market generally, and that it means that the flour so called patent flour, is less than the total flour content of the wheat, and includes what is known in the milling process as the purified middlings, but it is not claimed by the Government nor any of the witnesses that patent flour is or contains any definite or specific percentage of the total flour content of the wheat. On the other hand, some of the witnesses for the claimant testified that the phrase "patent flour" has no definite or recognized meaning among millers, bakers, flour dealers, or elsewhere, and that flours containing the total flour content of the wheat excepting low grade, sometimes called "red dog", are labeled and sold in the market as "patent flour."

It is the law that if the phrase "patent flour" has a well-known and well-understood meaning generally among millers, flour purchasers, bakers, and in the flour markets of the country, then such meaning as so understood is to be attributed to that phrase. In other words, patent flour is the kind of flour that it is generally understood to be by millers, bakers, flour purchasers, and in the

markets generally. You are therefore to determine, first, Has the phrase "patent flour" any well-defined and well-known meaning? And, second, Is the flour seized that kind of flour, namely, "patent flour"? If it is, your finding must be against the Government on this branch of the case. But if it is not a patent flour, as that phrase is understood as heretofore explained, your finding must be for the Government upon this branch of the case.

On the second branch of the charge of misbranding contained in the amended libel, the facts appear to be that the flour seized was manufactured by the claimant at its mill from wheat which was raised in the year 1909 in the general vicinity of Lexington, in the State of Nebraska; that the wheat weighed about 59 pounds to the bushel, and was of a variety known as No. 2 Turkey wheat, in which there was a quantity of wheat known as yellow berry or as sometimes called by millers, "yellow belly", amounting to from 10 to 25 percent of the total wheat used to make this flour. The wheat known as yellow berry is commonly found in Nebraska and Kansas growing with Turkey wheat. It differs in color and quality from pure Turkey wheat, and is considered by the millers less desirable and is of less value commercially.

The words upon each sack, "This flour is made of first quality hard wheat", is in effect a representation that the flour seized was made from the best hard wheat.

You are to determine whether or not that representation is true. And in so doing you will not be controlled by the fact, if it be a fact, that the wheat used was the best grown in the district where claimant procured his supply from milling, but you have a right to consider the same in comparison with other wheats grown in different places and parts of the country as disclosed by the evidence in the case, and in the light of all of the evidence on this question say whether or not the wheat used was in truth and in fact first quality hard wheat.

I am now about committing this case to you gentlemen for decision. We have been engaged in this trial continuously for five weeks of time, during most of which time the weather has been oppressively and well-nigh unbearably hot. Your work, as well as that of all of counsel in the case and my own work, has been exceedingly laborious and fatiguing. I commend you for the patience you have given to the testimony and to the argument of counsel. I have the right to insist and do insist that you now take this case to your room and give both the facts in the case and the law as I have given you in charge your best and most deliberate judgment. In view of statements that have been made by counsel during the progress of this case, you will not consider and you must put to one side all questions of who the counsel are, or where they are from. This is not a contest between States or sections of the country. Ours is but one country, and this enactment by Congress is for the entire country. The fact that the Patent Office at Washington issued a patent for the Alsop process has nothing to do with the question of branding correctly, or misbranding of flour. The fact that the Patent Office issued a patent for the Alsop process does not warrant nor authorize the adulteration of flour as made by the Alsop process if it is adulterated. All these things must be put to one side, and your

verdict must be determined in accordance with the law and facts in the case. It is of no importance to you, nor is it of importance to me, who will be pleased or displeased in this case, whether of counsel or of the parties, or of any other person. The only question is, What is the right, and what is the wrong of this case?

Your verdict must recite whether this flour was misbranded or not, and your verdict must further recite whether this flour was adulterated or not, within the meaning of what I have heretofore said to you. And that there may be no uncertainty as to your verdicts, I hand you two pairs of verdicts. Your foreman will sign the one of each pair and bring the same into court for record, the other of each pair having been destroyed by you. And you will make no other findings than these two. All matters bearing on these two forms you will give due weight thereto, and all matters not having a bearing thereon you will utterly disregard.

You will observe that one of these pairs of verdicts I now hand you is with reference to misbranding. If the flour seized was misbranded in any particular as alleged in the amended libel, your foreman will sign the one thus reciting, but if not misbranded in any particular as alleged in the amended libel, your foreman will sign the other. You will also observe that I hand you a pair of verdicts with reference to adulteration. If the flour seized was adulterated in any one of the ways or methods as alleged in the amended libel, your foreman will sign the one reciting the adulteration; if you do not so find, your foreman will sign the other. You will now take the case.

UNITED STATES v. 275 CASES TOMATO CATSUP

(District Court, S.D. Ohio, July 12, 1910)

N.J. No. 1044

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict in favor of claimants. Motion for new trial granted.[25]

HOLLISTER, *District Judge* (on motion for new trial). A libel was filed by the district attorney in the name of the United States against 275 cases, more or less, of tomato catsup shipped from Indiana into this State, charging that the catsup was "adulterated in violation of the act of Congress of June 30, 1906, known as the Food and Drugs Act, and liable to seizure and condemnation as provided therein, for the reason that each and every bottle and jug in the 275, more or less, cases, contains an article of food and food product consisting wholly or in part of a filthy, decomposed, and putrid vegetable substance and is unfit for food."

The case was tried and the jury returned a verdict in favor of the catsup and against the Government.

Among the grounds for a new trial these are noticed.

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[25] After the motion of the libelant for a new trial was granted, George Spraul & Co., claimants, withdrew their answers by leave of court, and filed a demurrer to the libel on the ground that the court was without jurisdiction in the premises because no seizure of the catsup had been made by the libelant prior to the filing of the libel. Demurrer sustained and libel dismissed. The United States sued out a writ of error, and on Mar. 7, 1911, the decision of the lower court was reversed by the Circuit Court of Appeals for the Sixth Circuit. (See *United States* v. *George Spraul & Co.*, p. 217, *post.*)

1. The court erred in charging the jury that although they be satisfied that the catsup consisted wholly or in part of a filthy, decomposed or putrid vegetable substance, yet, that would not be sufficient to warrant the jury in bringing in a verdict for the Government, unless they found that the catsup was unfit for food.

2. The court erred in stating to the jury that it could not be said from the testimony where a point is reached when the amount of the bacteria or germs is so great as to bring about decomposition or filthiness or a condition of putridity.

3. The verdict was contrary to the weight of the evidence.

The Pure Food Act of June 30, 1906, provides, section 2, that the introduction into any State * * * from any other State * * * any article of food * * * which is adulterated * * * within the meaning of this act is prohibited, and the person shipping the same shall be guilty of a misdemeanor, and under section 10, such adulterated food may be seized, following the procedure as nearly as may be, in admiralty giving the right to either party to have questions of fact tried by a jury.

It is provided, section 7—

> That for the purposes of this act an article shall be deemed to be adulterated, * * * in cases of food, * * * sixth, if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter.

Section 3 provides, that the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this act including the collection and examination of the specimens of food shipped from one State into another, etc., in unbroken packages.

Section 4 provides, that the examination of specimens of food, etc., shall be made in the Bureau of Chemistry of the Department of Agriculture or under its direction for the purpose of determining from such examinations whether the food is adulterated within the meaning of the act.

Section 6 defines the word "food" which shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed or compound.

Under the authority of the act of March 3, 1903, 32 Statutes at Large, 1158, the standards of purity for food products which have been established "vegetables are the succulent, clean, sound, edible parts of herbaceous plants used for culinary purposes."

"Catchup (ketchup, catsup) is the clean, sound product made from the properly prepared pulp of clean, sound, fresh, ripe, tomatoes, with spices and with or without sugar and vinegar." Greeley, "Food and Drugs Act", p. 147.

The libel having charged that this catsup was "unfit for food", and no objection being made to the inclusion of these words by the defense, and upon the district attorney's statement that the Department of Agriculture directed their inclusion, the court, while expressing doubt, nevertheless concluded to hold the Government to its charge and directed the jury in the way set forth above, and of which the Government now complains.

Upon further consideration and examination of the pure-food laws at length, the court is of opinion that the test of adulteration in this case is not to be determined by the answer to the question whether the article complained of is or is not fit for food.

Section 6 covers a number of different offenses. One is, if the food product consists in whole or in part of a filthy, decomposed, or putrid animal substance. Another is if it consists in whole or in part of any portion of an animal unfit for food, or again, if it is the product of a diseased animal, and again if it is one that has died otherwise than by slaughter. The article is adulterated if it consists in whole or in part of a filthy, decomposed, or putrid substance.

This is not a criminal prosecution, and the language in the libel "unfit for food" may be regarded as surplusage because the other language in it completely and distinctly describes an offense. Even in an indictment such superfluous language is not fatal. *Anderson* v. *United States*, 170 U.S. 481.

The question for the jury to determine was whether this tomato catsup was in whole or in part filthy, decomposed, or putrid. Counsel for the defense claims that without the allegations that the catsup was unfit for food the law could not stand because not a reasonable exercise of police power. Not so. The power of Congress to regulate interstate commerce is involved, not police power. Strictly speaking Congress has no police power. *Keller* v. *United States*, 213 U.S. 138. The motion on the first ground is sustained.

The testimony of the Government chemists, unrefuted, shows that this catsup contained eighty to one hundred millions of bacteria to the teaspoonful, and yeast germs and mold spores in proportion. Home-made catsup and catsup made at factories with similar care, and choice of material, contain very few. There was evidence that when catsup contains over thirty-seven millions, decay becomes apparent to the taste and smell. The evidence is conclusive that the taste and smell may be overcome by spices and vinegar. This particular catsup was a medium spiced catsup, but sufficiently spiced to overcome the taste and smell, although there was to the taste a flatness which indicated the existence of a change to a spoiled condition. The court misapprehended the testimony when the jury were charged that it did not appear from the testimony where the point is reached when the amount of the bacteria or germs is so great as to bring about decomposition, filthiness or a condition of putridity. The motion on the second ground is well taken.

There was no evidence that the catsup contained anything poisonous or deleterious, and the jury were charged that that was not the test. Although the question of fitness or unfitness for food was also not the proper test, yet, the court is of opinion that catsup such as this is not fit for food, and was surprised at the verdict of the jury. No doubt all food products have in them bacteria and most of them yeast germs and mold spores, and it is the action of these which eventually brings about decomposition, and a point is reached when the article becomes rotten, and if rotten, it is certainly not fit for food although it may be that it is not poisonous or deleterious in the sense that some of it taken into the system does not appear injurious on the ancient theory that every man in his lifetime may

safely eat a "peck of dirt." It is not strange that the condition of this catsup was, as one of the chemists said, startling. It was made in this way: Tomatoes in large quantities were dumped out of wagons on a platform at the factory; some attempt was made at separating the rotten tomatoes from the mass; the tomatoes were carried in large quanties by boys into the factory and there placed in wire wicker baskets and immersed in hot water for a short time. The baskets were then placed in front of women or girls, who with knives peeled them and took out the cores. The fine ripe tomatoes were canned and that was the primary purpose of the operation. The cores, the skins, the worm-eaten and insect-bitten tomatoes, the partly green, and some decayed tomatoes were thrown into a trough which from time to time was scraped out by boys. This refuse was put into the pulping machine and subjected to heat. The pulp was made in the summer time and there were more or less decayed tomatoes in the vicinity of the factory and opportunity for flies to carry germs. There were no screens. Reasonable efforts were made to keep the place clean by scrubbing it carefully twice a week. There was testimony tending to show that some whole tomatoes were put in the pulping machine. It does not appear how many and what proportion but the probabilities are that very few whole, ripe, first-class tomatoes went into the pulping machine. From the pulping machine the pulp was put into old whisky barrels of some 200 gallons capacity and was stored in the cellar and most of the catsup made in the fall and winter following. Some of the barrels exploded because, as is said, they were not air tight, but it was the contents of only those that exploded that were rejected in making the catsup. Apparently the spices and benzoate of soda were added when the time came to actually take the pulp from the barrels to make the catsup, although the maker said that he put up some 20 casks as an experiment and did not use benzoate of soda. This experiment failed, for the catsup spoiled.

The court is of opinion that the verdict was contrary to the weight of the evidence even on the theory that the proof must establish that the catsup was unfit for food.

The motion for a new trial is granted.

UNITED STATES v. 74 CASES OF GRAPE JUICE

(District Court, W.D. New York, July 15, 1910)

181 Fed. 629

Libel under section 10 of the Food and Drugs Act. Demurrer to libel overruled.[26]

HOLT, *District Judge.* This is a demurrer to a libel filed to forfeit 74 cases of grape juice on the ground that they were adulterated and misbranded, in violation of the act of June 30, 1906, commonly called the "Pure Food Act." The grounds of demurrer alleged are that the libel fails to allege that notice of the examination

[26] Affirmed, *United States* v. 74 (*or 20*) *Cases of Grape Juice*, p. 256, *post.*

of the samples made in or under the direction or supervision of the Bureau of Chemistry in the Department of Agriculture was given to the claimants, and an opportunity to be heard afforded them, as provided in section 4 of the act, and that the act itself is unconstitutional.

This is a proceeding in rem, under section 10 of the act, for the forfeiture of the goods alleged to have been adulterated and misbranded. It has been held in *United States* v. *50 Barrels of Whisky* (D.C.) 165 Fed. 966, and *United States* v. *65 Casks of Liquid Extracts* (D.C.) 170 Fed. 449, and in some other unreported cases, that the provisions of section 4 requiring notice of the examination of the goods by Federal officers to be given to the party from whom the samples have been taken, and an opportunity to be afforded such party to be heard, apply to suits in personam to recover penalties under section 5 only, and not to suits in rem to forfeit the goods under section 10. With the highest respect for the eminent judges who have reached this conclusion, it seems to me at least doubtful. Section 5, to which it is admitted that the provisions of section 4 apply, requiring such notice to be given and such opportunity to be heard afforded, does not in terms provide that the prosecutions instituted after such notice has been given and such opportunity to be heard afforded shall be prosecutions in personam only. It provides that it shall be the duty of the district attorney "to cause appropriate proceedings to be commenced and prosecuted * * * for the enforcement of the penalties as in such case herein provided." The word "herein" here means in any part of the entire act. A statute which provides for the forfeiture of goods for a violation of law imposes a penalty just as much as a statute which provides for a fine for such violation. Moreover, the eleventh section of the act provides, in the case of imported goods, that samples shall be delivered to the Secretary of Agriculture, and that notice shall be given to the owner or consignee who may appear before the Secretary of Agriculture and give testimony, and, "if it appears from the examination of such samples that any article of food or drug * * * is adulterated or misbranded", the said article shall be refused admission, and the Secretary of the Treasury shall cause the destruction of such goods if not exported by the consignee within three months.

If Congress thought it proper to provide that an importer is entitled to a preliminary notice and hearing before his goods can be refused admission and if not exported, destroyed, I cannot see why it did not intend the same protection for a citizen whose goods it is proposed to forfeit and destroy. But it is unnecessary to decide this question upon this demurrer, for I think it should be overruled on another point. The ground of demurrer under consideration assumes that there can be no prosecution of any kind under the Pure Food Act without such preliminary notice and opportunity to be heard. But this obviously is not so. The fifth section authorizes prosecutions upon the complaint of any State health officer, and, in my opinion, the district attorney can institute such a prosecution, upon any adequate proof, without the action of the agents of the Department of Agriculture. When, however, the officers of the Department of Agriculture first bring the matter before the district attorney, I think that the notice must be given and the opportunity to

be heard afforded provided for in section 4 before an indictment can be found. In all such prosecutions therefore the indictment or libel must allege, and the evidence establish, that such notice was given and such opportunity to be heard afforded before the prosecution was instituted. As the libel in this case may have been instituted by the district attorney without the intervention of the agents of the Department of Agriculture, I think the demurrer on the ground under consideration should be overruled.

The point that the Pure Food Act is unconstitutional has been ably argued in the claimants' brief. If it were an original question, the claim that this act is really an attempt to exercise the police power, which resides wholly in the States, would be entitled to careful consideration. But, in my opinion, the underlying principle governing the question has been decided. The *Lottery Case*, 188 U.S. 321, 23 Sup. Ct. 321, 47 L.Ed. 492, held that an act of Congress prohibiting the transportation in interstate commerce of lottery tickets was constitutional. I can see no difference in principle in the two cases. So the acts providing for the humane treatment of animals transported in interstate commerce, the acts making it a criminal offense to use the United States mails in the prosecution of a fraudulent scheme, or for the transportation of obscene publications, and many similar statutes, all rest on the same basis. Congress having exclusive power to regulate interstate commerce and the postal service, it can prohibit their use for the prosecution of any fundamentally objectionable business. The selling of adulterated or misbranded articles of food, drink, or medicine is as unmitigated an evil as the sale of lottery tickets or counterfeit money or obscene publications. At all events, the Pure Food Act is a beneficial one; many convictions have been had under it in many courts, and a court of first instance should not hold such a statute unconstitutional except upon clear grounds.

The demurrer is overruled, with leave to the claimants to answer within 20 days upon payment of costs.

UNITED STATES v. MORGAN ET AL.

(Circuit Court, S.D. New York, July 15, 1910)

181 Fed. 587; N.J. No. 1692

Indictment alleging violation of section 2 of the Food and Drugs Act. Motion to quash indictment denied. Jury trial. Verdict of guilty. On motion for a new trial and in arrest of judgment. Motion in arrest granted and the motion for new trial denied.[27]

HOLT, *District Judge* (on motion for a new trial and in arrest of judgment). These are motions by the defendant for a new trial and in arrest of judgment. The defendants were convicted, under the act of June 30, 1906, commonly called the "Pure Food Act", for shipping from New York to New Jersey misbranded bottled water. The bottles were labeled "Imperial Spring Water." They contained

[27] Judgment reversed, *United States* v. *Morgan et al.*, p. 335, *post*.

water which was originally ordinary Croton water, drawn from a pipe on the defendants' premises in New York City. This water was first passed through a fine sand filter, then through beds of gravel and charcoal. Then a small quantity of mineral salts was added. It was charged with carbonic acid gas and put in thoroughly clean bottles. This water when sold was pure and wholesome. A food and drug inspector, appointed by and acting under the Department of Agriculture, whose office was in New York City, went to a druggist at Newark, N.J., and asked for Imperial Spring Water. The druggist had none. The inspector thereupon asked the druggist to order some for him. He did so. In compliance with such order the defendant shipped half a dozen bottles so labeled from New York City to the druggist at Newark, N.J. He thereupon sold them to the inspector, who brought them back to New York and reported the case to the district attorney. The defendants were thereupon indicted for such shipment. There was no evidence on the trial that any notice was given to the defendants of the examination of said water by or under the direction of the Bureau of Chemistry in the Department of Agriculture, or that any opportunity was given to them to be heard on the question whether the Pure Food Act had been violated.

The defendants claim, on these motions, first, that the evidence showed that the water sold was spring water, and therefore that the bottles were not misbranded. The proof showed that ordinary Croton water, like the water of any fresh-water lake or river, is partly spring and partly rain and surface water. The water as treated by the defendants was a thoroughly filtered water, with a little mineral salts and carbonic acid gas added, which made it more sparkling, and, to many people, more attractive. It was perhaps as expensive to produce and as pure and wholesome as spring water. But it was not what is commonly understood by the public as spring water; that is, water taken directly from a natural spring. The label therefore was misleading and the bottles misbranded. The object of the Pure Food Act is not only to protect the public from unwholesome food and drink but to require that any article of food, drink, or medicine sold shall be correctly described by its label.

The defendants also claim that no judgment should be entered in this case because there is no evidence that they ever made any other shipment of such water in interstate commerce, and the evidence shows that the shipment on which the indictment was based was secretly induced by a Government detective in order to create a basis for a criminal charge. There is no evidence that the defendants ever before sold or shipped water outside of New York City. The inspector who ordered the water at Newark had his office in New York. His only apparent object in going to Newark to order this water was to secretly lure the defendants into an act which would enable him to make a criminal charge against them. This was a perfectly wholesome water, and if there was no other justification for the inspector's proceeding than appears in the evidence. I think his course of action was one of unnecessary zeal. If there were no bottles to be found in other States which had been voluntarily shipped there by the defendants, whatever public evil might result from the sale of such water in New York City might wisely,

in my opinion, have been left to be dealt with by the State authorities. The Pure Food Act is a beneficial act; and it will be a matter of regret if the inspectors of the Department of Agriculture arouse hostility to it by excessive zeal to institute trivial prosecutions. But there may have been valid reasons for the course which was taken which did not appear on the trial; and, in any event, I am not willing to hold that because some criticism may perhaps be made on the manner in which the proof was obtained, the proof itself was invalid or insufficient.

The important question on these motions is whether it was necessary for the indictment to allege and for the Government to prove that notice was given to the defendants by the agents of the Department of Agriculture of the examination of the samples obtained of the water, and an opportunity given them to be heard on the question whether the law had been violated.

Sections 3, 4, and 5 of the Pure Food Act are as follows:

SEC. 3. That the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this act, including the collection and examination of specimens of foods and drugs manufactured or offered for sale in the District of Columbia, or in any Territory of the United States, or which shall be offered for sale in unbroken packages in any State other than that in which they shall have been respectively manufactured or produced, or which shall be received from any foreign country, or intended for shipment to any foreign country, or which may be submitted for examination by the chief health, food, or drug officer of any State, Territory, or the District of Columbia, or at any domestic or foreign port through which such product is offered for interstate commerce, or for export or import between the United States and any foreign port or country.

SEC. 4. That the examinations of specimens of foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of such Bureau, for the purpose of determining from such examinations whether such articles are adulterated or misbranded within the meaning of this act; and if it shall appear from any such examination that any of such specimens is adulterated or misbranded within the meaning of this act, the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such sample was obtained. Any party so notified shall be given an opportunity to be heard under such rules and regulations as may be prescribed as aforesaid, and if it appears that any of the provisions of this act have been violated by such party, then the Secretary of Agriculture shall at once certify the facts to the proper United States district attorney, with a copy of the results of the analysis or the examination of such article duly authenticated by the analyst or officer making such examination, under the oath of such officer. After judgment of the court, notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid.

SEC. 5. That it shall be the duty of each district attorney to whom the Secretary of Agriculture shall report any violation of this act, or to whom any health or food or drug officer or agent of any State, Territory, or the District of Columbia shall present satisfactory evidence of any such violation, to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States, without delay, for the enforcement of the penalties as in such case herein provided.

The claim that the indictment was invalid on its face because it did not allege that notice of the examination and opportunity to be heard was given to the defendants is, I think, untenable. There is obviously at least one case in which a prosecution is authorized when no preliminary investigation has been had by officers of the Department of Agriculture. The fifth section provides that it shall be the duty of the district attorney to prosecute whenever any State health

officer presents satisfactory evidence of any violations of the act. Moreover, the first and second sections, making it a misdemeanor to manufacture in the Territories or District of Columbia, or to ship in interstate commerce, adulterated or misbranded foods or drugs, are general in their terms. The act prohibited constitutes the misdemeanor. There is no direct reference in them to the subsequent sections providing for the notice to the owner of the samples and the opportunity to be heard; and in my opinion the district attorney can institute prosecutions under those sections, upon adequate evidence, without any preliminary investigation or action by the officers of the Department of Agriculture. But under the provisions of section 4 of the act, whenever an investigation is first instituted by the food and drug inspectors or other agents of the Department of Agriculture or of its Bureau of Chemistry, and an examination of specimens of foods or drugs had for the purpose of determining whether they have been adulterated or misbranded, notice of the examination and an opportunity to be heard must have been given to the party from whom the sample was obtained. In my opinion a compliance with this section is a prerequisite to a prosecution in all cases in which the matter is brought before the district attorney for prosecution by the agents of the Department of Agriculture. Proof of such notice and opportunity to be heard before the indictment is therefore material in all such prosecutions; and, of course, all material facts which are necessary to sustain a conviction must be alleged in the indictment. The result is that although an indictment under the Pure Food Act is not demurrable because it contains no allegation of such notice and opportunity to be heard, since such prosecutions can be maintained by the district attorney without the intervention of the officers of the Department of Agriculture, such allegations and proof are necessary in all cases where the prosecution is instigated by such officers; and, if it appears by evidence on the trial that the case is such, no conviction can be had in the absence of such allegation and proof. In this case, the investigation and prosecution were due to such officers. I think therefore that the indictment should have alleged and the evidence for the Government established that such notice and opportunity to be heard were given to the defendants and that, in the absence of such allegation and proof, the motion in arrest of judgment should be granted. The motion for a new trial should be either withdrawn or denied. If granted a new trial would result in nothing, because, in my opinion, the indictment is fatally defective.

UNITED STATES v. EIGHT PACKAGES AND CASKS OF DRUGS

(District Court, S.D. Ohio, Aug. 15, 1910)

5 Fed. (2) 971; N.J. No. 697

Libel under section 10 of the Food and Drugs Act. Demurrer to libel sustained.

HOLLISTER, *District Judge.* The libelant represents that certain packages and casks of drugs are labeled, marked and branded on the

outside in a certain way. The marking on each is described, the descriptions differing only in the designated numbers of each, and it may suffice to quote the marking and branding of one.

Prescription Products Company, Dayton, Ohio, S. 59884, P. D. Co. No. (1).

The casks or packages are represented as being within and on the premises of the Prescription Products Company in Dayton, Ohio, and owned by or in the possession of that Company for the purpose of being used and manufactured, sold, and consumed as drugs.

It is represented that these packages are misbranded within the meaning of section 8, paragraph 2, under the title "Drugs," of the act of Congress of June 30, 1906, 34 Stat. at L. 768, and are liable to condemnation for the reason that each package and cask fails to bear a statement on the label of the quantity and proportion of any alcohol or any derivative or preparation of alcohol contained therein, and that each of the packages and casks contain a certain percentage of alcohol as set forth in the libel.

It is alleged that they have been and were transported from Detroit to Dayton, and are now in the original unbroken packages as the same were transported, and the libelant prays that they be proceeded against and seized for condemnation in accordance with the act of Congress, and according to the course of this court in cases of admiralty and maritime jurisdiction, so far as it is applicable, and that they may be adjudged and decreed misbranded and be condemned as provided by law.

The act of June 30, 1906, provides, section 10—

That any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act, and is being transported from one State, Territory, District, or insular possession to another for sale, or having been transported, remains unloaded, unsold, or in original unbroken packages, or if it be sold or offered for sale in the District of Columbia or the Territories, or insular possessions of the United States, or if it be imported from a foreign country for sale, or if it is intended for export to a foreign country, shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. And if such article is condemned as being adulterated or misbranded, or of a poisonous or deleterious character, within the meaning of this act, the same shall be disposed of by destruction or sale, as the said court may direct, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States, but such goods shall not be sold in any jurisdiction contrary to the provisions of this act or the laws of that jurisdiction: *Provided, however,* That upon the payment of the costs of such libel proceedings and the execution and delivery of a good and sufficient bond to the effect that such articles shall not be sold or otherwise disposed of contrary to the provisions of this act, or the laws of any State, Territory, District, or insular possession, the court may by order direct that such articles be delivered to the owner thereof. The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States.

The claimant demurs on four grounds which will be taken up and disposed of seriatim.

1. "The court is without jurisdiction inasmuch as it appears from said libel that no seizure of the goods therein mentioned had been made prior to the filing of said libel."

It has been the practice in this jurisdiction for seizures of goods for alleged infringements of the food laws to be made on warrant

issued after the libel. This is probably the universal practice in such cases. The question so far as it relates to the food act has not been passed upon by any of the courts, so far as this court is aware. But it is not a new question in admiralty or in the many cases in which seizure and forfeiture of goods have been sought under navigation revenue, and other laws of the United States.

Upon first impression, and having regard to the punctuation of the act, it would seem that the article is to be seized for confiscation by a process of libel for condemnation in any district court within the district where the same is found, the basis for the seizure being the libel on which the warrant of seizure is issued. If there were no other light to be had upon the subject, the conclusion might easily be reached that it would be sufficient for a warrant of arrest to follow the libel, the filing of which gives the court jurisdiction. But it has been the rule in proceedings in rem ever since the declaration of Mr. Justice Story in *The Brig Ann*, 9 Cranch, 289—

> that before judicial cognizance can attach upon a forfeiture in rem, under the statute, there must be a seizure; for until seizure, it is impossible to ascertain what is the competent form.

In that case the Nonintercourse and Nonimportation Act directed against Great Britain and France (act March 1, 1809, 2 Stat. at L. 528) was involved. Section 5 provided—

> That whenever any article or articles, the importation of which is prohibited, by this act, shall, after the twentieth day of May, be imported into the United States, * * * contrary to the true intent and meaning of this act, or shall, after the said twentieth of May, be put on board of any ship or vessel, boat, raft or carriage, belonging to the owner of such prohibited articles, shall be forfeited; and the owner thereof shall moreover forfeit and pay treble the value of such articles.

Section 8 gave authority to every collector and other enumerated officer to seize the goods and to—

> keep the same in custody until it shall have been ascertained whether the same have been forfeited or not.

Section 18 provides—

> That all penalties and forfeitures arising under or incurred by virtue of this act, may be sued for, prosecuted and recovered, with costs of suit, by action of debt, in the name of the United States of America, or by indictment or information in any court having competent jurisdiction to try the same.

Mr. Justice Story said what he did after a consideration, not of the particular statute under which the seizure was made or attempted to be made in that case, but from a consideration of the Judiciary Act of September 24, 1789, ch. 20, sec. 9 (1 Stat. 76), which conferred jurisdiction upon the district court, and which says those courts are vested with—

> exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made on waters navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas.

In determining the question of the jurisdiction of the court, Mr. Justice Story said—

> It seems manifest * * * that the jurisdiction as to revenue forfeitures was intended to be given to the court of the district, not where the offense was

committed, but where the seizure was made. And this with good reason. In order to institute and perfect proceedings in rem, it is necessary that the thing should be actually or constructively within the reach of the court. It is actually within its possession, when it is submitted to the process of the court; it is constructively so, when, by a seizure, it is held, to ascertain and enforce a right or forfeiture which can alone be decided by a judicial decree in rem. If the place of committing the offense had fixed the judicial forum where it was to be tried, the law would have been, in numerous cases, evaded; for, by a removal of the thing from such place, the court could have no power to enforce its decree. The legislature therefore, wisely determined that the place of seizure should decide as to the proper and competent tribunal.

It seems clear that the "statute" to which that great judge referred was the Judiciary Act, the terms of which he was considering. This court is not alone in that view. The case, Silver Spring No. 12858 Fed. Cases, is reported to have been brought under the act of July 29, 1813, ch. 35, sec. 5–7. That act (3 Stat. at L. 49–50–51–52) seems to have been limited in its operation to February 17, 1816, while the libel charges fraud and deceit of obtaining the bounty to have been perpetrated in the summer of 1853, but it must be assumed to have been in force when it was sought to condemn the fish, etc., in the year 1854. It will be noticed that the act does not provide for a seizure, although it does provide for a forfeiture.

The claim of counsel for the defendant in that case based on the Judiciary Act, and Mr. Justice Story's decision that the action must fail because no seizure of the property was alleged in the libel, was sustained by Judge Sprague of the District Court of Massachusetts, who, speaking of the decision in *The Brig Ann*, said—

> The decision in that case did not depend upon the construction of the particular statute under which the property thus became forfeited, but upon the construction of the act of September 24, 1789 (the Judiciary Act), which is equally applicable to the present proceeding and, therefore, the rule laid down by the Supreme Court in that case "that before judicial cognizance can attach upon a forfeiture in rem, there must be a seizure", must govern the present case.

The question was before Judge Drummond in *The May*, Fed. Cas. No. 9330, and while he was evidently not satisfied with the reasons for the rule, yet he felt compelled, upon a consideration of the Judiciary Act, the Navigation Act of 1871, and the decision in *The Brig Ann*, to rule that an actual seizure of the res prior to the filing of the libel is essential to the jurisdiction of the Federal courts, and that the libel should state the place of seizure. The learned judge also states the fact to be that the twenty-second rule in admiralty was adopted by the Supreme Court in conformity with the view of Mr. Justice Story in *The Brig Ann*.

The Judiciary Act as it now reads gives jurisdiction to the district courts:

> Eighth. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it; and of all seizures on land and on waters not within admiralty and maritime jurisdiction.

If this section is construed as the Judiciary Act was construed in *The Brig Ann*, and it would seem it ought to be, the conclusion is inevitable that jurisdiction is based upon the seizure, and for the same reasons as were given in that case as well as those to which reference will be made.

In every one of the cases arising under the laws of the United States providing for seizure, forfeiture, confiscation, and condemnation, whether they are revenue laws or navigation laws or laws providing for confiscation of certain property in times of war or rebellion, the rule is universally declared whenever the question was raised, that the matter of seizure is jurisdictional and that the libel follows, through which it may be determined whether the seizure was legal or not.

In *Gelston* v. *Hoyt*, 3 Wheat. 247, the act of February 18, 1793, 1 Stat. 305, was under consideration, sec. 27 of which provided that an officer of the revenue might go on board a ship within or without his district, and if it should appear that any breach of the laws of the United States had been committed whereby the ship or goods on board might be liable to forfeiture, to make seizure of the same.

Mr. Justice Story, at 318, says with respect to proceedings in rem—

> where the property is seized and libeled, as forfeited to the Government, the sole object of the suit is to ascertain whether the seizure be rightful, and the forfeiture incurred or not.

The Food and Drugs Act, sections 3, 4, and 5, make provisions for an examination of specimens of food and drugs offered for sale in unbroken packages in any State other than that in which they may have been manufactured or produced, and if any of the provisions of the act have been violated, the Secretary of Agriculture shall certify the facts to the proper district attorney with a copy of the results of analysis or examination, and it is made the duty of each district attorney—

> to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States without delay for the enforcement of the penalties.

What are the penalties? The whole act has in view seizure, forfeiture, condemnation, and confiscation, and in that respect does not differ in the slightest from all other acts the court has examined providing for seizure, forfeiture, condemnation, and confiscation under various admiralty and revenue and other laws of the United States.

Among the cases which may be examined with profit are: *United States* v. *92 Barrels of Rectified Spirits*, 8 Blatch. 480; *U. S.* v. *One Raft of Timber*, 13 Fed. 796; *The Lewellen*, 4 Biss. 156; *Hatch* v. *Steamboat Boston*, 3 Fed. 807; *United States* v. *Winchester*, 99 U.S. 372, 376; *Clifton* v. *United States*, 4 How. 242; *Coffey* v. *United States*, 116 U.S. 427, 435; *The Washington*, 17221 Fed. Cases; *The Josefa Segunda*, 10 Wheat. 312; *Fideleter* v. *United States*, 1 Sawy. 153; *Dobbins Distillery* v. *United States*, 96 U.S. 395, 396; *The Bolina*, 1608 Fed. Cases; *The Idaho*, 29 Fed. 187, 190; *The Rio Grande*, 23 Wall. 458; *Miller* v. *United States*, 11 Wall. 268, 294, 295, 296; *Windsor* v. *McVeigh*, 93 U.S. 274, 278, et seq.; *In re Moore*, 66 Fed. 950.

In fact, in some of the cases in which the same rule was adopted there was no provision for forfeiture or seizure of the property. *The Lewellen*, 4 Biss. 156; *Hatch* v. *Steamboat Boston*, 3 Fed. 807. Such was *The Bolina*, 1608 Fed. Cases.

Full authority is found in that case for a seizure by the district attorney, or under his authority, even if the statute had been silent on the subject, and in the opinion Mr. Justice Story said—

> But if there had been no mode of prosecution provided, I should have had no doubt that an information would have lain upon common-law principles.

Under the Food and Drugs Act the steps provided are the same and just as drastic in their results as in any of the other cases. In the case under consideration "the sole object of the suit is to ascertain whether the seizure be rightful and the forfeiture incurred or not", just as much as in all of the other cases in which the statute expressly gives some officer the power to seize the offending article. It would serve to no useful purpose to go at length into the many cases cited by counsel and found by the court, in which revenue laws, navigation laws, or laws for providing for confiscation in times of war and rebellion were under consideration. They all announce the same rule, that when it is sought to declare a forfeiture of goods for a violation of some law of the United States, and the proceeding is strictly in rem, the seizure must be made prior to the filing of the libel, and the libel must allege the fact.

This conclusion is not to be affected by questions of punctuation. If the comma after the word "found" is omitted, the language will be found to contain all the elements found in other statutes considered in the cases referred to. If the comma is transposed and put after the word "seized" then there could be no doubt that the intention of the statute was that the same proceeding should be had as in admiralty in cases providing for seizure. Punctuation may not be regarded in construing a statute. *Cushing* v. *Worrick*, 75 Mass. 382; *Martin* v. *Gleason*, 139 Mass. 183. "But for the punctuation as it stands," says Judge Day in *Hamilton* v. *Steamboat Hamilton*, 16 U.S. 428, "there could be little doubt but that this was the meaning of the legislature. Courts, will, however, in the construction of statutes, for the purpose of arriving at the real meaning and intention of the law makers, disregard the punctuation, or repunctuate, if need be, to render the true meaning of the statute."

It cannot be that when without the comma, or with the comma after the word "seized", the act would be in its operation in conformity with all similar legislation, that Congress by putting the comma after the word "found" intended to change the whole course of established procedure. It is interesting to notice that the act of March 3, 1807, ch. 77, sec. 4, considered in *The Josefa Segunda*, 10 Wheat. 312, the language with respect to the property to be confiscated was—

> shall be liable to be seized, prosecuted, and condemned * * * in the district where the said ship or vessel *may be found or seized.* * * *

There are good reasons why in such cases as this the seizure should precede the libel. It will be observed that the offense may be committed while the article "is being transported * * * or having been transported remains unloaded, unsold, or in original unbroken packages." Let a case be assumed in which the proper authorities have information that foods misbranded in violation of the act are on the cars in the Northern District of Ohio en route to Dayton in the Southern District. If the district attorney in the Northern Dis-

trict be apprised by the Secretary of Agriculture after an examination, that certain goods are misbranded, filed his libel within his jurisdiction, and by it seeks seizure of the article, it is very apparent that long before the libel may be prepared and the warrant of arrest issued and served, the goods may be without the jurisdiction of the court and the libel a futility. But if on the other hand, the district attorney in the Northern District of Ohio who causes a warrant of seizure upon information lodged in the proper court, to issue, and thereupon the goods were seized in his district, can it be doubted that the court in the jurisdiction in which the seizure was made would acquire jurisdiction of the case? Again, let it be assumed that the goods have arrived in Dayton and remained in the unbroken packages, and, being misbranded are forfeited under the law. The district attorney for the Southern District of Ohio filed his libel and a writ of seizure is issued. Let it be assumed that before his libel is prepared and filed and the writ issued and served, the goods have been sold by the Dayton consignee and transported to a bona fide purchaser in the Northern District of Ohio or in some other State, of what avail would the libel be then? The court could certainly not proceed to condemn and forfeit the misbranded article.

It is an established rule that a proceeding in rem is notice to the world. *Mankin* v. *Chandler*, 2 Brock. 125, 127, Marshall, C.J. If the proceeding is not instituted until the libel is filed then a bona fide purchaser has no notice actual or constructive. It is easy to see how upon goods actually forfeited by a commission of the offence a lien to a bona fide purchaser might be put, or a sale made, which would render a libel seeking a forfeiture a vain thing.

Under section 68 of the Internal Revenue Act of June 30, 1864 (13 Stat. 248), providing for the forfeiture of liquors and spirits, and the seizure of the same for violation of internal revenue laws, it was held that a factor's lien was protected where the bona fides are unquestioned, if the lien was subsisting at the date of the seizure. *United States* v. *396 Barrels of Distilled Spirits*, 16504 Fed. Cases.

The purposes of the Food and Drugs Act and of seizures, condemnations, and forfeitures under it are the same as the purposes of the other acts of the Government seeking the enforcement of laws of the United States by seizure, condemnation, and forfeiture of the property and goods which by the laws are made contraband, and there seems to be no reason why the proceedings in this case should differ from the proceedings in cases of similar purport and intention.

The demurrer on the first ground will be sustained.

2. " Said libel is not properly verified by any person having knowledge of the facts."

The claim is, that the proceedings of seizure and forfeiture are criminal in their nature, and that the warrant should be of the character contemplated by the fourth amendment to the Constitution, which reads—

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

It is claimed that the probable cause must be supported by oath or affirmation of some one conversant with the facts which must be

submitted to the magistrate issuing the warrant so that he may determine whether probable cause exists.

It was the opinion of Chief Justice Marshall, that a proceeding in forfeiture of a vessel is a civil cause. *The Vengeance*, 3 Dall. 297, he says at page 301—

> We are unanimously of opinion that it is a civil cause. It is a process of the nature of a libel *in rem* and does not in any degree touch the person of the offender.

The same great authority expressed the same view in *The Schooner Sally*, 2 Cranch, 406; *The Samuel*, 1 Wheat. 10; and in *The Betsy and Charlotte*, 4 Cranch, 442.

It is said by Mr. Justice Clifford in *Dobbins Distillery* v. *U.S.* 96 U.S. 395, 399—

> Cases arise undoubtedly, where the judgment of forfeiture necessarily carries with it, and as part of the sentence, a conviction and judgment against the person for the crime committed; and in that state of the pleadings it is clear that the proceeding is one of a criminal character; but where the information, as in this case, does not involve the personal conviction of the wrongdoer for the offense charged, the remedy of forfeiture claimed is plainly one of a civil nature; as the conviction of the wrongdoer must be obtained, if at all, in another wholly independent proceeding.

This would seem to settle the question, but there is a long list of cases beginning with *Boyd* v. *United States*, 116 U.S. 616, 634, which hold that proceedings in seizure and forfeiture are so far criminal as to come within the meaning of the fourth amendment. *Lees* v. *United States*, 150 U.S. 480; *Stone* v. *United States*, 167 U.S. 178, 187; *State* v. *Chicago*, 37 Fed. 497, 500; *State* v. *Day Land, etc.*, 41 Fed. 228, 230; *United States* v. *Two Barrels of Whisky*, 96 Fed. 116 U.S. 434; *Clifton* v. *United States*, 4 How. 242, 250.

The question in *Boyd* v. *United States*, was whether or not in an action in rem to establish a forfeiture of goods alleged to have been fraudulently imported without paying duties, an order of court based on the fifth section of the act authorizing the proceeding which required the claimants of the goods to produce a certain invoice in court for the inspection of the Government attorney and to be offered in evidence by him, was constitutional or not. Section five was held to be unconstitutional. Mr. Justice Bradley, at page 634, says—

> As, therefore, suits for penalties and forfeitures incurred by the commission of offences against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the fourth amendment of the Constitution, and of that portion of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; and we are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the fifth amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the fourth amendment.

The propriety of these views has not been questioned, so far as this court after much research has been able to ascertain, and they are summed up by Mr. Justice Harlan in *Hepner* v. *United States*, 213 U.S. 103, 111, in this language—

> In the latter case [*Boyd* v. *U.S.*] it was adjudged that penalties and forfeitures incurred by the conviction of offenders against the law are of such a quasi-criminal nature that they come within the reason of criminal proceedings

for the purpose of the fourth amendment of the Constitution and of that part of the fifth amendment declaring that no person shall be compelled in any criminal case to be a witness against himself.

Some light is thrown upon the subject by what is said in *Smith* v. *Maryland*, 18 How. 71, 76. In that case the question was whether a law of Maryland, enacted for the protection of oysters in waters covering lands in the State afforded valid cause for seizing a licensed and enrolled vessel of the United States and interrupting its voyage, and pronouncing for its forfeiture. As bearing upon the subject under discussion Mr. Justice Curtis said—

> That objection that the law in question contains no provision for an oath on which to found the warrant of arrest of the vessel, cannot be here maintained. So far as it rests on the constitution of the State, the objection is not examinable here, under the twenty-fifth section of the Judiciary Act. If rested on that clause in the Constitution of the United States which prohibits the issuing of a warrant but on probable cause supported by oath, the answer is, that this restrains the issue of warrants only under the laws of the United States, and has no application to State process.

See also what is said by Mr. Justice Curtis in *Murray's Lessee* v. *Hoboken, etc., Co.*, 18 How. 227, bottom page 285, and see the opinion of Attorney General Nelson (1843).

> The protection guaranteed is not against all seizures; it is against unreasonable seizures, can be made only upon reasonable cause; and, when authorized, the evidence of its reasonableness is to be presented by oath or affirmation. (4 Op. Attys. Gen. 213.)

The question in every case of seizure is, whether the seizure was justified or not, and the proceeding to ascertain that fact is a civil proceeding, but a seizure of goods is in effect a proceeding against the owner (*Boyd* v. *United States*, 116 U.S. 637; *The City of Norwich*, 118 U.S. 468, 504), and hence criminal in nature, and the matter is brought within the meaning and operation of the fourth amendment under which it is a no less serious offense to seize goods than it is to seize the person without a warrant under oath founded upon probable cause.

Power is given Congress by the Constitution to regulate commerce and to pass all laws necessary and proper to carry that power into effect. The Food and Drugs Act is sanctioned by that power. But in carrying out that power regard must be had to other provisions of the Constitution, and if a seizure of goods is necessary it can only be made in the way prescribed by the fourth amendment. See remarks of Judge Drummond in *Mason* v. *Robbins*, 9252 Fed. Cases.

In all criminal cases in which a warrant is issued for arrest, probable cause must be shown by the affidavit of some one who has knowledge of the facts. This may be regarded as settled. The rule is laid down by Justice Bradley on the circuit, in the Rule of Court, No. 12126 Fed. Cases. He says:

> No warrant shall be issued by any commissioner of this court for the seizure or arrest of any person charged with a crime or offense against the laws of the United States upon mere belief or suspicion of the person making such charge; but only upon probable cause, supported by oath or affirmation of such person, in which shall be stated the facts within his own knowledge constituting the grounds for such belief or suspicion.

See also *United States* v. *Tureaud*, 20 Fed. 621, 623; *United States* v. *Polite*, 35 Fed. 59; *Erwin* v. *United States*, 37 Fed. 470, 489; *In*

re Gourdin, 45 Fed. 842, 843; *In re Dana*, 68 Fed. 895; *Johnson* v. *United States*, 87 Fed. 187.

Historically, arbitrary seizure is one of the great grievances against despotic power. In these days the reasons for the protection of persons and property, and the fact that they are protected, are almost forgotten in the paucity of attacks upon them, yet, how that protection was wrung from reluctant tyranny must always be borne in mind and no act can be sanctioned which would tend to weaken the great safeguard of our liberties and permit at sometime encroachments thereon which might seem justified by authority of law or by judicial interpretation. *Boyd* v. *United States*, 116 U.S. 616, 635. In many cases of seizure discussed in this opinion the fact does not appear whether a warrant was issued prior to the seizure, nor was the form of the warrant disclosed, but in the opinion of this court, considering the seriousness of governmental seizures of the private property of a citizen and the requirements of the fourth amendment, it would seem that the affidavit preceding a warrant in proceedings in their nature criminal for the seizure of goods should be made by some one cognizant of the facts, then upon the issuing of the warrant and the seizure of the goods, the district attorney may proceed "to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States without delay for the enforcement of the penalties," as provided by the act.

It is argued by the district attorney that—

> even the Constitution must be reasonably construed, and it was never intended or decided that the court should examine a case in advance of issuing process for seizure for condemnation, and should afterwards have to try the case on the same evidence to determine whether the case was actually made out.

In answer to this it may be said that the proceedings resulting in the issuing of the warrant are altogether ex parte. There is no trial. There is an affidavit presented by some one who claims to be conversant with the facts, setting forth facts which would show probable cause.

The demurrer on its second ground is well taken.

3. "It does not appear in and from the averments contained in said libel that the goods therein mentioned are still subject to the provisions of the act of Congress of June 30, 1906, in said libel invoked."

From sections 2 and 10, it may be gathered that the offense charged is the shipping of the contraband article from one State into another, or, having received it, to deliver or offer to deliver the unbroken packages for pay or otherwise, and that a seizure and forfeiture may be had, first, when the article is being transported from one State to another for sale, and, second, having been so transported remains unloaded, unsold, or in the original unbroken packages.

It may well be that the Prescription Products Company was the owner of these unbroken packages or had them in its possession for the purpose of being used, manufactured, sold, and consumed as drugs without the packages having been transported for sale or received for sale. Of course if the original packages were to be used and manufactured Congress had no power to legislate respecting them, and if they were to be sold after manufacture then the original

packages must necessarily have been broken, and then the law would have to look to the labels on the original packages into which the manufactured product been put, and only then if it were shipped from Dayton into some other State.

If the words "used and manufactured" are rejected as surplusage and the illegal conduct is restrained to the words "sold and consumed as drugs", it may be said that the owner or possessor of these original packages could do as he pleases with them if they were not transported into the State to be sold in the original packages. They may heve been, as they probably were, transported to be manufactured as in the *United States* v. *65 Casks Liquid Extracts*, 170 Fed. 449, 456, and then when the manufactured product is sold it must bear the proper label, if labeled at all. These casks may have been transported for purposes of experiment and, not being used for such purposes, were sold by the person receiving them to the present owner or possessor. So far as it appears by the label, years may have elapsed since the transportation for some other purpose than for sale in the original packages, and it may be that during all that time State taxes have been paid by the owner or possessor. Indeed the packages may have been in the ownership and possession of the claimant before the Food Act was passed, and if so, could not come within its operation, article 1, section 9, clause 3, Constitution of the United States. The court is of opinion that no forfeiture can be declared under the libel as drawn, and the third ground of demurrer will be sustained.

4. "Said libelant has not in and by its said libel made or stated such a case as entitles the said libelant to the relief therein prayed, inasmuch as the said act of June 30, 1906, has no application to shipments of the character of the said shipments, set forth in said libel."

Under the provisions of section 8, the term "misbranded" applies to drugs, "the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular", or (sub-second) "if the package fails to bear a statement on the label of the quantity or proportion of any alcohol * * *."

The legend, "Prescription Products Company, Dayton, Ohio, S. 59884, P. D. Co. No. (1)", is not intelligible. It may be a shipping direction or it may have been put on the packages by the claimant for purely innocent purposes of its own. As it reads it cannot be said to be a statement, etc., of the article in the casks or of the ingredients and substances contained in them. It may be that apt words by way of inducement or innuendo would bring the legend within the language of the law and show that it was a statement, etc., false or misleading in some particular. It may be that when interpreted it would show a full compliance with the law.

The law does not require any label except by inference, and by no means necessary inference. A man cannot be convicted of a criminal offence or his property forfeited by inference. The effect of the provision of the law is that no original packages of drugs shall be introduced into one State from another for purposes of sale in the original packages the label of which is misleading or false. If there

is no label there is no misrepresentation. If the label is unintelligible it is no description of the contents of the package and can deceive nobody.

But it would be a too great refinement of language to say that these marks are not labels. The casks certainly are labeled as described. It may be that the marks when interpreted would show the required content of alcohol, but the label should make that fact intelligible. Since the casks are labeled, the required information should appear clearly on the label, whether it is a separate paper pasted on the cask or branded upon it.

Inasmuch, however, as the libel does not charge that the packages were transported into the State for sale, this ground also for the demurrer must be sustained.

Order accordingly.

UNITED STATES v. FIVE BOXES OF ASAFŒTIDA

(District Court, E.D. Pennsylvania, Sept. 19, 1910)

181 Fed. 561

Libel under section 10 of the Food and Drugs Act. Trial before the court. Decree in favor of claimant.

HOLLAND, *District Judge.* This libel is filed by the Government under the provisions of the act of June 30, 1906, for the purpose of effecting the condemnation of five boxes of asafœtida, which it is alleged were adulterated within the meaning of this act of Congress. An attachment was issued and the drug seized by the Government, after which a claim was made by Smith, Kline & French Company, in whose possession the asafœtida was found, and an answer duly filed by them, in which the claimants urge that the libel be dismissed and that the drug seized under the attachment be returned to them.

From the libel and answer, upon which the case was argued, we gather the following undisputed material facts:

On the third day of May 1910 T. M. Curtius, of the city of New York and State of New York, shipped via Clyde Steamship Company, a common carrier, five boxes of asafœtida to Smith, Kline & French Company, of the city of Philadelphia, in the State of Pennsylvania, for which, at the time, the latter paid Curtius in full and received the asafœtida in their possession, at their place of business, no. 429 Arch Street, in this city. "Being a drug sold under a recognized name in the United States Pharmacopœia", it was adulterated within the meaning of the act of Congress at the time of transportation, in that it differed from the strength, quality, and purity as determined in the test laid down in the United States Pharmacopœia official at the time of the investigation, in this: That the standard of strength, quality, and purity determined by the test required that not less than 50 percent of the asafœtida should dissolve in alcohol, and, when incinerated, the said alcohol should yield not more than 15 percent of ash; whereas, less than 50 percent of the asafœtida contained in these five boxes was soluble in alcohol, and when incinerated yielded more than 15 percent of ash.

The claimants, immediately after the receipt of this asafœtida and before the service of the attachment, opened the packages and took therefrom sufficient for the purpose of examination, and caused the standard of strength, quality, and purity to be plainly stamped upon the containers, as required by the seventh section of the Pure Food Act, and all the containers were so marked at the time of the service of the attachment. Smith, Kline & French Company, in whose possession the drug was found, were the owners thereof, having paid the full purchase price before the service of the attachment; but after its receipt they had never delivered it in original unbroken packages for pay, or otherwise, or offered to deliver it to any other person before the containers were duly marked as required by the act.

Upon these facts the claimants urge that the libel should be dismissed, for the reasons: (1) That no forfeiture could be had under section 10 because under section 2 the facts in this case would not support a criminal prosecution against the claimants; (2) that the taking of samples operated to remove the merchandise from the provision of the act as "original packages"; and (3) that the proper labeling of the packages before seizure relieved them from liability to forfeiture under the terms of section 10.

The provisions of the act upon which the Government relies to enforce its claim for forfeiture of this merchandise, upon the facts as above stated, are as follows:

In section 2 it is provided that the introduction into any State from any other State of any article of drug which is adulterated or misbranded within the meaning of this act is hereby prohibited, and any person who shall ship or deliver for shipment from any State to any other State, or shall receive in any State from any other State, and, having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of the act, shall be guilty of a misdemeanor.

Section 7 provides:

> First. If, when a drug is sold under or by a name recognized in the United States Pharmacopœia or National Formulary, it differs from the standard of strength, quality, or purity, as determined by the test laid down in the United States Pharmacopœia or National Formulary official at the time of investigation: *Provided,* That no drug defined in the United States Pharmacopœia or National Formulary shall be deemed to be adulterated under this provision if the standard of strength, quality, or purity be plainly stated upon the bottle, box, or other container thereof although the standard may differ from that determined by the test laid down in the United States Pharmacopœia or National Formulary.

And section 10 provides that any article of drug that is adulterated or misbranded within the meaning of this act, and is being transported from one State to another for sale, or, having been transported, remains unloaded, unsold, or in original or unbroken packages, shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation.

It is obvious that the claimants could not be convicted of a misdemeanor, as section 2 requires not only that they should have received the adulterated or misbranded drugs from another State, which they have done in this case, but the section further requires that, after hav-

ing so received it, they deliver it in unbroken packages, for pay or otherwise, or offer to deliver it to another person so adulterated or misbranded within the meaning of the act, which they have not done. They have received it from another State, but they neither delivered nor offered to deliver it, for pay or otherwise, in the unbroken packages.

It is urged that, by reason of the fact that a criminal prosecution could not be sustained against them, no forfeiture can be had under section 10. We do not consider this contention sound, because section 2 and section 10 are not at all interdependent. The misdemeanor denounced in section 2 is entirely distinct and independent of the grounds of forfeiture in section 10. Congress has clearly defined in section 2 what acts or omissions shall constitute a misdemeanor with regard to adulterated or misbranded articles of food or drug, and in order to ascertain whether or not any person is guilty of having violated the provisions of this section, it is not at all necessary to refer to section 10, as section 2, as to what shall be deemed a misdemeanor, is complete within itself.

As to adulterated articles, it is a misdemeanor (1) to ship from one State to another; (2) to receive and deliver, or offer to deliver the same for pay, in unbroken packages. Such articles are liable to seizure and forfeiture under section 10 (1) when in the course of being transported from State to State; (2) when, having been transported, they remain (*a*) unloaded, or (*b*) unsold, or (*c*) in the original packages.

It will be seen that section 10 fully and completely defines the conditions under which such articles are liable to seizure and forfeiture. There is no reference to or dependence upon the misdemeanor defined in section 2, and it is unimportant, as far as the forfeiture proceedings are concerned, whether or not any person could be convicted under section 2. Congress has defined fully in section 10 when and under what circumstances the article of food or drug shall be forfeited without reference to the guilt of the owner under section 2. Under the common law, the offender's right was not divested upon forfeiture proceedings until conviction, but this doctrine never was applied to seizures and forfeitures created by statute in rem for violations of the revenue law of the Government. The thing there is primarily considered the offender, or rather, the offense was attached primarily to the thing, and this whether the offense was malum prohibitum or malum in se. It therefore follows that when the thing is inculpated under an in rem statutory provision it may be forfeited, although the act which caused the forfeiture was not authorized or done by or with the consent or knowledge of the owner. *Dobbins* v. *United States*, 96 U.S. 395, 24 L.Ed. 637, 19 Cyc. 1357.

The purpose of this act is to conserve the public health by preventing interstate commerce in poisonous or deleterious foods and drugs, and, in order that this may be effected, it is not only made a misdemeanor under the act, but the article of food or drug adulterated or misbranded is declared to be forfeited as an offending thing which threatens the health of the citizen and therefore subject to seizure without regard to the acts or knowledge of the owners of claimants.

Neither do we think that the taking of samples operated to remove the merchandise from the provisions of the statute as original packages. There is no exact and comprehensive definition of the term, "original package." The cases heretofore considered involving this question have been disposed of by the application not of a precise definition, but of certain broad general principles to the precise and particular facts.

An extract from the opinion of the Supreme Court in *Brown* v. *Maryland*, 25 U.S. 419, 6 L.Ed. 678, is probably the nearest guide we may have as to what may be considered an original package.

> It is sufficient for the present to say, generally, that, when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State.

In the case at bar, the claimants, upon receipt of these packages of asafœtida, merely took samples therefrom for the purpose of examination, and in order that they might comply with the provisions of the act in regard to causing the standard of strength, quality, and purity to be plainly stamped upon the containers. This could not be considered to have destroyed the commercial form, and obviously did not operate to "incorporate" the same with the general property of this State.

A substantially similar question was presented to the Supreme Court of Iowa in 1895, in the case of *Wind* v. *Iler & Co.*, 93 Iowa 316, 61 N.W. 1001, 27 L.R.A. 219, in which case the bungs in certain barrels of liquor were drawn for the purpose of testing the contents before accepting the same by the purchaser, and the question was whether it was still to be regarded as interstate commerce. Upon this point the court said:

> The question yet remains, did the drawing of the bung in the barrels in which the liquors were shipped into the State have the effect claimed for it by the appellant? We think not. The barrel was opened in order that a small quantity might be taken from it and tested—not used—in order to determine whether the liquors would be returned or not. We do not think that the inspecting or testing of an imported article to determine whether it shall be returned has the effect to make it a part of the general mass of property in the State.

This conclusion is supported by the decision in two well considered Federal cases.

The first case (*United States* v. *Fox*, Fed. Cas. No. 15,155), decided in 1869, was a suit by the United States under the Internal Revenue Act of July 13, 1866 (14 Stat. 144), to recover the penalties therein prescribed for the sale of perfumery without affixing a proper stamp thereon. A proviso in the act prescribed that, when imported perfumery was sold in the original and unbroken package in which the bottle or other inclosure was packed by the manufactuer, the person so selling should not be liable to the aforesaid penalty.

Fox sold one small wooden box containing twelve 1½-ounce bottles of hair oil and a similar but larger box containing twelve bottles of pomade. He opened both boxes, so that the purchaser might examine the contents. The top of the smaller box was put on again before delivery without change of the contents. In the larger box, containing the pomade, Fox, at the request of the purchaser,

substituted three smaller bottles taken from the shelf of the store, and nailed up the box.

In respect to the smaller box of oil the court said:

> Although the top of this box was taken off by the defendant, Fox, it was only for the purpose of enabling the witness Quivey to ascertain the kind and quality of its contents, and before the sale and delivery to him it was put on again, with the contents unchanged in kind or quantity. Under these circumstances the defendant must be considered as selling an unbroken package, the contents of which were not then required to be stamped.

But as to the sale of the box of pomade the court said:

> The package was opened, and, three bottles being taken out of it, it was sold with only the remaining nine bottles in it. This was a broken package, and so the court instructed the jury.

The verdict of the jury in favor of the defendant, Fox, was set aside on motion of the United States, upon the ground that the package of pomade was not an original package; the court holding:

> Goods are sold "in original and unbroken package" within the meaning of the act of July 13, 1866 (14 Stat. 144), although the package is opened for inspection, if closed again before delivery without the contents being changed.

In the other case (In re McAllister [C.C.] 51 Fed. 282, decided in 1892), the facts were these: Two men, emissaries of a butter dealer in Baltimore, went to the store of McAllister, a dealer in oleomargarine, and sought to buy butter. McAllister stated that he had none, but could supply oleomargine. They requested him to remove the lid from the tub of oleomargarine that they might look at it. He did so, stating that he could not sell less than ten pounds, as it reached him in the tub from Chicago. They purchased the tub and forthwith informed on him. He was duly tried in the State court and convicted. The State court of appeals affirmed the conviction, and McAllister applied to the Circuit Court of the United States for a writ of habeas corpus, on the ground that the sale of the tub of oleomargarine was a sale of an original package and beyond the power of the State to prohibit, which it sought to do in the act of the legislature. The court granted the writ and announced the proposition of law involved, in the following syllabus to the case:

> Removing the lid of an original package of oleomargarine, so that a prospective buyer may examine its contents, is not such a breaking of the package as will destroy its original character.

In reaching the above conclusion the court said:

> It is argued that the taking the lid from the tub containing this oleomargarine was a breaking of the package so as to destroy its original character. This in no sense did it do. The goods had in no way become commingled with his property or the general property of the State (*Low* v. *Austin*, 13 Wall. 29, 20 L.Ed. 517). Any one calling for oleomargarine with an honest purpose would have purchased this package as an original one, even if he knew it had had its lid lifted off once to see whether or not it held another substance than it purported to hold. The laws of the United States recognize oleomargarine as a merchantable article. Being such, while a State may perhaps regulate its sale, it cannot prohibit its importation. The statute in question does this, and is unconstitutional, and in this respect void. The petitioner is discharged.

In the light of the foregoing adjudications, it cannot be held that the mere taking of a sample from the original package for the purpose of examination and for the purpose of complying with the act to plainly state upon the container the standard of strength, quality,

and purity of the drug was a breaking up of the original package and operated to incorporate the same in the general property of the State. The original character of the package was not, for the reasons stated by the claimants, destroyed.

The third defence interposed by the claimants, that the proper labeling of the packages before seizure relieved them from liability to forfeiture under the terms of section 10, must be regarded as more substantial and as a good ground for dismissing the libel. Under this in rem statutory forfeiture procedure of section 10, the article of drug itself is the thing inculpated, and it must be adulterated or misbranded within the meaning of the act at the time the Government seizes it. It was not adulterated when seized, but branded as required by law. It is not sufficient that it was adulterated when it was being transported from one State to another and liable to forfeiture at that time. It was not then seized, and there is no language of the act to authorize seizure for any past offending condition of the drug. A drug that "is" adulterated or misbranded (is the language used) and "is" being transported from one State to another for sale, shall be liable, etc. A drug, which, "having been transported, remains unloaded, unsold, or in original unbroken packages", shall it be liable to forfeiture for some previous irregularity, if not adulterated or misbranded at the time of seizure? It is not so stated in the act. There is no seizure of a drug that "was" adulterated authorized. Having been transported and remaining unloaded, unsold, or in the original unbroken packages, it can only be forfeited when it "is" adulterated and misbranded when seized.

These boxes of asafœtida when seized by the Government were not adulterated within the meaning of the act. It is true they "had been transported" (from one State to another for sale) and "remained in the original unbroken packages at the time the Government seized them"; but they were not adulterated.

Under section 7 this asafœtida was adulterated only in case its standard of strength, quality, and purity was not plainly stamped upon the containers, but if so marked it was not adulterated. The liability to forfeiture of the drug, therefore, would depend upon whether or not the containers were so marked at the time the Government seized them. They were so marked and not liable to seizure.

The containers having been branded according to the requirements of the act at the time of seizure, there is no valid ground for forfeiture, and the libel in this case is dismissed, and the Government is directed to return to the claimants the five boxes of asafœtida seized under the attachment.

UNITED STATES v. NINE BOXES OF ASAFŒTIDA

(District Court, E.D. Pennsylvania, Sept. 19, 1910)

181 Fed. 568

Libel under section 10 of the Food and Drugs Act. Libel dismissed.

HOLLAND, *District Judge.* The facts in this case are substantially the same as those upon which the case of *United States of America*

v. *Five Boxes of Asafœtida* (No. 7 of 1910), 181 Fed. 561, was determined.

For the reasons stated in the opinion filed in that case, the libel in this case is dismissed, and the Government is directed to return to the claimants the nine boxes of asafœtida seized under the attachment.

NAVE-McCORD MERCANTILE CO. v. UNITED STATES

(Circuit Court of Appeals, Eighth Circuit, Sept. 19, 1910)

182 Fed. 46; N.J. No. 895

Error to the District Court for the Western District of Missouri. Judgment reversed.

Before SANBORN and ADAMS, Circuit Judges, and REED, District Judge.

SANBORN, *Circuit Judge.* The Nave-McCord Mercantile Company, a manufacturing corporation, challenges its conviction of a violation of act June 30, 1906, ch. 3915, 34 Stat. 768, for the prevention of the manufacture, sale, or transportation of adulterated, or misbranded, or poisonous, or deleterious foods, drugs, medicines, and liquors, and assigns as error that the court below overruled its demurrer to the information under which it was convicted. That information consisted of three counts. The first count charged that the company misbranded a fluid it made and sold by labelling it "Flavor of Lemon and Citral—A Pure Flavor", when in fact this fluid "did not then and there contain any measurable and appreciable quantity of lemon oil, which said lemon oil in measurable and appreciable quantity is a necessary and essential ingredient of a pure lemon flavor." But the fluid was not marked or labeled a pure lemon flavor, and the count contained no averment that lemon oil in measurable quantities was an essential ingredient of a pure flavor of lemon and citral, and hence it charged no offense.

The second count charged a misbranding of the same fluid, which the pleading declared "was a fluid substance purporting and represented to be lemon and citral flavor", in that the company labeled it "A Pure Flavor", "which said marking and labeling", the information avers, "was intended to convey to the purchasing public the meaning that said article of food was a pure flavor or extract derived from the lemon fruit, containing, among other things, the oil of lemon and citral derived from such fruit, when in truth and in fact said article of food contained no pure lemon flavor, in that it contained no measurable amount of lemon oil, and did contain an added substance not derived from the lemon fruit, to wit, citral, and when in truth and in fact pure fruit flavors are derived either from the fruit directly or by the solution of the essential oil of the fruit through the medium of alcohol." But the fluid according to this count was represented to be a lemon and citral flavor, and was branded a pure flavor. The plain and incontrovertible meaning of such a brand was, not that the fluid was a pure flavor of lemon, but that it was a pure flavor of lemon and citral; and the averment that the company intended that the purchasing public should interpret the label to mean that which it clearly did not indicate, and which the information does

not aver that any purchaser ever understood it to mean, could not constitute a misbranding. In reality this charge is that the fluid contained no pure lemon flavor, but contained an added substance not derived from the lemon fruit, to wit, citral, and that it was branded a pure flavor of lemon and citral. This was a true and not a false branding. If the company had branded the fluid a pure flavor of lemon, it might have violated the law, because it also had the flavor of citral; and if the pleader had averred that the oil of lemon in appreciable quantities was an essential ingredient of a pure flavor of lemon and citral, and that this fluid contained none of it, the count might have stated an offense. But no such averment was made, and the second count failed to state facts sufficient to constitute a violation of the law.

The third count of the information charged that the company adulterated and misbranded this fluid, which purported and was represented to be lemon and citral flavor, by marking and labeling it "Flavor of Lemon and Citral—A Pure Flavor", by which statements the count declares the company "designed and intended the public to understand and believe that said food product was a pure flavor and extract of lemon," when these marks and labels "were false and misleading in this: That said article, so manufactured, prepared, and shipped, * * * was an imitation of the true lemon flavor, commonly called "lemon extract," so commonly used and employed in the preparation of food products, and of far less value, strength, and efficacy than said true lemon flavor." But an innuendo may not change, add to, or enlarge the sense of expressions beyond their usual acceptation and meaning. It may serve as an explanation, but not as a substitute. Wharton's Criminal Pleading and Practice, 9th Ed., sec. 181a, and cases there cited. The usual acceptation and meaning of the label "Flavor of Lemon and Citral—A Pure Flavor" distinctly negatives the idea that it describes a pure flavor and extract of lemon, and the expression "a pure flavor and extract of lemon" cannot be substituted by pleading or proof for that which the defendant actually used, and then the defendant be convicted upon the substituted label, which it never conceived. Nor may an averment that a defendant intended that a label should be understood by the public to mean the opposite of its ordinary and accepted interpretation make its use a misbranding or constitute a violation of the law. The truth is that, when the averments of this count are read and construed together, they clearly disclose the facts that the fluid made and sold by the defendant was not a pure lemon extract or a pure lemon flavor, or any imitation thereof; that the defendant never placed any label or mark upon it which indicated that it was, or which could mislead a purchaser, but that by its declaration through the label that it was a flavor of lemon and citral it clearly notified all purchasers that the fluid was neither a pure lemon extract nor a pure lemon flavor. There is no averment of any facts which disclose any adulteration of this flavor of lemon and citral, and the averment fails to state sufficient facts to constitute a violation of the law. *United States* v. *Hess*, 124 U.S. 483, 486, 487, 8 Sup. Ct. 571, 31 L.Ed. 516; *United States* v. *Post* (D.C.) 113 Fed. 852. The demurrer to the information should have been sustained, and, as this conclusion disposes of the case, it is unnecessary to consider other

alleged errors, and the judgment below is reversed, and the case is remanded to the district court, with instructions to discharge the defendant below.

UNITED STATES v. 46 PACKAGES AND BAGS OF SUGAR

(District Court, S.D. Ohio, Oct. 8, 1910)

183 Fed. 642; N.J. No. 723

Libel under section 10 of the Food and Drugs Act. On exceptions and demurrer to the libel. Sustained.

SATER, *District Judge.* The libel is filed under section 10 of the Pure Food and Drugs Act (act June 30, 1906, ch. 3915, 34 Stat. 771). By that section it is enacted that:

> Any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act, and is being transported from one State, Territory, District, or insular possession to another for sale, * * * shall be liable to be proceeded against in any district court of the United States within the Territory where the same is found, and seized for confiscation by a process of libel for condemnation.

The case does not fall within that provision of the law because the goods were not seized while in transportation. The section also provides in the alternative that:

> Any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act * * * having been transported, remains unloaded, unsold, or in original unbroken packages, * * * shall be liable to be proceeded against [in like manner].

"Having been transported" from where to where? Clearly not from one point in a given State, Territory, District, or insular possession to another point in the same State, Territory, District, or insular possession, because in that case the article has not passed into interstate commerce. The words, "having been transported", etc., are connected by the disjunctive "or" with the preceding portion of the section. Following the words "having been transported" is an ellipsis, an omission of words necessary to the complete construction of the sentence. Those words are found in the preceding part of the section and, when supplied, the clause under which this libel is filed reads and means:

> Any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act, having been transported from one State, Territory, District, or insular possession to another for sale, remains unloaded, unsold, or in original unbroken packages, * * * shall be liable, etc.

This construction of the section is not only rational and in accordance with the maxim noscitur a sociis, but is necessary to make the clause applicable to articles which have entered into interstate commerce. The words "is being transported", and "having been transported", are coupled together by the word "or" and are both limited by the same qualifying terms. The view above expressed is in accordance with the ruling in *United States* v. *65 Casks of Liquid Extracts* (D.C.), 170 Fed. 449, affirmed in 175 Fed. 1022, 99 C.C.A. 667. The libel does not show that the articles seized were transported for sale. It does not show whether the articles were shipped by

some one in Illinois to himself at Cincinnati, or to some other person, or how or from whom the Gerke Brewing Company obtained possession or acquired ownership, if such it has.

There is an averment in the third paragraph of the libel that the packages are "owned by or in the possession of said Gerke Brewing Company, doing business as aforesaid, for the purpose of being used and manufactured, sold and consumed as food." The closing language of the quoted passage is somewhat ambiguous, but giving it the construction most favorable to the Government—that the brewing company's purpose is to sell it for consumption as food—I do not see how the otherwise defective nature of the libel is helped out.

In view of the conclusions above reached, it is perhaps unnecessary to rule on the contention that there should be a specific averment that the percentage of ash is greater than that found in standard climax sugar, or as to whether or not the court must take notice of the standard fixed by the circular issued by the Secretary of Agriculture. The fact that there is a doubt as to the court's duty in that respect will suggest an averment in future libels that will obviate the objection urged. The exceptions and demurrer are sustained. Exceptions may be noted.

The district attorney disputes the right of the Corn Products Refining Company to interplead or file a brief in the case unless further evidence is offered that it is a party in interest or that it is the bona fide owner of the packages of sugar which have been seized. As Judge Thompson permitted the company to answer, and subsequently another order was granted permitting the answer to be withdrawn and the exceptions and demurrer to be filed, to which latter the district attorney assented, the objection comes too late.

The exceptions and demurrer are ruled on to the extent above named. Several of them were waived by the defendant.

UNITED STATES v. J. LINDSAY WELLS CO.

(District Court, W.D. Tennessee, Oct. 22, 1910)

186 Fed. 248; N.J. No. 794

Information charging violation of section 2 of the Food and Drugs Act. Motion to quash denied. Plea of guilty.

On or about March 23, 1909, the J. Lindsay Wells Company, a corporation of Memphis, Tenn., shipped from the State of Tennessee into the State of Indiana a consignment of cottonseed meal. Samples from this shipment were procured and examined by the Bureau of Chemistry, United States Department of Agriculture, and the product was found to be a mixture of cottonseed meal and cottonseed hulls. As it appeared from the above examination and report thereon that the product was adulterated and misbranded, within the meaning of the Food and Drugs Act of June 30, 1906, the Secretary of Agriculture afforded the said J. Lindsay Wells Company, Incorporated, and the party from whom the samples were procured, opportunities for hearings. As it appeared at the hearings held that the shipment was made in violation of the act, the Secretary of Agriculture reported the facts to the Attorney General, with a statement of the evidence upon which to base a prosecution.

In due course a criminal information was filed in the District Court of the United States for the Western District of Tennessee against the said J. Lindsay Wells Company, Incorporated, charging the above shipment, and alleging that

the product so shipped was adulterated, in that a substance, to wit, cottonseed hulls, had been mixed and packed with the said cottonseed meal, so as to reduce, lower, and injuriously affect its quality, and in that said cottonseed hulls had been substituted in part for the said cottonseed meal. The information also alleged that the product so shipped was misbranded, in that said article was offered for sale and sold upon the representation that the same was choice cottonseed meal, thereby causing the purchaser to believe the same to be pure cottonseed meal, whereas in truth and in fact the same was a mixture of cottonseed meal and cottonseed hulls, and that the statement that said article was cottonseed meal was false and untrue.

Whereupon the said J. Lindsay Wells Company, Incorporated, moved to quash the above information upon the ground that the same violated that part of the fifth amendment of the Constitution of the United States which provides that no person shall be held to answer for a capital or otherwise infamous crime, unless upon presentment or indictment of a grand jury.

McCall, *District Judge.* This is an action brought by the United States against J. Lindsay Wells Company under section 2 of the act of June 30, 1906, on the charge of shipping from Memphis, in the State of Tennessee, to Attica, in the State of Indiana, 30 tons of cottonseed meal, which article of food at Memphis, Tenn., was adulterated. The suit is brought upon information made by the United States district attorney. The defendants move to quash the information, upon the ground that the same violates that part of the fifth amendment of the Constitution of the United States which provides that no person shall be held to answer for a capital or otherwise infamous crime, unless upon presentment or indictment of a grand jury.

The question presented is whether or not the offense alleged to have been committed by the defendant is a capital or otherwise infamous crime? It is, of course, not a capital crime, and, if it is otherwise an infamous crime, the motion to quash must be allowed, since, under the authorities, it is well settled, that a prosecution cannot be maintained upon information made by the district attorney for such a crime. *Ex parte Wilson*, 114 U.S. 417, 5 Sup. Ct. 935, 29 L.Ed. 89.

As I understand the authorities, they hold that any offense, the punishment for which may be imprisonment in the penitentiary, with or without hard labor, is an infamous crime. *Mackin* v. *United States*, 117 U.S. 348, 6 Sup. Ct. 777, 29 L.Ed. 909; *Parkinson* v. *United States*, 121 U.S. 281, 7 Sup. Ct. 896, 30 L.Ed. 959; *In re Claasen*, 140 U.S. 204, 11 Sup. Ct. 735, 35 L.Ed. 409. On an examination of the act under which this suit is instituted, I find that the punishment therefor is a fine not exceeding $200 for the first offense, and, upon conviction for each subsequent offense, not exceeding $300, or by imprisonment not exceeding one year, or both, in the discretion of the court.

Under the authorities above cited, it is held that a defendant cannot be imprisoned in the penitentiary, unless the time for which he is sentenced shall be more than one year. Under the act of June 30, 1906, the imprisonment cannot exceed one year. Therefore the court has no power to sentence the defendant to imprisonment to the penitentiary, because that would be in excess of the maximum time which the court is authorized to imprison a party for such offense. As I understand the authorities, they hold in substance that, where the court may imprison the accused for more than one year, the confinement must be in the penitentiary, and that fact, with or with-

out labor, makes the offense for the commission of which the accused is imprisoned an infamous crime. Upon the other hand, where the period of imprisonment is for one year or less, the court must imprison in a county jail, and in such case the crime is not infamous. If the court may imprison for more than one year, the crime is infamous. If for a year or less, it is not infamous.

Under section 1022 of the Revised Statutes, it is provided that all crimes and offenses committed against the provisions of chapter 7, entitled " Crimes ", which are not infamous, may be prosecuted either by indictment or by information filed by the district attorney. It appearing from the foregoing that the crime for which the defendant is charged is not infamous, I am of the opinion that this suit can be maintained upon the information filed, and the motion to quash will be disallowed.

UNITED STATES v. HOBART ET AL.

(Circuit Court, S.D. New York, Nov. 15, 1910)

N.J. No. 846

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of "Guilty without criminal intent." Motion for new trial and in arrest of judgment overruled.

HAZEL, *District Judge* (charge to the jury). The United States attorney has filed an information in this court charging the defendants, a partnership doing business in the city of New York, with committing a misdeameanor, in that they are claimed to have violated the so-called Pure Food and Drug Act, which was passed by Congress in June, 1906. The case does not lack in importance, for it is the undoubted duty of the Government and of the officials of the Government to carry a law, solemnly enacted by Congress, into effect, and to bring the offenders of the statute before the bar of justice.

The case is not unimportant from the viewpoint of the defendants. Although the penalty for the first offense may not be regarded as large in comparison, yet it is to be borne in mind that the business rectitude of the defendants is challenged by the information and by evidence in support thereof and which is about to be submitted to you for your determination.

The information contains two counts, and it is for you gentlemen to say whether the Government has established both counts, or either of them, beyond a reasonable doubt, and it is entirely within your province to find the defendants guilty as charged; to find them guilty on one count only, or to find them not guilty.

The information does not charge the defendants with adulterating this product. They are not charged with admixing with molasses the ingredient commercial glucose, but they are charged with misbranding the merchandise that was sold and delivered to the individuals named in the counts of the information and with selling and delivering to them molasses which in truth and in fact was not such, but which was a compound of molasses and glucose. I think that you should understand the specific charge contained in the indictment,

and therefore I quote from it: The defendants are charged "with consigning to Heyer Bros. a certain article of food which was shipped as aforesaid and was misbranded, in that it was in imitation of and offered for sale under the distinctive name of another article, to wit, molasses, whereas in truth and in fact said food shipped as aforesaid was not molasses, but was a compound of molasses and glucose." This specific allegation is also substantially contained in count 2.

The Pure Food and Drugs Act was passed by Congress to remedy a preexisting evil. It had been called to the attention of Congress that foods sold to the public were adulterated and intermixed with deleterious substances and hence a law was passed forbidding such acts; and hence a law was passed even going further, namely, prohibiting the misbranding of merchandise and prohibiting attaching thereto a mark or indication which held it out to be an article different from what it actually was. The preexisting evil produced by adulterated or misbranded articles of food or drugs, could not be overestimated, and hence I again admonish you that the evil that Congress designed to remove and obliterate and eradicate was an important one and touching the welfare and the comfort of the people.

In this case it is to be established in the first instance that this was an interstate commerce shipment. This court would not have jurisdiction of the offense if it were not an interstate shipment; and the evidence is undisputed in this case that the shipment initiated in the city of New York and that it was delivered in a foreign State, the State of North Carolina; so that you need not take up any time to consider any testimony upon the subject as to whether this was an interstate shipment or not. At the outset of the trial you will remember it was contended that as to the second count the shipment was not interstate, but that question has been waived by the defendant and therefore you may reach the conclusion that the evidence in the case is sufficient to justify your holding that this was an interstate shipment—that both shipments were interstate.

The second element which the Government is required to prove beyond a reasonable doubt is that glucose was in fact introduced into the molasses before or at the time of the shipment, and that the molasses was misbranded in that it was a compound of molasses and glucose.

And the third element is that the defendants, or one of them, or their agent, acting within the scope of his authority, shipped the molasses, in interstate commerce.

That the molasses contained commercial glucose as distinguished from natural glucose is stoutly denied by the defendants and the defendants contend that if you should find that this molasses contained commercial glucose, and if it was admixed with or added to molasses by an agent of the defendants, that such agent was acting without the scope of his authority.

I think before discussing the evidence given on both sides at great length it will not be inappropriate for me to more particularly call your attention to the act under which this information was filed. The act, defining the word "misbranded" substantially says that the term shall apply to a package or label containing a statement, design, or device regarding such article or its ingredients which shall be

false or misleading in any particular; and moreover that an article of food or drug shall be deemed to be misbranded when it contains a false label, print or inscription as to the State, Territory, or country in which it is manufactured or produced.

The act then specially provides—and this provision more nearly applies to the facts as claimed by the Government in this case—that food is misbranded if it be an imitation of or offered for sale under the distinctive name of another article; or if it be labeled or branded so as to deceive or mislead the purchaser; and when it is a mixture or compound it must be branded by its distinctive name, and it cannot be legally branded as an imitation of some other article and offered for sale.

The Pure Food and Drugs Act also provides that when articles of food are labeled and marked "compound" or "blend" the term "blend" shall be understood to mean a mixture of like substances, and uses these words in that connection; "not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only."

Of course manufacturers are not obliged to disclose their trade secrets, in the case of proprietary foods which contain no deleterious or harmful ingredients.

The act contains another provision, that after the judgment of the court notice shall be given by publication in such manner as may be prescribed by the rules and regulations referred to in section 3 of the act.

These, in substance, gentlemen, are the same provisions of the act of Congress under which this information was filed. The Government claims that the information is supported by the evidence. It claims that the first shipment occurred on February 28, 1908, and it was from New York City, and then and there consigned to Heyer Brothers and that the consignment was marked "Heyer Bros., No. 1 Fancy." The word "molasses" was not indicated on the consignment, as I remember the testimony, but it is practically conceded on both sides and certainly as I believe it is conceded by the defendant, that it was understood that this indication "No. 1 Fancy" meant no. 1 fancy molasses.

The witness McIntyre, a Government inspector, came to the business place of the consignee sometime thereafter and took from one of the barrels a sample of this molasses which had been delivered by the defendant. He sealed it in a bottle or jar, placing his initials thereupon and forwarded it to the Department of Agriculture where it remained a certain period of time and was then forwarded to the chemist who gave testimony with relation to that count. The chemist, Mr. Seeker, testified that the molasses was contained in a jar or bottle, that it had a seal upon it, to which I have already drawn your attention, and that that seal was intact and the bottle securely closed and the Government actually believes, from that testimony, that the sample had not been disturbed by any one; that the commodity that was analyzed was precisely the commodity that was taken from the barrel by the inspector. Mr. Seeker testified that he made a chemical analysis of this molasses, that he made two tests, a polariscope test and an erythrodextrine test, and that there was present in the molasses commercial glucose to the extent of 12.8 per-

cent. He testified that the fact that the molasses for a period of time was kept in a warm climate or in a warm place, or that it contained organic matter, made no difference with the accuracy of his test.

Count 2 relates to a shipment of five barrels of molasses from New York to Newbern, North Carolina, to Armstrong & Co. The witness Mr. Armstrong testified that he ordered molasses and that it came to him in due course of time and was labeled or had a designation upon the barrels of the letters "W. I." and a butterfly; and it is practically conceded that these initials meant or were understood to mean West India Butterfly Molasses. The witness testified that he ordered molasses and not an admixture of the article glucose.

The Government witness Woodman testified that these bottles came to him from the samples that had been collected by the inspector. He also gave testimony that the boxes of jars were accurately sealed and that as a result of the analysis which he made he found the commodity contained commercial glucose amounting to 25 percent and the balance was molasses. He further testified that natural glucose is different from commercial glucose; and such was also the testimony of the other expert witness who testified with relation to the first count.

Now this testimony, gentlemen, demands your very careful consideration. No witness has been produced by the Government to show that these defendants admixed into this molasses the ingredient glucose. There is no direct evidence tending to show that this offense was committed by the defendant except such as may be ordinarily presumed from the facts and circumstances; but it seems to me, before the testimony of these expert witnesses is set aside as entitled to no weight, before it is discredited, it should receive your careful consideration and should be most carefully scrutinized. In the acceptance of expert testimony or opinion testimony we are often required to accept the testimony of men who are learned in a particular science, or who are skilled in a particular avocation. A physician is called because of his skill and because of his acumen in matters of medical science and surgery and because few of us are doctors or surgeons. A carpenter is called because he may have some peculiar knowledge with relation to building. And so it is with a chemist; a chemist is called to give opinion testimony with a view of disclosing to us the mysteries of chemistry and with a view of stating to us what his opinion may be with reference to a certain state of facts, or with reference to certain researches that he may have made or certain tests that were made by him or in his presence. The credibility of such testimony, however, is entirely for your consideration. You may set it aside as entitled to no weight. But, gentlemen, if you believe from the testimony as it was given in your presence and from the appearances of the witness upon the stand, that it was impartially given, that the chemists were disinterested, then I charge you that their evidence is of the greatest value and entitled to the greatest consideration. On the other hand, if you believe, as is suggested by the defendant that it was biased, narrow, and prejudiced, then manifestly it has little value. The testimony in either event is not conclusive upon you. It is simply given for the purpose of enlightening you as to the true situation.

The defendants have given testimony in their own behalf and they deny mixing molasses with glucose. They deny misbranding; and testimony was given by Mr. Hobart and by Mr. Inslee that the shipment in fact was pure and wholesome; that it was pure molasses and was branded as molasses. Furthermore, they testify that the samples in evidence are pure molasses and contain no commercial glucose; that if commercial glucose is contained in the samples it is due to chemical reaction since the shipment was initiated.

You will perceive, gentlemen, that this testimony, which is based on the skill and experience of the defendants, who have been engaged in this business for a number of years, is directly opposed to the testimony of the Government; so that you are to determine where the truth lies. Do you believe the testimony of the chemists, who have stated in the one case that 12 percent of glucose was found in the sample submitted to them, and that in the other case 25 percent of glucose was contained in the sample submitted to them? If so, the Government has proved its case and the defendant is guilty as charged in the information. Of course in reaching such a conclusion you should take into consideration the inferences that are drawn by the defendants, namely, that these samples were not fair samples; and in that connection I also call your attention to the testimony of the chemists that they are abundantly able to reach an accurate analysis or at least practically an accurate analysis. The witness Christianson testified that the molasses was bought from dealers in the West Indies and Cuba and elsewhere; that defendants' exhibits A and B were tested by him, and in his judgment contained pure molasses. He is not a chemist, but he claims to be able to testify upon the subject from the long practical experience that he has had in this business, and he claims to be able to tell you that these samples did not contain any glucose, from merely tasting the samples.

Evidence is also given that at the time this molasses was received by the defendant it was submitted to a polariscope test and that that test was to ascertain the presence of sucrose, and as I understand the testimony, no direct examination was made to ascertain, with respect to the molasses from foreign countries, as to whether it contained glucose or not.

I do not think I need to discuss the evidence any longer. It is highly technical. You will remember the salient points of it. I have endeavored to direct your attention to it, but you are not to take my opinion or accept my suggestion with reference to any item of fact.

In the courts of the United States the presiding justice may state to the jury what his opinion may be in reference to testimony, in reference to the facts, as to whether a witness in his judgment is reliable or not; yet it seems to me that I ought not to do that in this case. The witnesses on the part of the Government as well as the witnesses on the part of the defendants have given testimony in your presence, and I believe that you are as able as I am, perhaps more so, to judge of the qualifications of these various witnesses and what weight should be attached to them.

The next question which it is important to dwell upon is whether in the absence of knowledge or intent to violate a statute these de-

fendants should be convicted as charged. On that subject I charge you that in most offenses of a criminal nature it is essential that it be shown that the accused intended to commit the offense charged. A person charged with crime ought not to be convicted if it appears that the offense was due to mistake or inadvertence, that there was an absence of intent to violate a statute. But is this such a case? Ordinarily the intent is inferred from the facts and circumstances and follows as a necessary consequence of the act; therefore if these defendants knew—and they are presumed to have known—what law Congress had passed, they are presumed to have known that it was a violation of the statute to misbrand merchandise that was shipped interstate. If knowing that fact it contained commercial glucose; if knowing that fact the commodity was not pure molasses, the commodity which had been ordered, then in my judgment the defendant must be held responsible under this act; for, in cases of this class the statute in effect provides that a dealer may defend on the ground of the absence of knowledge on his part when the article of food has been bought from a manufacturer residing in the United States, and when a guarantee was taken by him from such manufacturer that the article complied with the requirements of the act. I do not think that it is necessary for the Government to prove that the defendants, the shippers or dealers had actual knowledge of the contents of the barrels of molasses, or that it was misbranded. The pure food and drug act does not provide that shippers or dealers must intentionally violate its provisions, or that they must know the contents or character of the packages or barrels in which the goods are contained before they may be found guilty of misbranding. The only provision approaching the question of intent or guilty knowledge is the one already mentioned regarding a guarantee from the manufacturer living in the United States to the dealer that the merchandise is of the character specified. Hence the shipper must be presumed to have knowledge of the character of the shipments and that the manufacturer lived in a foreign country is immaterial. It is quite evident, gentlemen, that it would be comparatively easy for a dealer or shipper to escape punishment under the provisions of the act if he could be heard to claim that he had no knowledge of the misbranding. The intent follows from the act. In my judgment the true construction of this law is that the dealer or manufacturer sells the commodity at his peril, and he is bound to understand the ingredients of the product. The defendants in this case were bound to know whether the shipment was pure molasses, as that was understood in the trade, or whether it was a compound of molasses and glucose.

Testimony was given by the witness Hobart that just prior to the time when the act in question went into effect he instructed his superintendent Inslee not to ship goods unless they were properly branded as provided by the pure food law; that compounds should be properly branded; and the superintendent Inslee testified that he received instructions to obey the statute and not misbrand the goods but to ship them for what they actually were; that if compounds consisting of molasses and glucose were to be shipped they should be branded properly. Such were the instructions given by Mr. Hobart, and there is no evidence here denying that they were given.

But, gentlemen, there is no evidence here tending to show that any specific instructions were given with reference to the merchandise in question, and I think I will charge you as a general proposition of law that the defendants must be liable if the product was shipped interstate by their superintendent, and if he was authorized to run the factory or plant, and sell and deliver the product in the usual course of business, and if the testimony establishes that the superintendent had charge of the Hoboken plant and of the shipping of orders forwarded to him from New York by the defendants, and if you believe from the evidence that in the shipment of the merchandise specified in counts 1 and 2, he acted within the scope of his authority, and if you believe that in fact the shipment was misbranded, that is, if it was an imitation of molasses and known under and by the name of molasses compounds, or a compound of molasses and glucose, then the defendants as principals are liable for the acts of their agents. The act, section 12, specifically provides that the principal shall be liable for the failure of an agent employed by him when acting within the scope of his employment, that his act or failure shall be deemed the act or failure of the employer. As to whether the superintendent and manager Inslee acted in the scope of his employment the Government has given testimony tending to show that he was in charge of the factory at Hoboken, that orders were usually sent to him from New York and that he filled them, that he had authority to fill them; he made the shipments and he supervised and managed the plant. If you believe such testimony, and as I recall it is not disputed, you are justified in reaching the conclusion that this instruction which is claimed to have been given to the superintendent does not relieve the defendants from responsibility.

Gentlemen, this is a criminal case and I am obliged under the rules of law to instruct you that you cannot find the accused guilty unless the Government has satisfied you upon the various elements required to be proven by it and to which I have already called your attention. The Government has the burden of proof and a mere preponderance of evidence is not sufficient; you must be satisfied beyond a reasonable doubt, not only that the shipment was interstate, but that the percentage of glucose, or approximately the percentage of glucose, was found in the samples that have been submitted to the chemists, and that such samples in fact were taken from the merchandise sold by the defendants, and that such samples had not been disturbed or admixed by any other person.

Something has been said with respect to the good character of the accused. In all criminal trials the good character of the accused is presumed, and it has been held to be a proper charge to a jury to say that this character very often will generate a reasonable doubt. The defendants in this case are entitled to the presumption of innocence, until their guilt has been established by the Government beyond a reasonable doubt; but by the term "reasonable doubt" is not meant a capricious or fanciful doubt. If you have such a doubt it should be based on testimony; it should be based on the showing of the Government, namely, that you believe such showing, that the testimony is insufficient, that it is unreliable, that the chemists ought not to be believed because their tests were improper or not sufficiently accurate. If a reasonable doubt arises in your mind with

reference to any such matters which are salient and material in the case you should acquit the defendants. The facts of the case must be consistent with the innocence of the defendants and consistent with their guilt. You should not base your verdict in favor of the Government and against the defendants on mere surmise and conjecture. If they are guilty of the offense, as I have already had occasion to say, their guilt should be established upon the record beyond a reasonable doubt.

Take the case.

In due course the jury returned the following verdict: "Guilty on both counts without criminal intent." Thereupon counsel for defendants moved to set aside the above verdict, and for a new trial, and arrest of judgment, urging in support of said motion the following grounds:

(1) Because the jury has affirmatively found the element of criminal intent to be lacking.

(2) For the reason that a suspension of sentence is in order here for each of the following grounds:

(a) Because the jury has expressly negatived criminal intent.

(b) Because it appears that the Government's last witness himself, at its request, tasted the molasses involved and reported that it did not contain glucose, to judge by taste, though he said that where as much as 25 percent of glucose was present you could tell it by taste.

(c) Because express written instructions from the defendants to their employees governed these two specific shipments, and were ignored by the court in its charge to the jury; the written shipping orders referring to the lot numbers of molasses which were to be used, and excluding the numbers indicating glucose or glucose compounds.

(d) Because the glucose, if any at all, was probably in at the time of the importation, or before the pure food law went into effect; and we could get no guarantee because of the non-residence of the persons from whom we bought the goods in the foreign country, and this particular importation took place before the Pure Food Law went into effect with its specific provisions as to Government analysis in the custom house for importations subsequent to that date.

(e) Because the fact that we went to trial is no reason for increasing the penalty in view of the uncertainties of the law and its bona fides.

The court overruled the foregoing motion.

UNITED STATES v. 100 PACKAGES ANTIKAMNIA TABLETS

(Supreme Court, District of Columbia, Nov. 18, 1910)

N.J. No. 1056

Libel under section 10 of the Food and Drugs Act. Exceptions to libel sustained.[28]

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[28] Judgment affirmed by Court of Appeals, *United States* v. *Antikamnia Chemical Co.*, p. 260, *post*. Judgment of Court of Appeals reversed by U.S. Supreme Court, *United States* v. *Antikamnia Chemical Co.*, p. 552, *post*.

CLABAUGH, *Chief Justice.* Now, gentlemen, in accordance with the views stated to counsel here, the opinion of the court is sought purely as to the question whether or not, under this Food and Drugs Act, it is essential, where any of the drugs, and more particularly in this case, acetanilid, is used—whether it is essential to place upon the label not only the name of the derivative of the parent drug, but also a further statement upon the label that it is the derivative of the parent drug. That is really the question at issue. In other words, in this case the label bore the name of this acetphenetidin, and was labeled correctly, so far as the amount of it contained in the package is concerned, the only question being whether it ought further to have stated that it is the derivative of acetanilid, or words to that effect, and the question therefore arises whether or not the label in the case contains all that is sufficient under this act.

Now in this case the Government has libeled the various packages, upon the theory that the law requires, in conjunction with the regulations of the three Secretaries, the further statement of the fact that it is the derivative of this acetanilid.

Now a good deal of the argument in this case was spent upon the question as to whether or not the act in question was a penal statute, or merely a remedial one; that is, was it a quasi-criminal act, or purely a remedial act?

The only question here, in my judgment, is this: Does the act under which these proceedings have been taken, require the statement, where the name of the derivative is given—does that act require the further statement placed upon the label that it is the derivative of some given drug mentioned in this given section of the act; in this case, of acetanilid? Now the act specifies these various drugs that are mentioned in this particular section, and to read that portion of it that is material, it seems to me, the law says:

> Second: * * * or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol * * * or acetanilid or any derivative, or preparation of any such substance contained therein.

Now the act further provides that these three Secretaries shall have the right to make all needful and necessary regulations for the purpose of carrying into effect this act. Now, in that view of the case, the respective Secretaries mentioned in the act did provide regulations, which regulations said, among other things, that it was essential for the manufacturers to place upon the label the derivative, and to show not only that it was a derivative, but shall further add to that the drug from which it is a derivative; in other words, the parent thereof. It is within the scope of the authority of these Secretaries, therefore, to add regulations compelling that addition, or is that legislation upon their part, and therefore beyond the scope of their right or authority?

Now, I have spent a good deal of time, gentlemen, in considering this case. Everyone, I suppose, at least the general public is disposed to regard this act as of great benefit and use to the public, and it ought to be upheld in every particular, if it is possible so to do. Now, briefly stating what is conceded in the brief of the Government, and fairly conceded, and to which there can be no dispute, and that is, that the Secretaries cannot add anything to the law, that is, make

an addition to an act that has already made its provisions; they cannot provide anything that will become an additional law in the construction of that act. So that it is a pretty narrow question, and one that, it seems to me, is not so much a question of authority, as purely a question of interpretation of this act.

Now conceding, for the purposes of the statement of this case, that this is not a quasi-criminal statute, but is purely a remedial one. If that be true, then it is the duty of the court to so construe it as will give effect to the purposes and objects for which it was passed, and I have no doubt that the Secretaries could, with the same propriety, make regulations that would the more effectually carry into execution the purpose and intent of the law makers. That being so, what is the fair construction of the act, and does it not need interpretation? Now, the right to interpret an act in conformity with the purposes and object of that act simply means that where the act itself is not perfectly clear, then they can give such an interpretation to it as will carry out and gratify the purposes of its passage.

An interpretation does not, as I understand it, mean that you can add anything to language which is plain. If there is anything about the language of a statute which annuls the purposes of that statute, then you have the right to interpret according to its purposes, if there be the slightest doubt about the words of the act; but if the act is plain, and the words present no difficulty, then, it seems to me, you cannot interpret or put something else in, because, perhaps, it would have been plainer or broader in its effect than the simple words of the act. I do not mean that you have got to indulge in the interpretation of the letter of the law, but the spirit, of course; otherwise we would have a very exceedingly narrow condition concerning the law. We must always interpret by the spirit of the law. What does this law say? Reading it again: "Or, second, if the package fail to bear a statement on the label of the quantity or proportion of any acetanilid, or any derivative or preparation of any such substances contained therein." Now, if it fails to state that it is acetanilid, if it fails to state that it is a derivative, that is, the name of anything derived from acetanilid, if it fails to state what the name of that derivative is, then it brings it within the penalties of the act. Now, as I understand it, this label that they have on the packages states the name of the derivative—acetphenetidin is the name of the derivative which is stated upon there—and the amount that is contained in the package is likewise stated. Now, what is to suggest that it should go any further? It is argued that the very title of the act implied the demand of something else, and that title is, from the libel by the Government, "An act for preventing the manufacture, sale, or transportation of adulterated, or misbranded, or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating the traffic therein, and for other purposes." Now, is it for the purpose of preventing the manufacture, sale, etc.?

Now that is the purpose of it. It is to protect the community from being imposed upon by packages having one brand, when, indeed, the contents of them are entirely different from the character of brand that may be imposed upon anybody. It is suggested that it is likewise to prevent the drug habit, as it has been described in the argument, and it is to be gathered from the argument, as I understand,

when the act was passed; so that at all events it is done for the protection of society, for the protection of the people, and when we come to the consideration of the act itself, we have the law stating that you shall truly brand, you shall truly label any article that you are selling. Now they are selling this acetphenetidin, and this package is branded as that. Now why, or what there is in the act which would say, or which would require to be stated that this acetphenetidin is the derivative of acetanilid, is certainly not apparent upon the face of either the title or the reasons for the act. When the court cannot assume that the people generally are any more familiar with acetanilid than they would be with this acetphenetidin, how can the court say that, as a matter of law, one may be just as familiar with the statute as the other. The court cannot give its own personal views on the subject, that it knew more about this acetanilid than it did of these derivatives. The purpose of the act is to state to the person who makes this drug that you must truly state to the people what it is. Now how can they be informed, unless the court takes judicial knowledge of something that it seems to me would be certainly doubtful, to say the least, that the people at large are any more familiar with one thing than the other? Furthermore, I don't see that it adds to it one way or the other, by labeling in this way, as it is suggested.

It would be very much more safe to a community, it seems to me, if the Secretaries who have the right to pass regulations for the carrying of this law into effect, had passed an act which said: Wherever the derivative of acetanilid is to be used—either acetanilid or its derivative—either the manufacturer shall place upon the label that it is a poisonous drug, or a dangerous drug, and that it should not be taken in doses of over five grains, say. Now that would effect the purposes of this act in a proper way; it would advise the people at large that acetphenetidin is a dangerous drug; that it ought not to be taken in doses of over five grains, say, for illustration. That would give notice to the people that it was a dangerous drug, but would it be contended that under this act the Secretaries could force the placing of such a statement upon the label? Surely that would not be for the purpose of carrying into effect an act, but it would be adding legislation to the act, because it would be requiring something that the act did not require. For some reason or the other I would assume that the druggist or manufacturer who put these things up did not feel compelled to put these things on the label. It would be a good thing to protect the people, but unless some such suggestion was made in the act, how can the Secretaries, with the authority only to suggest regulations as would carry into effect the act—how can they undertake to say that in addition to what the law says, that he place upon the label from what parent drug it is derived? If they can say that they can also say: You must put upon that label the statement of the character of the drug. That would manifestly be a positive addition to the law which requires the name of the drug to be placed upon the label, though such action on their part would be very much more effective to advise the people that it is a dangerous drug, than merely to say it is a derivative of acetanilid.

Now, when this case was argued—and we are taking the whole argument together—it occurred to me that it was very similar to that

decided by the Supreme Court of the United States in 166 U.S., in respect to the importation of stallions. Here, under the act, they were authorized to bring into this country from some place abroad, free of duty, any stallion, if it was for breeding purposes. That was the act. What was the reason of that? The reason was that it would improve the stock in this country. It could have had no other reason. Here you are allowed to bring foreign-bred stallions into this country for breeding purposes, and the only reason for that would have been because the foreign-bred stallion was supposed to be better, and would improve the breed of horses in this country. I cannot imagine any other reason. It was not certainly because we wanted more. That would be a useless thing, because we certainly had all of the character of the horse that we needed for breeding purposes, but it was manifestly for the purpose of improving the breed of horse in this country. Now, to carry out that purpose, the Secretary of the Treasury says: Here, inasmuch as this act is passed for the purpose of improving the breed of horse in this country, why we will, in accordance with our rights, make any necessary regulations to carry into effect that statute; we will pass a regulation that before you can bring him in, you must show that the stallion is of superior breed, and they refused to permit a stallion to be brought in until it was shown that it was of a superior character or breed of horse. Now, they refused, therefore, when the party to that cause sought to have this horse brought in without the payment of any duty. The Secretary says no, you have not shown him to be a superior breed, and the result was that it went to the Supreme Court of the United States, and the court says: The Secretary of the Treasury had nothing to do with it. The law says that any stallion could be brought in for breeding purposes; it did not say whether it should be superior or not. And consequently the court held that the Secretary had exceeded his rights; that he had added something to the law.

I have read the other cases, but that case seems to me to put into a nutshell the point of view that I am trying to impress here. I have read all the authorities suggested and some others, but it seems to me that it comes back to the simple question: Did this act need any interpretation, or was it perfectly plain, and if it needed such interpretation, could that interpretation add anything that Congress required to be done? Now, this is the way that question seems to be answered here. I don't think the act needs any interpretation, because it is perfectly plain as to what it said, and evidently as to the purposes for which it was said. Then, from the other standpoint, if they have added anything to the law that should be placed upon that label, they have exceeded their rights. Now, in my opinion, they have added something. * * * Therefore, I think the exceptions in this case ought to be sustained.

UNITED STATES v. S. GUMPERT ET AL.

(Circuit Court, S.D. New York, Nov. 21, 1910)

N.J. No. 806

Informations alleging violations of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

HAZEL, *District Judge* (charge to the jury). The United States attorney for this district has filed four informations in this case charging the defendants with violating the Pure Food and Drugs Act, so called. The Pure Food and Drugs Act was passed by Congress in 1906 and was designed to protect the public from the adulterations of food and drugs, furthermore, it was designed to protect the public from being deceived by misbranding or labeling an article differently from what it is in truth and in fact.

Now, in this case, the Government is required to satisfy you beyond a reasonable doubt of the guilt of the accused on all of these various informations and unless it has done so the defendants are entitled to an acquittal. Of course it is entirely within your province to find the defendant guilty of one or more of the alleged offenses contained in the various informations, or all of them, or not guilty of any. The Government is required to show affirmatively that this was an interstate shipment, because the jurisdiction of this court depends upon the claim contained in the information that the alleged misbranded merchandise was shipped or forwarded from the State of New York into another State. There is no controversy in relation to interstate shipment, and hence, you gentlemen doubtless will be able to reach a conclusion upon that subject without difficulty.

The Government is also required to show that the samples taken by the inspectors in each case were submitted to the chemists intact, were not mixed with other ingredients or deleterious substances, and this must be established by the Government to the end that you may be satisfied by the proofs that when the chemists made the analyses that the contents of the container were in fact the articles or goods that had been shipped or sent by the defendants interstate.

It must also appear beyond a reasonable doubt that the chemical analyses were true and correct, and if you are satisfied upon all these points as stated by me, then the defendants are guilty as charged in the information.

Now, we are chiefly concerned with articles named variously Maple Flavo, Extracts of Vanilla, and Extracts of Lemon Peel. With reference to the extract of vanilla the defendants contend that there was no intention on their part to violate the statute, and they leave the impression in my mind and perhaps in yours that they do not dispute the analysis made by the Government's witness Shanley, that the article was adulterated and misbranded as claimed by the Government. But to excuse such misbranding it is claimed on behalf of the defendants that the misbranding was an inadvertence or a mistake; and that is a question submitted to you for your consideration. As this, however, is a criminal case, the Government is required to satisfy you, as I have already intimated, that there was a misbranding, and because the Government is required to satisfy you upon that point it may not be amiss for me to recall to your mind that the witness Shanley, the expert chemist of the Government, testified that the product shipped to the witnesses Young and Heim, this extract of vanilla, was analyzed by him and that he found the samples were imitations of vanilla. He testified, in substance, that he found coumarin and vanillin in the samples submitted to him, and that they were artificially colored with caramel; that

he found there was twice the amount of vanillin in the samples, and that in the genuine vanilla extract there is no coumarin and not as large a percentage of vanillin. This is the evidence that is submitted now for your consideration upon the subject of whether the article that was shipped in interstate was misbranded and as to whether it was admixed with ingredients such as are necessary to produce the pure article. The claim of the Government, of course is, that this vanilla was not an extract of vanilla, and, as I have already indicated to you, that is not seriously controverted by the defendants. The defendants claim that the article was misbranded or mislabeled and that such misbranding or mislabeling was due to a mistake, and of that I shall speak later.

The expert witness Wilson for the Government testified that he made an analysis of the so-called Maple Flavo, and he found that it was chiefly made of cane sugar, glucose, slippery elm and largely colored with caramel, and that the ingredients of caramel were used to imitate the color of maple, and lovage to imitate the Maple Flavo—in fact, it was an imitation of the Maple product. The witness explained that the maple product of the maple tree does not contain the same ingredients as Flavo, and that it contains neither vanillin, caramel, lovage nor slippery elm. The witness Seeker, for the Government, testified that he analyzed the defendants' lemon extract, so-called, and found the article contained no lemon oil; that it was colored with a coloring of lemon peel, and that citral was used by the defendant for flavoring; that citral is obtained from lemon grass; and he further testified that according to the standards fixed by the Association of Chemists and adopted by the Agricultural Department, lemon extract contains a solution of 5 per cent of lemon oil by volume in grain alcohol; that the first analysis of the defendants' product did not disclose oil of lemon. He further testified that extract of lemon peel is the same as an extract of lemon, and gives the same testimony with reference to the absence of terpenes, and that the product was an imitation of lemon extract.

This, gentlemen, is substantially the testimony of the Government, and it remains for you to say as to whether these chemists who testified as you will perceive upon the material point, are entitled to weight and as to whether their testimony is entitled to controlling weight upon the subject in reference to the analyses.

Now, the defendants have given testimony in their own behalf and they deny that they intended to violate the statute, and they undertake to explain various of these transactions to which the information relates. Now, they claim that the term "Maple Flavo" used by them in the sale of their commodity is a distinctive name and the product became generally known by that name and that it became so known prior to the enactment of the Pure Food and Drugs Act. Now, gentlemen, if the term "Maple Flavo" is used to mislead the public or cause it to believe that it was a pure maple product, then I instruct you it was a misbranding. The Government's claim is that the term "Maple Flavo" is false and misleading and that the compound was artificial flavoring. Now, if you find from the evidence that the defendants' designation was false and misleading and calculated to deceive the ordinary purchaser, then the article was misbranded and

the statute applies. Upon this question of whether the name "Maple Flavo" was distinctive, I instruct you that a distinctive name is one ordinarily used to clearly distinguish it or the article to which it is applied from all others, or one which the public might come to generally recognize as meaning something different from any other thing. Now, if you believe from the evidence Maple Flavo by reason of that name used by the defendants so completely distinguished it from the pure maple product as to readily inform the public the difference between it and the genuine maple product, then the defendants should not be convicted on count 1 of the information. In other words, if the defendants' article has been on the market long enough to inform the public generally that it was not a genuine maple product but merely a maple flavo, or imitation of the maple product, then this has an important bearing on the question of whether the public was misled or was deceived by the alleged misbranding. On the other hand, gentlemen, if you are not satisfied by the testimony of the defendants on this point, if you believe that the product has not become generally known to the public as one distinguished from the maple product, and that the word "Flavo" was merely a trade distinction and was used in connection with the word "Maple", and it deceived the public into believing that it was a product containing pure maple, then the defendants are guilty of misbranding. You will bear in mind, gentlemen, that the defendant, Mr. Gumpert, gave testimony generally to show that this article "Maple Flavo" was exhibited by him at various exhibitions here in this city and elsewhere, and moreover it was exhibited in London, and he claims that it became widely known in various States, and so it became a distinctive product from what was ordinarily known by the term maple product. Now, if in that respect he has testified truthfully and you are satisfied by the evidence that his commodity did become distinctive, that it was ordinarily recognized by the public as distinctive, that it was not regarded as purely a maple product, he is entitled to an acquittal. If you believe this was simply a trade distinction used by him for convenience or used by him to beguile the public or lead the public to believe that his commodity really consisted of pure maple, then he is guilty of the count.

Now, as to the lemon extract, which the evidence indicates was sold to Mr. Young, the defendant claims that he used terpeneless lemon oil instead of pure lemon oil. He explained the method of manufacturing this product and claims it to be an extract. The point, however, according to the Government, turns on the requirements of the pure lemon oil, as to pure lemon ingredients of the lemon extract. Expert witnesses for the Government testified that the article was not a lemon extract, as I have already stated, in that it contained no lemon oil; that it was colored with a coloring of lemon peel and citral, and was used as a flavoring; that the true lemon extract is a solution of five percent.

I think, gentlemen, this substantially states or recalls to you the evidence given on behalf of the Government, and substantially all the testimony given on behalf of the defendants to establish the innocence of the company, and there may be and doubtless is other testimony in the case which you ought to consider and which it is

your duty to consider, in order to establish the guilt of the accused or their innocence.

Now, there is another question, however, to which your attention must be directed by the court, and that is the question of intent: As to whether the defendants intentionally committed the offense charged in the information. Now, gentlemen, in most criminal trials it is necessary for the Government to establish beyond reasonable doubt that the accused intended to violate the statute and the person charged with crime should not be convicted if it appears that the offense was due to a mistake or inadvertence—that is to say, absence of intent to violate the statute. Usually in criminal trials the intent is presumed from the facts and circumstances and follows as a necessary consequence of the act, hence if the defendants knew that their product was an imitation of the other and was not a distinctive article, then you may assume the defendants must be held responsible under the act in question. The Pure Food and Drugs Act does not expressly provide that shippers or dealers must knowingly or wilfully violate its provisions, but if, as it is claimed by the defendants, this label was put on inadvertently or by a mistake by employees whom he had hired, and who had not become sufficiently familiar with their duties, it is my opinion then, gentlemen, that he ought not to be held guilty of these two counts. On the other hand, if it is your opinion that this claim made at this time is merely a subterfuge, that the article in fact was misbranded and that it is now claimed to have been a mistake, in bad faith, in order to escape liability under the statute, then manifestly you will give little heed to the claim of mistake or inadvertence. Of course, if a dealer in a commodity of this character is to escape punishment, if persons are to be permitted to misbrand their goods and send them into interstate commerce and then may be heard to say that they did not intend to violate the statute, if they are not to be held liable as a necessary consequence of their act, this statute which is now before us will not remedy the evils that Congress designed it to remedy by its enactment.

Now, gentlemen, there is another rule of law, which it is my duty to call your attention to, namely, that the defendants cannot be convicted unless the Government has established these essential elements to which I have drawn your attention beyond a reasonable doubt. By that term, however, is not meant a capricious doubt or one that may fancifully rise in your mind. If it exists at all it should be based upon the testimony, namely, that the Government has not satisfied you, that the evidence is not sufficient to justify you to believe that the defendants are guilty as charged. Moreover it would be well for you to bear in mind that the defendants are presumed to be innocent until the contrary is established. This presumption remains with them throughout the trial and follows you into your jury room until you are satisfied that the offenses are established by the Government.

Now take this case with the facts and circumstances and give it such consideration as you can.

Mr. HANSON. May it please the court, at one place in your charge, in referring to the evidence of one of the experts, I understood Your Honor to say that you understood him to testify that citral is not ob-

tained from the lemon but from lemon grass. My recollection is that his testimony was that it was obtained not only from lemons but also from the grass, that it might be obtained from both.

Mr. SMITH. He testified commercially, that the citral sold commercially was obtained from the lemon grass.

The COURT. You will remember the testimony.

Mr. SMITH. I will ask the court to charge the jury that for all first offenses the law only provides that the defendant shall be fined.

The COURT. Yes.

Mr. SMITH. And this, I understand, is the first offense. And I also ask Your Honor to charge the jury the first section of subdivision 4 of the Food and Drug Act wherein it states: "In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names and not an imitation of or offered for sale under the distinctive name of another article"—that is subdivision first—right there, sir [indicating].

The COURT. I intended to read to you this provision of the act, for it bears on one of the defenses interposed by the defendants. The act provides as follows: "In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced." You may consider so much of the statute together with what I have already said on the subject.

You may now retire.

UNITED STATES v. ITALIAN IMPORTING CO.

(Circuit Court, S.D. New York, Dec. 2, 1910)

N.J. No. 832

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

HAZEL, *District Judge* (charge to the jury). This is another case of so-called misbranding of things sent from New York State into another State. It is conceded by the defendant that the article in question is cottonseed oil; that it contains 5 percent of olive oil and 95 per cent of cottonseed oil, and the Government claims that the branding of the article, or branding on the container, the words "Olio Sopraffino Savoia Brand Salad Oil", deceives the public and leads the ordinary purchaser to believe that he is getting olive oil of a foreign production when in fact he is getting a spurious article.

Now, the witness Eginton, who gave testimony for the Government, substantially testified, if I recall his testimony, that salad oil is commonly known in the trade as olive oil, and other witnesses for the Government have testified that by the mere words "Olio Sopraffino Savoia Brand Salad Oil", Italians or persons of Italian birth, believe that olive oil is meant by such designation. Now, the term olive oil has a dictionary definition, and Judge Lacombe not

long since had occasion to examine into a similar question that was presented to him, and upon looking at the dictionaries as to its definitions, found that the Century Dictionary, Worcester's Dictionary and the Encyclopedia all defined salad oil as olive oil. Webster does not give any definition. So that the dictionary definition apparently defines salad oil as synonymous with olive oil. Now while that is conceded to be true by the defendant, it claims nevertheless that this term "salad oil" in connection with cottonseed oil has received a wide and distinctive designation; that the dictionary definition is not universal in that the public generally, the buying public generally, understand by the term superimposed or branded upon this can the real meaning, namely, a production of cottonseed oil and not of genuine olive oil; that in fact the term in trade and commerce has come to mean other oils than salad oil. If you believe this to be the fact, that consumers, the public generally, or persons generally who use this commodity would not be misled by this inscription on the container and that the defendant's commodity is not misbranded by the use of the words "Olio Sopraffino Savoia Brand Salad Oil", and unless you believe the other words and that the style of the can misleads the user, your verdict should be one of acquittal. On the other hand, if you believe from the testimony of the Government and the manner in which this article is put upon the market that people who use this commodity or the public generally are led to believe by reason of the phraseology to which I have already referred and the configuration of the can, that they were actually buying olive oil whereas in truth and in fact they were only receiving cotton oil or a spurious oil, then your verdict should be in favor of the Government. If, therefore, the term "salad oil" in connection with the other words on the can requires a distinctive trade designation, the defendant is not guilty of misbranding. Upon that subject the defendant has called a number of witnesses, one of them at least a dealer in cotton oil, and he testifies that cotton oil is very largely used in this country, and that it is used as a substitute for olive oil. Perhaps this is some evidence that should be taken into consideration, and yet it would seem to have no particular bearing on the question as to whether the public generally, the people who use this commodity, are misled or not. As to whether the public generally is misled by the article must be taken by you from the evidence as to how the user and consumer of the article views the can and inscription, and upon that subject there is some contradictory testimony, and it is for you to determine it.

This is a criminal case. The Government is required to substantiate the charge contained in the information beyond a reasonable doubt, and likewise the defendant is presumed to be innocent until the contrary is established. Of course, you will bear in mind that Congress in enacting the Pure Food and Drugs Act had in mind the protection of the public, and in mind the punishment of persons who misbrand their merchantable or vendable articles.

As I have already indicated, it is not claimed that cotton oil is deleterious or harmful to the health of the user, but persons who go into the market to buy olive oil should not have foisted upon them cotton oil. So that these are matters you should have in mind. I don't think I need say anything further. I think you are thoroughly

familiar with all the facts, and that you will take the matter and return a verdict as your judgment dictates. Perhaps you should bear in mind that the can contains other words than those I have specifically mentioned. On the lower corner is found the word "Compound" in parentheses and the "Winter Pressed Cotton Salad Oil Flavored With Pure Italian Oil." Then with relation to this inscription, added to the one I have already spoken of, the Government claims it is not sufficient and is misleading, and is not a sufficient warning to the purchaser as to the character of the commodity that he is buying.

CHARLES v. UNITED STATES

(Circuit Court of Appeals, Fifth Circuit, Dec. 6, 1910)

183 Fed. 566; N.J. No. 875

Error to the District Court for the Northern District of Texas to review decree of condemnation and forfeiture in libel proceedings under section 10 of the Food and Drugs Act. Decree affirmed.

Before PARDEE, MCCORMICK, and SHELBY, *Circuit Judges.*

By the COURT: In this case the lower court found and decreed on evidence supporting the same, as follows:

On this day came on to be heard the above-entitled and numbered cause, and R. G. Charles appeared as claimant to the property therein libeled, after having given cost bond as required by the statute, and thereupon came the United States of America, libelants, by their district attorney, William H. Atwell, and the claimant in person and by his attorneys, and each and all announced ready for trial.

The matters of law, as well as of fact being submitted to the court without a jury, the court is of the opinion, after having heard the pleading and testimony and being advised as to the law, and having heard the argument of counsel, that the allegations of the libel are true and that the tomatoes libeled are interstate commerce, from the State of Maryland to the State of Texas, intended for food, and that a portion of the two thousand cases of canned tomatoes is unfit for food, in that the same is decomposed and contains putrid matter, and further that the same contains salts of tin, an ingredient deleterious to health; and it further appearing to the court that there are in said two thousand cases of canned tomatoes some good cans and some bad cans, as hereinbefore described; and it further appearing to the court that the said two thousand cases of canned tomatoes were seized by the United States Marshal under the said libel, and from the return of the said officer it appears that the same said two thousand cases of canned tomatoes are still in his possession:

Now, therefore, it is ordered, adjudged, and decreed that the said United States marshal for the Northern District of Texas shall separate the good cans from the bad cans, which said bad cans are herein and hereby condemned, and that after such separation the said marshal shall deliver to the claimant, R. G. Charles, such cans as are good, and shall destroy such cans as are bad.

It is further ordered, adjudged, and decreed that the costs of this proceeding shall be taxed against the claimant, the said R. G. Charles, and that the marshal shall be reimbursed for such expenses in carrying out this judgment as under the law he is entitled to, to be charged and taxed as other costs.

This decree was executed by the marshal and acquiesced in by the claimant who received the good cans and paid the costs.

Now whether we consider the case here to be on writ of error or in the nature of an appeal and all of the assignments of error to be well taken, the only actual relief lies in the matter of costs which, in the

court below, have been voluntary paid by plaintiff in error, and in no case can be adjudged against the United States, *Stanley* v. *Schwalby*, 162 U.S. 255–272; and which in admiralty practice are within the discretion of the Court, from which no appeal lies. *Dubois* v. *Kirk*, 158 U.S. 58–67, and cases cited, unless perhaps in case of gross abuse of discretion.

We therefore decline to consider the questions argued as to the constitutionality of the Pure Food and Drugs Act of June 30, 1906, and as to the construction of that act in regard to whether manufacturers can exempt their goods from seizure thereunder by contract and surety from consignees not to violate the act, and other questions that seem to be academic.

The decree of the district court is affirmed.

UNITED STATES v. F. E. ROSEBROCK & CO.

(Circuit Court, S.D. New York, Dec. 16, 1910)

N.J. No. 825

Information charging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

HOUGH, *District Judge* (charge to the jury). The act of Congress under which this information is brought, and about which so much is heard nowadays, not only in the court room but in the public print, is (in its application to this particular transaction) as follows: The introduction into any State from another State of any article of food which is adulterated is prohibited, and the person who ships such article of food from one State to another (and person means corporation also) shall be guilty of a misdemeanor.

Now, the word "adulterated" is of course one of very wide or rather uncertain meaning, and therefore for the purpose of this act it is defined with great particularity as meaning in the case of food, two things, which are relevant to this trial: An article of food is adulterated if it contains any added poisonous or other added deleterious ingredient which may render such article injurious to health. It is also for the purpose of this act deemed adulterated (although the word cannot be used in that sense ordinarily) if it consists in whole or in any part of a filthy, decomposed, or putrid animal or vegetable substance.

The act then continues, although the rest of this section does not, I think, relate to this case, but it shows the general scope of the act, "or if it consists of any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter." I have read that merely to show the general scope of the legislation in this regard.

What is charged in this information and what is therefore on trial before you, is composed of two parts, that is, the charge is of two parts. The first is, that these eggs which are the subject of investigation contained formaldehyde, and it is said that formaldehyde is a deleterious ingredient which may render an article injurious to health; and it is also charged, irrespective of the formaldehyde, that the eggs themselves were filthy, decomposed, or putrid. Now, prob-

ably there is nothing so difficult in the world as a definition; some time when you have an opportunity, try to make an accurate, full, complete definition of anything, say a coat, and you will find it very hard; but from dictionaries and from the questions put to witnesses, and the study I have given the matter; I charge you that the meaning of the word "putrid" is, that a putrid substance is in such a state of decay as to be fetid or stinking from rottenness; an article which is decomposed is an organic body (as are eggs) reduced or being reduced to a state of dissolution by the processes of a natural decay, and an article which is filthy or dirty, noisome or nasty.

Take up the last word first; after some consideration I have concluded and so instruct you that inasmuch as it is a matter of common knowledge that an egg is not of itself dirty, such an article, namely, an egg, may become putrid or decomposed by the simple process of decay and the resultant or natural causes, but it will not become filthy, unless something be added thereto which renders it dirty, noisome, or nasty.

There is no evidence in this case that the eggs which are the subject of this investigation had become filthy in that sense; therefore you will divide your consideration of this case into two parts: The first inquiry is, was there formaldehyde added to these eggs, and if there was formaldehyde added to these eggs, what is the nature of formaldehyde, both of which are questions of fact. On the other hand, you have the statement of defendant's president, that he is the manager of the business, and that in that business, the defendant so far as he knew, never bought any formaldehyde since it was in operation. On the other hand, you have the statement of the chemist who testified that formaldehyde by well-known scientific tests was found to be present in the product when it was examined in Washington, and that, just like every other question of fact, is for your consideration alone.

If you find there was formaldehyde in this substance, then it appears to me you would be justified in inferring from the evidence on both sides that formaldehyde is what is known as an irritant, that is, it produces such a condition of irritation of the soft linings of the digestive tracts that if taken in sufficient quantity it is injurious to human health. If, therefore, on the first branch of the case you should be of the opinion that these eggs, no matter how bad they were, or how good they were, did contain formaldehyde, and you should be sure of the opinion that formaldehyde has a discoverable odor and was an ingredient so deleterious that it might render the eggs injurious to health, then the Government has maintained that branch of the proposition.

But entirely irrespective, as I have said, of the presence or absence of formaldehyde, the Government's contention is that the eggs were putrid and decomposed. But there was no smell discernible, so you have to come to the formaldehyde proposition, because it is said that formaldehyde disguises smell. But you have further to determine (irrespective of formaldehyde, and irrespective of putridity) whether the decomposition of these eggs had progressed so far that the eggs were in common parlance rotten.

Now, to approach this question, as in an everyday business manner; it is perfectly fair to ascertain what it is, that you would have

asked for, if you wanted to buy the article that Worischeck bought? The trade name by all the evidence appears to be frozen eggs. What are frozen eggs? In the first place, they are broken. Naturally, the inquiry arises why are they broken? In the next place, the contents of the egg shell are strained through a sieve-like article; and the inquiry is perfectly natural; why are they strained? In the next place, the whites and yolks are mixed. Again the inquiry, why? When this product, strained and mixed, was collected, in the month of February, 1910, the trade price at which those articles were sold, was 18 cents per pound, which according to the witnesses who averaged nine eggs to the pound, makes 24 cents per dozen; and tanners' eggs are worth four cents per pound. Why was all this done; what is the effect of the freezing, and what is the effect of the preservative formaldehyde, if there was a necessity for a preservative, and if there was in fact formaldehyde present?

It appears to me, that by all the testimony, the action of both cold and preservative, if there were any, was to arrest decay; further, I think it is perfectly fair to assume by all the testimony, leaving however the question of fact to you, that eggs are frozen, and the commercial article of frozen eggs exists for the purpose of arresting decay in the eggs so frozen.

Now, it is to be remembered that this is an article of food, and if an article of food be in such a state that it be deemed desirable to arrest decay by cold or preservatives or both, then it follows that in that article, (as testified to by both sides and all of the scientific experts here,) when the cold is removed, and the action of the preservative exhausted, decomposition will reassert itself, and progress even more rapidly than before.

The question, therefore, would seem to be perfectly fair, can a person who deals in frozen eggs, or other articles that may be preserved by cold or otherwise from the process of decay, such preservation being temporary only, rely upon instant use? What is reasonably to be expected, if an article is sent forth in trade for sale and distribution; and in the particular case of frozen eggs, what is to be expected in the distribution and sale thereof to bakers, for insertion into such articles of their product as may require eggs?

So, according to my understanding, when those eggs got to Washington on February 12 or two days after they were sold, you are asked to believe by the prosecution that the eggs were then in such condition as would reasonably be expected by any person who put them forth for food consumption, unless they were to be eaten, absolutely frozen.

Now, so far as the scientific knowledge which has been exposed to us, I am frank to say that a great deal of it falls off me, and I strongly suspect that a great deal falls off you, very much like the proverbial water off a duck's back; but I think that this result may be taken to have been shown by the scientists on both sides: There may be bacteria or bacilli without decomposition, but there cannot be decomposition without the presence of bacilli or bacteria. Decomposition when carried far enough will usually result in organic bodies in putrefaction, which is an advanced stage of decomposition, with a fetid odor; the odor of putrefaction can be temporarily concealed by certain chemicals, of which formaldehyde is one.

Now, says the Government, from the quantity and kind of bacteria discernible in this particular shipment of eggs—it is for you to say whether at a time, and in a condition that might reasonably have been expected as the time and condition of consumption—do the eggs show such an advanced stage of decomposition as to bring them under the condemnation of the act? which I interpret, to the best of my knowledge to mean that those eggs were in common parlance rotten eggs.

This, gentlemen, I believe to be the whole case. Returning again to the two propositions, which I have before indicated; if you are of the opinion that formaldehyde was present in the shipment in question, if you are further of the opinion that formaldehyde is a deleterious ingredient, that may render the article containing it injurious to human health, that alone is sufficient to warrant a verdict of guilty. If you are of the opinion that there was no formaldehyde in that article, but if you are of the further opinion that the eggs were decomposed, in the sense of being, in common parlance, rotten, that fact is sufficient to warrant a finding of guilty. If you are of the opinion that there was no formaldehyde, and if you are further of the opinion that the eggs were not in such a stage of decomposition as to entitle them to be termed rotten, then you should bring in a verdict of not guilty.

In this case, no matter whether the person or party proceeded against is a corporation or not, this being a criminal case, it is just as necessary to find the result to which you arrive in favor of the prosecution beyond a reasonable doubt, as in any other case. During other trials in which you jurors of the present panel have been sitting, I have had occasion to define the meaning of the words reasonable doubt; I do not think it is necessary to repeat it. I assume I am talking to intelligent men.

UNITED STATES v. VON BREMEN ET AL.

(Circuit Court, S.D. New York, Dec. 20, 1910)

N.J. No. 1949

Information charging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.[29]

HOUGH, *District Judge* (charge to jury). In taking up this, the last case of our session together, I shall not waste time in speaking to men who have been here before me for nearly three weeks, regarding the burden of proof, presumption of innocence, and nature of reasonable doubt. I take it for granted that you understand those matters. And also at the session now ending probably every one of you has heard enough about the Pure Food Act to approach your Christmas dinner with greater caution, if not greater intelligence; and, therefore, I shall only point out that this indictment comes under what is commonly called the misbranding section of the act.

[29] Judgment reversed, *Von Bremen et al.* v. *United States*, p. 338, *post*.

These defendants sent from New York to Galveston, in interstate shipment, an article which bore on its exterior just these words "Imported Salad Oil, Morel Brand." That article is said by the Government to have been misbranded, which the act declares shall mean (among other things) this: Any article of food, the label on which shall bear any statement regarding such article of food, that is false or misleading in any particular. Such statement constitutes a misbranding of the article of food. Now, the Government in this information asserts that this label by the use of the words "Imported Salad Oil" without more, did contain a statement both false and misleading. False means, of course, untrue. Misleading means calculated to deceive, actually tending to deceive. I do not think either word is at all difficult to understand.

Therefore, of course, the first inquiry is, what does salad oil mean? Now, without any reference to dictionaries (about which a great deal has been said), it seems to me that the evidence adduced here, shows that there was a time not within the memory of some of the younger of us when salad oil meant olive oil, and it did not mean anything else. Therefore, you may assume that the first—original—or prima facie meaning of the words "salad oil" was olive oil.

But that phrase, like any other, may acquire in time, and be used in, a trade, a commercial, a secondary, or a wholly new meaning by the public. Now, that is the inquiry for you, viz: Whether salad oil has acquired a new or secondary meaning.

If so, what is it? The defendants say that the words "salad oil" have now come to mean an oil which serves for salad as indeed does olive oil in some of its preparations, but which is not necessarily olive oil; and in its trade signification in the United States is not olive oil at all, but an oil made from cotton, sesame, peanuts, and perhaps, quite recently, Indian corn. The question is not whether sesame oil and cottonseed oil and peanut oil are good to eat; if we want to eat those articles, we can eat them all we like; the question is merely about this label.

What is the effect as reasonably judged by reasonable men of that particular label, upon the public? Is that label false? That is, is it untrue, according to the understanding of the buying public? Is that label misleading, in the sense that it is calculated to deceive the buying public?

The defense practically asserts that the public has been "educated" (to use the expression of one of the defendants who went upon the stand), though not by sesame oil, which is the oil in this case. You will recall that Mr. McMonnies said the education of the public was a matter of some difficulty, but it has been educated, say the defendants, in the use of the phrase salad oil, and that education has been received from the enormous and long continued use of cotton seed oil for salad; for the purpose of olive oil; and then has been further educated by the smaller use of the other enumerated oils; until the public as represented by a fair and reasonable man recognizes, when such a man asks for "salad oil", and another person hands out to him something labeled "salad oil", that he is getting something which is not olive oil.

The prosecution, on the other hand, asserts that the public has not accepted that knowledge of the dealers. The prosecution says

there was once a considerable portion of the public which consumed olive oil on salads, they called it "salad oil", and knew no other; but when ingenious manufacturers found substitutes for the orignal product of the olive, those dealers called their product salad oil. Now, says the prosecution, that was done in order to conceal the substitution, and incidentally, perhaps, it may be inferred to keep up the prices. I may frankly say that it seems to me admitted as proven that the sale of cheaper oils as salad oils, has long progressed in this country, has attained large dimensions; but it is nevertheless urged upon you by the prosecution that such sales and such trade however large, and however long continued, has always been based upon a misleading of the public, and still is so based.

I shall not recapitulate the evidence to you. You happen to be dealing here with a substance with which we are all more or less familiar. The question is for you as reasonable members of the public, not (so far as known) identified with or particularly interested in either the manufacture and sale or the importation and sale of any brands of oil; it is for you as reasonable members of the body of citizens who are entitled to know so far as labels can tell you what it is you are eating. Are you of the opinion—if such reasonable representatives of the reasonable public have offered to them bottles of oil, or cans of oil—labeled on the outside "Imported Salad Oil", would such reasonable men be misled in this day and generation into believing that when they buy "Imported Salad Oil" they are buying olive oil? If on your oaths you are of the opinion that such men would be so misled, then these defendants are guilty. If you are of the opinion that such reasonable men would not be misled, and would know or ought in reason to know that they were not getting olive oil, but were getting some other kind of oil which was suitable for salad, then the defendants are not guilty.

Mr. BOYESEN. I would like to request Your Honor to charge the jury that the question for their determination is not whether isolated instances of deception of purchasers through their own carelessness or ignorance might occur through the defendants' sale of goods bearing the label in evidence, but whether that label tends to deceive the purchasing or consuming public generally.

The COURT. The question is whether that label tends to deceive a reasonably intelligent member of the public.

Mr. BOYESEN. I except.

Will Your Honor charge the jury that there is no question that pure sesame oil is an oil fit for use as a salad oil and that they are to determine whether it is misbranded when branded "Salad oil". Further, that that question will depend on whether it is or is not, in the language of the statute, "An imitation of or sold under the distinctive name of another article." That they must either find that all oils, except olive oil, fit for use as salad oils are imitations of olive oil, or that the term "salad oil" is the distinctive name of olive oil, in order to convict the defendants.

The COURT. I decline that. The question for the jury is simply whether this particular label is or is not false or misleading. It is not an issue in this case whether sesame oil is pure oil or good oil or a good oil for salads. The question is as to the label, not as to the quality of the oil, although I must say that it seems to have been

admitted here that sesame oil is pure oil and can be used for salads. It seems to me, as far as I recall the evidence, entirely harmless.

Mr. BOYESEN. I except to Your Honor's refusal to charge as requested. I also ask Your Honor to charge the jury that to find the defendants guilty, they must either find that sesame oil is an imitation of olive oil or that the term "salad oil" is its distinctive name.

The COURT. I will not charge just that. The question is whether this label is calculated by its wording or nature to deceive the public into believing that it is getting olive oil.

Mr. BOYESEN. I respectfully except. I also ask Your Honor to charge the jury that they are entitled to consider on the question of the credibility of the Government's witnesses the fact that they are all importers of olive oil, who might naturally be interested in excluding all other oils from the American salad oil market.

The COURT. Well, I think I will charge that. And I will also charge that an equal number of the defendants' witnesses are manufacturers of cottonseed oil.

Mr. BOYESEN. Yes; that is so.

Mr. STEPHENSON. I would request Your Honor to charge that if the jury find that this label is either misleading or false, that they must find the defendants guilty. They don't have to find both.

The COURT. Yes; and I may add to that, that in my opinion the sum and substance of both those words, for the purposes of this case, is the same.

Mr. STEPHENSON. I ask Your Honor further to charge that even if this label were not false or misleading to people in the trade, they must find the defendants guilty if they find it is false or misleading to the ordinary purchaser.

The COURT. I have so charged.

The defendant moved to set aside the verdict on the ground that it was against the weight of evidence and contrary to law, and also moved for a new trial and in arrest of judgment. Motions denied.

UNITED STATES v. UNION PACIFIC TEA CO.

(Circuit Court, S.D. New York, Dec. 20, 1910)

N.J. No. 2700

Information charging violation of section 2 of the Food and Drugs Act. Demurrer to information sustained.

The article in question was labeled:

2 oz. 20¢. 2 Checks Sovereign Orange Flavoring. Manufactured and sold only by the Union Pacific Tea Company, Washington and Laight Sts., New York.

Misbranding of the product was alleged in the information for the reason that it was labeled as set forth above, which label was false and misleading, in that it denominated the article as "Orange Flavoring," whereas in truth and in fact it was a very weak alcoholic solution of orange oil containing only about 20 percent of the amount of orange oil which should be present in an orange extract.

HOUGH, *District Judge.* The sum of the pleading is that an article labeled "Orange Flavoring" is misbranded because it contains no more than about 20 percent "of the amount of orange extract."

It follows that to succeed, the prosecution must show that orange "flavoring" is, in strength at all events, identical with orange "extracts". There may be a trade meaning to those words authorizing the contention, but if so it should be pleaded. As the information stands, nothing is alleged to change the accepted dictionary meaning of the words. By reference to standard works it seems to me plain that while probably every extract (i.e., essence or tincture) is a flavoring substance, not every such substance is an extract. It must be held therefore that identity of "flavoring" and "extract" is not averred, nor is the right to measure a lawfully branded flavoring by lawful extract shown.

The case referred to by demurrant *Nave-McCord, etc., Co.* v. *United States*, 182 Fed. 46) is not opposed to the foregoing, but the points decided seem to me different. Demurrer sustained.

UNITED STATES v. 443 CANS OF FROZEN EGG PRODUCT

(District Court, D. New Jersey, Jan. 4, 1911)

N.J. No. 1027

Libel under section 10 of the Food and Drugs Act. Trial before the court. Decree for claimant.[30]

CROSS, *District Judge* (orally). This is a suit brought by the Government against 443 cans of frozen egg product, to condemn this egg substance, under the pure food law; the Government claiming that, under that law, the article must be deemed to be adulterated in two respects; under the second subdivision of section 7, if any substance has been substituted wholly or in part for the article, and, under the sixth subdivision of the same section, if it consists in whole or in part of a filthy, decomposed, or putrid animal substance.

The charge under the sixth subdivision of section 7 has been limited so that only the word "decomposed" is now relied upon. A bill of particulars was furnished whereby the words "filthy" and "putrid" were eliminated. So, as just stated, there remain but two points for consideration—first, whether any substance has been wholly or in part substituted for the article, and, second, whether the food product under examination has been shown to be decomposed.

It has been admitted in the case that this egg mixture is a food product and that it was transported in interstate commerce. I understand that no question is raised about that.

The Government is the moving party herein, and the burden of proof, therefore, rests on the Government to establish, by the weight of the evidence, the allegations of its petition of forfeiture. The Government must not only establish its case by the weight of the

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[30] Judgment reversed by Circuit Court of Appeals, *United States* v. *443 Cans of Frozen Egg Product*, p. 345, *post*. Judgment of Circuit Court of Appeals reversed by Supreme Court, *443 Cans of Frozen Egg Product* v. *United States*, p. 416, *post*.

evidence, but, this being a case involving the forfeiture of property, the evidence must be of a clear and convincing character.

Under the second clause of the seventh section, I shall dismiss the Government's charge at once. I do not think, under the evidence in the case, that that clause has been violated; that is, I do not think that the egg product in question is adulterated within the meaning of the second subdivision of section 7. It is the very article that it was intended to be—the very article that was intended to be made—and sugar was a part of that article. This is not a case of misbranding. The article is made under a patent, or at least a similar article is patented—and I do not think that the introduction of sugar under the circumstances disclosed, adulterates the article within the meaning of the act. It is made just as it was ordered and as it was directed to be made; that being so it is not clear why sugar adulterates the article any more than the putting of salt and pepper into canned soup would adulterate that article, assuming that the soup was to be seasoned.

The only question remaining, therefore, is whether this egg product was decomposed in whole or in part, and, in determining whether or not it was so decomposed, that word must be given its ordinary signification. It is not used in any technical sense here, and should not have any such meaning given it.

The question is whether in the ordinary sense of the word the article was in whole or in part decomposed. I do not think it was under the evidence.

There has been a great deal of technical testimony given by experts upon both sides of that question, which testimony, as I look at it, is in direct conflict. Under the Government's expert testimony, the substance was apparently decomposed, while if you look at the other expert testimony, that in behalf of the claimant, it certainly could not be so considered.

I think the Government has not sustained the burden of proof which rested upon it to show, under the expert testimony, that this egg product was decomposed, either in whole or in part, and if we look at what might be called the lay testimony—the testimony as to tasting, smelling, and baking, or the practical uses of the substance—it has likewise failed. I think the claimant has really borne the burden of proving that this egg product was not decomposed. The Government has not, therefore, sustained the burden of proof which rested upon it, but, on the contrary, the clear weight of all of the testimony given is with the claimant and not with the Government, and accordingly my finding is in favor of the claimant.

UNITED STATES v. 3,000 POUNDS OF FROZEN EGGS

(District Court, D. Connecticut, Jan. 13, 1911)

N.J. No. 873

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict for libelant.

PLATT, *District Judge* (charge to the jury). We have reached the last stage of the interesting inquiry which has been before you for

the last two or three days, and the labor of the case now really falls upon your shoulders. It happens to be a case of that description in which the court's duty is nominal and your duties are the important and essential ones in the determination of the issue there is between the Government and these claimants.

You have undoubtedly observed, as the case has been presented, that I have been extremely liberal in my presentation of the testimony before you for your consideration, and I conceive that no fault can be found by either party to the controversy about the privilege which has been accorded them in presenting the case in such a way that in their view you will be able to arrive at a just conclusion.

This is a somewhat peculiar action, arising under the Pure Food and Drugs Act, as counsel have already explained to you several times, which was passed in 1906 and which puts under the control of the Government the investigation of drugs and food so far as they are concerned with interstate commerce; that is, so far as they are transported from State to State to form part of the general commerce of the country, aside from the individual commerce carried on here in Connecticut or in New York or in any other State of itself.

You understand, of course, that the frozen eggs against which this libel pleads are concededly the subject of interstate commerce and within the province of the Government under the Pure Food and Drugs Act to take action on. Whether the Government can do what it desires to do depends entirely upon the conclusion which you gentlemen reach as to the character of this product.

The Government says that this shipment of eggs was adulterated within the meaning of the act of Congress and the manner in which it was adulterated is set forth in the libel as follows:

> (a) The said article of food, to wit—three thousand (3,000) pounds, more or less, of frozen eggs is and was at the time of said shipment and delivery decomposed and filthy and of a poisonous and deleterious character.

Right around that statement of the Government centers the issue upon which you are to pass, gentlemen. The Pure Food and Drugs Act doesn't use the words "unfit for food." That particular expression isn't found in the act, but when it describes an adulterated article as one which is "decomposed and filthy," it means undoubtedly unfit for food to the extent that it would be improper and unfit food for me or you or any other citizen of this country to indulge in.

The burden of proof, you understand, I presume, gentlemen, is upon the Government, which presents that allegation that the article was of a poisonous and deleterious character. The Government is bound, by a preponderance of the evidence that has been presented to you during the last three days, to have satisfied your minds as reasonable men that their contention is true that upon this testimony which has been presented to you it is your duty to find that these frozen eggs were decomposed, filthy and poisonous and deleterious in character. Now, I don't think that you are bound to find that all of those characteristics exist in this produce which is under consideration by you. I don't think it necessary for you to find, upon the evidence presented by both parties to the controversy, that the frozen eggs were not only decomposed, but filthy and also poisonous and also deleterious. Of course, it goes without saying that if they are decomposed to the extent that they are unfit for human food, they might reasonably be called filthy and deleterious and perhaps in a

sense poisonous. If they are unfit for food, there must be a certain element of poison about them. But that is the entire issue upon which you have to pass, and it all depends upon the view which you take, gentlemen, of the testimony which has been presented to you since the case opened—first on behalf of the Government and then on behalf of the claimants. I don't think it my duty to occupy your time with a review of that testimony in extenso. It is fresh in your minds and you have listened to it with care, and I am sure with intelligence, and I expect you, when you retire to our room for consultation, to apply to the evidence presented by both parties the ordinary rules of reason and common sense which you apply to every other issue that arises for your consideration and judgment as you pass along through life. I am willing to take it for granted that you will not be respecters of persons, that you will let no feeling of sympathy govern you in your considerations, but that you will treat the matter as a purely abstract proposition.

A certain amount of so-called " frozen eggs " has been seized by the Government because, as the Government avers, it is in the condition referred to, and it is for you to say whether, in the testimony presented to you, the Government has sustained the averment and satisfied you that they are in that condition.

The Government has produced, as you will remember, two gentlemen from Washington connected with the Department that is engaged in carrying on investigations under the provisions of the Pure Food and Drug Act, Dr. Bates and Dr. Stiles, who have both told you about the way in which they obtained samples of the article in question, what they did with them, how they treated them, and what the results they found were, and, after telling you what results they obtained, they gave you their conclusions as experts that, containing the things that they say the article contained, the article itself is filthy, decomposed, and deleterious. In addition to that, Dr. Wolff, whom I presume is known to some of you, who is in charge of the health department here in the city, has told you about his experience and has given you his opinion, based upon, as I remember it, the condition of the article as testified to by Dr. Bates and Dr. Stiles, that, if they have given you correct reports of the condition of the article, he considers it an entirely improper article to be distributed and sold under the Pure Food Act.

In their evidence, the claimants have described to you the place in which they produce and make this food, and you remember all the details of how they make it and the location of the room in which the frozen product is prepared. All this is fresh in your minds. It is unnecessary for me to enlarge upon it.

You, I presume, gentlemen, have had sufficient experience in the line of the duty you are now engaged upon to know that in the consideration of the evidence it is not a mere question of counting heads; if it were, it would be the Government's case without question because they presented Dr. Stiles and Dr. Bates, who both told you about what they found, and the claimants have been contented to present Dr. Smith, who told you what he found in examining the same product. It won't turn, of course, in your minds upon the fact that two say one thing and one says the other, but it is for you to make up your minds which line of expert testimony it strikes you is the most reasonable and it is for you to determine, as I said before,

which line of thought with reference to the matter of the frozen eggs seems the most reasonable way of approaching it. You recollect Dr. Smith says it isn't enough to find out how many bugs there are in a quarter of a teaspoonful of the product. (I believe he says he found 18,000,000.) It doesn't follow from that that they were bad bugs. It is fair to say, however, it seems a fair inference to make, that, if he did find 18,000,000, he would think it worth while to apply the acid test in order to be sure one way or the other. You will also remember that Dr. Wolff told you the acid test is not a recognized test in such cases and is not used by boards of health the country over. I think Dr. Smith says that he himself has confidence in it, but he doesn't state that he is following the rest of the scientific investigators when he performs it.

I don't think it worth while for me, gentlemen, to delay you in your work. I want you to approach the matter fairly and apply your ordinary common sense which was born in you and which it is your duty to apply to all matters that come before you for your decision. I shall trust you to arrive at the proper verdict after consultation among yourselves.

You may now retire.

UNITED STATES v. THREE BARRELS OF VANILLA TONKA AND COMPOUND

(District Court, W.D. Texas, Jan. 14, 1911)

N.J. No. 1306

Libel under section 10 of the Food and Drugs Act. Tried before the court. Libel dismissed.[31]

MAXEY, *District Judge.* This cause coming on to be heard this 11th day of January, A.D. 1911, the parties hereto appeared in open court by their counsel and announced ready for trial, and a jury being waived the matters of law and fact were submitted to the court without a jury; and the United States of America, libelant, having introduced and closed its evidence and the court finding therefrom that the three barrels charged to be Vanilla Tonka and Compound, seized and libeled herein, were not transported or shipped for sale, but were shipped for the purpose of being used by the Creamery Dairy Co. in the manufacture of ice cream and purchased and held by it for that purpose, and the United States of America, libelant, having failed to introduce any evidence showing that the Secretary of Agriculture had caused notices to be given to the party from whom the sample was obtained and given him an opportunity to be heard as prescribed in section 4 of the act of Congress of June 30, 1906, regulating such proceedings; and the court being of opinion as a matter of law that the property libeled herein cannot be condemned because it was not transported for sale as above indicated, and being also of the opinion as a matter of law that the proceedings against property in such a case can in no event be had without the notices referred to having been given by the Secretary of Agriculture and

[31] Appeal dismissed, *United States* v. *Hudson Manufacturing Co. et al.*, p. 420, *post.*

an opportunity for a hearing allowed, as provided by said act, is of the opinion that it is unnecessary to consume further time of the court in hearing the defendants' evidence: It is, therefore, ordered, adjudged, and decreed that the United States of America, libelant herein, take nothing by this its suit and that the libel proceedings herein be dismissed. To which action and judgment of the court, libelant, United States Government, in open court excepted and gave notice of appeal, and by consent of parties is allowed 6 months from the date hereof to perfect its appeal herein; and it is therefore hereby ordered by the court that the libelant, United States of America, is allowed and given 6 months from date hereof in which to perfect its appeal herein.

UNITED STATES v. 165 CASES OF BI-CARB-SODARINE

(District Court, W.D. Tennessee, Jan. 16, 1911)

N.J. No. 1610

Libel under section 10 of the Food and Drugs Act alleging misbranding of 105 cases and 60 cases of a product labeled "Bi-Carb-Sodarine, a wonderful leavening preparation—Sodarine—Better than Soda—Better than other bread preparations. Ingredients: Sodium, aluminum sulphate, corn starch, sodium bicarbonate, available carbonic acid gas when packed 16.66 per cent—net weight not less than 16 oz." Demurrer to libel sustained. Libel dismissed.

Misbranding was charged in the libel for the reason that the product was an alum baking powder and contained a large quantity of alum, while the labels and brands on the packages of the product declared it to be entirely different from and superior to the leavening agents ordinarily used; such statements were therefore alleged to be false and misleading because the product was composed only of ordinary leavening agents.

McCall, *District Judge.* The only thing that I can deduce from the label complained of in this proceeding is that the manufacturers thereof state that their leavening preparation was better than soda and better than any other bread preparations. I do not think that the act was intended to include within its condemnation such a label or publication. The result is that the demurrer will be sustained and the libel dismissed with costs.

UNITED STATES v. LORICK & LOWRANCE

(District Court, E.D. South Carolina, Jan. 17, 1911)

N.J. No. 877

Information charging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

Lorick & Lowrance, Columbia, S.C., shipped from the State of South Carolina into the State of Virginia 3 barrels of a product

invoiced and sold as spirits of turpentine. Samples of this product were procured and analyzed by the Bureau of Chemistry, United States Department of Agriculture, and mineral oil was found to be present.

A criminal information was filed against the said Lorick & Lowrance, charging the shipments above referred to and alleging the product so shipped to be adulterated in that it was sold as and for pure spirits of turpentine, when in truth and in fact it was adulterated because it contained 3.2 percent of mineral oil.

The following charge was delivered to the jury:

By the COURT. The court is requested by the learned counsel for the defendant to give you certain instructions:

1. The information being for the violation of the act by the shipment of turpentine alleged to have been adulterated by the addition of mineral oil, if the jury believe from the evidence that turpentine is a commodity the bulk of which is used for mechanical purposes and only a small percentage is used as a drug, the jury cannot convict, unless it has been shown by the evidence—beyond a reasonable doubt—that the defendant knew that the shipment in question was intended for use as a drug.

I cannot give you that instruction. I am doubtful whether it is a correct statement of the law. Without passing upon that, where a case might arise in which that instruction might be pertinent and important, the court is of opinion that in this case there is sufficient evidence to go to the jury that the defendants were advised that this particular turpentine was to be used as a drug, because the paper which I hold in my hand is the first letter which was addressed by the Hite Company, Roanoke, Va., to the defendant company, and that has in broad, plain letters at the top of it these words: "Dr. S. P. Hite Company, Inc., Manufacturers of Hite's Pain Cure and Other Remedies, also Flavoring Extracts, Staple Drugs, etc.", and in the corner there is a bottle, "Hite's Pain Cure, the Greatest Internal and External Remedy", and the letter is as follows: "Please quote us your bottom price on pure spirits of turpentine in 5-gallon, ½- and 1-barrel lots." That is sufficient advice to this defendant company that this particular shipment of turpentine was to be used as a drug.

2. The information in this case alleging three different shipments of adulterated turpentine, and the evidence tending to show only one instance of adulteration, the jury cannot convict, unless the evidence connects—beyond a reasonable doubt—the turpentine analyzed with some one particular shipment.

I cannot give you that instruction; it would be misleading. The testimony of the manager of the Hite Company was that this turpentine was obtained from Lorick & Lowrance; that there were three shipments—one in May, one in June, and one in July; he was uncertain as to which package this particular turpentine which was sent to the Williamson Grocery Company was taken from. It was taken from one of the three. Now, if the case were otherwise made out, it is uncertain which package this turpentine was taken from, if you are satisfied beyond a reasonable doubt that it was taken from any one, you will consider the testimony as to which one of the packages was most likely to be the one that this turpentine came from. If

you believe that it came from any one of the three it will be sufficient, and you will find your verdict, guilty or not guilty, as the case may be, on whichever count you think it most likely that this package, which is most likely from the testimony that this turpentine came from.

3. The jury can not convict in this case unless the evidence has shown beyond a reasonable doubt that the turpentine alleged to have been analyzed was from some one of the barrels alleged to have been shipped by the defendant.

The court gives you that instruction; that is, you must be satisfied beyond a reasonable doubt that the turpentine alleged to have been adulterated came from one or the other of those three shipments by Lorick & Lowrance.

The testimony shows that Hite and Company ordered three times, and that three separate shipments were made, and that, out of the three, possibly the three commingled, certain packages were made up in small bottles, such as have been produced in testimony, and sent to the Williamson Company, West Virginia, some time early in the year following the shipment; that the Government inspector bought from Williamson and Company several of these boxes filled with these small bottles of turpentine, and upon analysis it was found that the turpentine was adulterated, that it was not pure; that there was 3 to 3.2 percent of mineral oil in it. If you believe that testimony, then the only question left for you is whether or not the turpentine was adulterated when it was shipped by the defendants. On the part of the defendants it has been testified that this turpentine was bought from distillers in the adjoining counties; they are uncertain as to the particular parties from whom this particular turpentine was bought; that the practice of that company was that when turpentine was received to subject it to certain examinations, and they have produced here the instrument by which they examined it, a hydrometer, that demonstrated, for all their purposes, that it was pure turpentine. On the part of the Government, it is contended that the hydrometer that defendants employed was not such as would enable Lorick & Lowrance to ascertain whether or not there was mineral oil in the turpentine, that that is not a process which would demonstrate the presence or not of mineral oil. You have heard that testimony, you have to determine from it whether or not that contention is true. If you believe, and you must believe from the testimony, that the turpentine was adulterated, then you must determine whether or not it was adulterated before it was shipped whether by Lorick & Lowrance, or by the parties from whom they purchased. If it was adulterated after it passed from their possession, whether in transit on the railroad, or whether it was adulterated by Hite and Company, or by Williamson and Company, after it was received by them, then you can not hold Lorick & Lowrence responsible. You must be satisfied beyond a reasonable doubt that it was adulterated before it was shipped. It is the shipping of the adulterated drugs which gives this court cognizance of the offense. If you have reasonable doubt about it, you must give the defendants the benefit of the doubt.

UNITED STATES v. FRANK ET AL.

(District Court, S.D. Ohio, W.D., Jan. 21, 1911)

189 Fed. 195; N.J. No. 823

Information alleging violation of section 2 of the Food and Drugs Act. Judgment on plea of guilty.

HOLLISTER, *District Judge.* The United States filed an information against Jacob Frank, Charles Frank, and Emil Frank, doing business under the firm name and style of the Frank Tea and Spice Company, charging them with having unlawfully shipped and delivered for shipment from Cincinnati to a firm at Mount Sterling in Kentucky, 1 gross bottles of a certain article of food purporting to be terpeneless lemon extract, marked " P. & S. Brand Extract Terpeneless Lemon Artificially Colored. The Frank Tea & Spice Co., Cincinnati, O.", and that the same was adulterated in that a dilute solution of alcohol and water was substituted in part for said terpeneless lemon extract so that the same contained no more than five one-hundredths of 1 percent (0.05%) of citral derived from the oil of lemon; whereas, it should contain at least two-tenths of 1 percent (0.2%) by weight of citral derived from the oil of lemons, as required by the standards of purity of food products, established by the Secretary of Agriculture in accordance with the provisions of the act of Congress, approved March 3, 1903, 32 Stat. 1158.

The information also charged that the dilute solution of alcohol and water was mixed and packed as and with said article of food so as to reduce and lower and injuriously affect the quality and strength of the article of food purporting to be terpeneless lemon extract.

For a second count the information charges that the article of food called " terpeneless lemon extract " was misbranded in that the statement on the bottles that the article contained herein was extract terpeneless lemon was false and misleading in that the article did not contain at least two-tenths of 1 percent of oil product by weight of citral derived from the oil of lemon, and did in fact contain only five hundredths of 1 percent (0.05%) of citral, and that the same was not terpeneless lemon extract as recognized in the trade generally and in the standards of purity of food products established by the Secretary of Agriculture in collaboration with the Association of Official Agricultural Chemists, approved by act of Congress, March 3, 1903, ch. 1008, 32 Stat. 1158.

The defendants, believing, as admitted in open court, that only a nominal fine would be imposed upon a plea of guilty as for a technical violation of the pure food law, pleaded guilty.

The defedants having within some 6 or 7 months prior to the filing of this information pleaded guilty to two so-called " technical violations " of the Pure Food Law, and being thereupon fined only in nominal amounts, the court on this plea imposed a fine of $200. Thereupon the defendants deeming themselves aggrieved, and upon the urgent solicitation of their counsel, the court permitted counsel to

file a brief in support of the proposition that no offense in fact had been committed under the laws of the United States. Counsel for the defendants submitted an elaborate brief to which the district attorney filed a brief in answer.

Upon consideration of these, the court is of opinion that there is an offense against the laws of the United States charged in this information, and sees no reason why, under the circumstances of the case, the fine imposed was too large.

On March 3, 1903, the Congress appropriated a sum of money to the Department of Agriculture for the fiscal year ending June 30, 1904, for the purpose, among others, "to enable the Secretary of Agriculture, in collaboration with the Association of Official Agricultural Chemists, and such other experts as he may deem necessary, to establish standards of purity for food products, and to determine what are regarded as adulterations therein, for the guidance of the officials of the various States and of the courts of justice. * * *"

The information alleges that the standard of purity for terpeneless lemon extract was established by the Secretary of Agriculture and it appears aliunde that in the publication of Department of Agriculture, Circular No. 19, the following:

> Terpeneless extract of lemon is the flavoring extract prepared by shaking the oil of lemon with dilute alcohol, or by dissolving terpeneless oil of lemon in dilute alcohol, and contains not less than two tenths (0.2) percent by weight of citral derived from oil of lemon.

That the Secretary of Agriculture had the constitutional power under the act of 1903 to establish standards for purity of food products is not disputed, nor could it be under the decisions of the Supreme Court of the United States. He adopted the standard for the article of food in question as alleged in the information. The allegation of the information is that the standard so established was existent at the time of the filing of the information.

On June 30, 1906 (act June 30, 1906, ch. 3915, sec. 2, 34 Stat. 768), the Congress provided: "That the introduction into any State * * * from any other State * * * any article of food * * * which is adulterated or misbranded" (within the meaning of this act) "is hereby prohibited." And the offender "shall be guilty of a misdemeanor and for such offense be fined not exceeding two hundred dollars for the first offense, and upon conviction for each subsequent offense not exceeding three hundred dollars or be imprisoned not exceeding one year, or both, in the discretion of the court."

The act further provides that an article shall be deemed to be adulterated, in the case of food, "if any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality and strength", and shall be deemed to be misbranded, "if the package containing it or its label shall bear any statement, design, or device regarding such article or the ingredients or substances contained therein which shall be false or misleading in any particular."

The claim of the defendants is that the statute does not distinctly incorporate the standards fixed by the Secretary of Agriculture within the provisions of the food law, and it does not therefore define a criminal offense.

The answer to this is that if the Secretary of Agriculture had the power to fix standards and did fix a standard of this food product, which standard was in existence at the time the food law was passed, and the information charges wherein the article was adulterated and misbranded with respect to this standard, there seems to be no room for doubt that if upon proof that the article did not conform to the requirements of the standard purity established by the Secretary of Agriculture, then an offense has been charged under the laws of the United States.

The defendants claim that the act of 1903 was a mere appropriation law, but it would seem that a law approaching a certain sum of money to the Secretary of Agriculture for the purpose of doing certain things which he could constitutionally do for the purpose of fixing standards of purity of food, and that he did so fix them, carries with it a necessary implication that he could do that for which the money was appropriated to him for the purpose of doing, and when he fixed the standards then those standards prevailed unless they have been changed since. It does not appear that they have been changed.

The defendants claim that as the act of 1906 does not incorporate the standards fixed by the Secretary of Agriculture, the act of the Secretary was legislative in character, and hence no criminal offense could be predicated upon it. It is also claimed that since the act of 1906, in describing drugs, refers to the Pharmacopœia or National Formulary, and in describing what food is, refers to no standard at all, Congress has not fixed any standard for food. Both of these claims are based on a misapprehension. Section 6 of the act of 1906 provides:

> That the term "drug," as used in this act, shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of diseases of either man or other animals. The term "food," as used herein, shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound.

These are mere terms of description. If the Pharmacopœia or National Formulary says something is a drug, it is a drug under the meaning of the act. Or if it comes under the other description of what a drug is, it is a drug, and so food also is described. There are no standards fixed in either case, for, if any substance or mixture is intended to be used for the cure, mitigation, or prevention of disease of either man or other animals, it is nevertheless a drug whether it is recognized in the Pharmacopœia or National Formulary or not. The standard for food was fixed by the Department of Agriculture under the act of 1903. If one in the business of making food products would look for the standard he would find it in the promulgations of the Secretary of Agriculture made under direct authority of Congress. The act of 1903 does not describe any offense, but the act of 1906 says that if any article of food adulterated or misbranded is manufactured or transported so as to become the subject of interstate commerce, the maker, transporter, etc., shall be guilty of an offense. How shall it be known whether he is guilty of an

offense or not? The answer is clear, by referring to the standards which have been established under the authority of Congress.

The Secretary of Agriculture, under authority of Congress, fixed the standards of purity for certain foods. This is a fact upon which the law of 1906 operates. It is not a law. The law of 1906 under which the offense is charged to have been committed says what food is. The offense charged is that the defendant transported a food and that it was adulterated and misbranded. How is this to be ascertained? By looking to the standard as a fact.

The question is dealt with in *Coopersville Co-operative Creamery Co.* v. *Lemon*, 163 Fed. 145, 89 C.C.A. 595. It appears that the Oleomargarine Act May 19, 1902, ch. 784, sec. 4, 32 Stat. 194, provides that "any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk or cream" shall be deemed "adulterated butter", and authorizes the Commissioner of Internal Revenue to decide what substances are taxable thereunder. It also authorizes him, with the approval of the Secretary of the Treasury, to make all needful regulations for carrying the act into effect. It was held that such a regulation, providing that butter containing 16 percent or more of water, milk or cream should be classified as "adulterated butter" under the act, was within the authority so granted, and was valid, being neither an exercise of legislative or judicial power, but merely a determination as a question of fact of what constitutes an "abnormal" quantity of water, etc., upon which the application of the statute is made to depend.

Judge Lurton, speaking for the Circuit Court of Appeals, says:

> The contention that the delegation of authority to promulgate such a regulation is to delegate either legislative or judicial power to an executive officer is founded upon a misapprehension of the character of the authority delegated. That Congress cannot delegate legislative authority or power to any executive official or board of officials is elementary. To do so would be destructive of our whole system and scheme of government. *Field* v. *Clark*, 143 U.S. 649, 691, 12 Sup. Ct. 495, 36 L.Ed. 294. That the delegation of authority to add to or take from a law would be to delegate legislative power must also be conceded. But that Congress may enact a law and delegate the power of finding some fact or state of things upon which the operation of the law is made to depend is equally clear. *Field* v. *Clark*, 143 U.S. 649, 12 Sup. Ct. 495, 36 L.Ed. 294; *In re Kollock*, 165 U.S. 526, 17 Sup. Ct. 444, 41 L.Ed. 813; *Union Bridge Co.* v. *United States*, 204 U.S. 364, 386, 27 Sup. Ct. 367, 51 L.Ed. 523. The authority to make all needful regulations not inconsistent with law is not a delegation of power to add something to an incomplete law nor a grant of judicial power. It is only an authority to determine the fact upon which the operation of the law is made to depend. Congress might have made the necessary tests and might have acquired the knowledge of the butter-making art to enable it to have enacted that adulterated butter should consist of butter having a moisture content of 16 percent or more. But that would have been an unnecessary detail, for it was altogether competent to declare that butter which contained an abnormal quantity of water, milk, or cream should be classified as adulterated butter, and that the fact as to what was, in dairy butter, an abnormal proportion of water, milk, or cream should be determined by a regulation of the Commissioner of Internal revenue, with the approval of the Secretary of the Treasury.

It surely can make no difference that the authority to establish the standard was not in the act itself creating the offense as in the oleomargarine law. It may be well said that the Food and Drugs Act of 1906 was made with special reference to the standards of food

fixed by the Secretary of Agriculture under prior authority of Congress.

It is true that the case of the *United States* v. *St. Louis Coffee & Spice Mills*, 189 Fed. 191, decided May 22, 1909, in the District Court for the Eastern District of Missouri, bears out the contention of the defendant, but in a subsequent case, *United States* v. *Edward Westen Tea & Spice Company*, decided November 30, 1909, the same court submitted to the jury a case necessarily involving the same question. If he at that time entertained the opinion expressed in the other case he would not have permitted the case to go to the jury.

The court is of opinion that the information charges an offense. There is some doubt in the court's mind as to the propriety of passing upon this question of law at all. The defendant before pleading guilty had the opportunity to demur to the information, and, having many months in which to make up his mind what to do, pleaded guilty. Not until the imposition of a fine unexpectedly large did he raise the question here discussed. It is probable that the fine having been imposed on the plea of guilty the matter has passed from the power of the court to the pardoning power. The court has no intention of making this case a precedent which may be followed in similar cases. If persons charged with an offense against the laws of the United States with ample time to prepare their defense, assisted by able counsel, nevertheless pleaded guilty and a fine was imposed, it is difficult to see upon what ground they have right to appeal to the court by an attack upon the legality of the proceeding.

The court has only looked into the subject lest some injury has come to the defendants through their own plea of guilty.

The Food and Drugs Act is one of the most beneficient legislative enactments of recent times and its provisions must be observed.

UNITED STATES v. SCHUCH

(District Court, D. Colorado, Jan. 26, 1911)

N.J. No. 1049

Indictment alleging violations of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

Lewis, *District Judge* (charge to the jury). The defendant, Philip Schuch, Jr., is on trial under an indictment which charges him with the commission of two separate criminal offenses. These offenses charged in the indictment are in violation of the act known as the Food and Drugs Act, passed by Congress in 1906. That act, among other things, provides that the introduction into any State or Territory, or the District of Columbia, from any other State or Territory, of any article of food or drugs which is misbranded, within the meaning of this act, is prohibited, and any person who shall ship, or deliver for shipment, from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, any such misbranded drugs shall be guilty of a criminal offense. That act further provides that the term drug, as used in this act, shall include all medicines and preparations recognized in the United

States Pharmacopœia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals. It also provides that the term "misbranded", as used in the act, shall apply to all drugs, the package or label of which shall bear any statement regarding such article which shall be false or misleading in any particular.

The indictment, in its first count, charges that the defendant knowingly and unlawfully did sell and ship, and deliver for shipment, for interstate carriage from the city and county of Denver, in the district and State of Colorado, to and into the District of Columbia, an article and preparation of drugs called Radio-Sulpho, which article was misbranded in that the labels on the package containing said Radio-Sulpho had thereon the following: "Radio-Sulpho, Remedy for Rheumatism, Diseases of the Skin, Ulcers, Running Sores, Putrid Wounds, Pus, Gangrene, Bloody Flux, and Chronic Dysentery." "Radio-Sulpho, a Remedy for certain forms of Cancer, Syphilis in any form; dissolves and removes Poisons absorbed into the Skin of Printers, Painters, Artists, and Metal-workers. A Remedy for Rheumatism, Skin Diseases, Ulcers, Running Sores, Uric Acid, and Blood Poisons." And it charges that the defendant, Philip Schuch, Jr., then and there well knew that the said statements were false and misleading, and that the said packages, in the particulars just referred to, were misbranded.

The charge in the second count of the indictment is similar in the respects noted, in that the defendant is charged with knowingly and unlawfully selling and shipping, and delivering to be shipped, the preparation offered in evidence called Radio-Sulpho Brew from the State of Colorado to the District of Columbia, and that said package containing Radio-Sulpho Brew was misbranded, in that it contained the following inscriptions: "Radio-Sulpho Brew, Blood Purifier and Tonic for Indigestion, Constipation, Catarrh, Nervousness, Bloating, Turbid Liver and Kidney Disorders. Is a Laxative, and prevents Appendicitis. This great Remedy is Highly Beneficial for Sufferers with Asthma and Consumption, for it rids the System of all Obnoxious Substances." And the charge is also contained in this count of the indictment to the effect that the defendant, when he so sold, shipped, and delivered for shipment the two packages of Radio-Sulpho Brew offered in evidence, well knew that said bottles containing the same were misbranded.

Now the question for the determination of the jury in each count of this indictment is whether or not the defendant did, as is charged in these counts, ship from the State of Colorado to the District of Columbia the Radio-Sulpho and the Radio-Sulpho Brew, and whether or not both, or either, of these preparations were misbranded in the particulars mentioned as to the inscriptions contained on the packages of these preparations, in that they made false representations as to their curative properties, and that the defendant, at the time he so shipped the same, did not know that they were curatives for those purposes.

These are criminal charges, and the rule applicable in all criminal cases for the guidance of the jury is, of course, applicable here to the effect that a defendant in a criminal case is not called upon to prove

his innocence; the presumption of law is that he is not guilty, and this presumption abides with him throughout the case until it is overcome and his guilt has been established by the testimony; and it must be established, before you can find him guilty on either count, by the testimony to your reasonable satisfaction, beyond a reasonable doubt. A reasonable doubt, however, does not mean a mere possibility of innocence; it means a substantial doubt, founded on the evidence in the case, or the lack of evidence. If, after you have considered all the testimony in this case you cannot say to yourselves that you are convinced of the defendant's guilt, then you have a reasonable doubt and you must acquit him; but if, on the other hand, after carefully considering all the testimony in the case, you can say to yourselves, under your oaths, that you have an abiding conviction that the defendant is guilty as charged in the indictment, then you have no doubt and you must return, in that event, a verdict of guilty.

Now you are the sole judges as to what the facts are; you determine the facts in the case, the court determines and tells you what the law applicable to the facts in the case is. You take that testimony and applying it to the rules of law given you by the court you thereon render your verdict. You are also the judges, and the sole judges, of the weight of the evidence and of the credibility that you will give to the testimony of each witness; the court has nothing to do with determining the credibility of the witnesses who testified before you, or the weight to be given to the testimony of those different witnesses. You might discover, or might think you discover, that the court was of a certain opinion about the facts, or about the credibility of some particular witness, and yet if what you thought the court believed in that respect did not correspond with your belief about it you ought to follow your own convictions, and not permit what you might think the court thought about it to influence you in any wise. The law vests with you the sole duty and the sole power of determining what the facts are in the case. As a principle of law, however, the court tells you that if you should believe that any witness has knowingly and willfully testified falsely to any material fact you are at liberty to disregard all of the testimony of such witness, except in so far as it may be corroborated by other facts and circumstances in the case; and in determining what weight you will give to the testimony of each witness you should consider the apparent disposition of that witness to tell the truth, his familiarity with the facts about which he attempts to speak to you, his intelligence, his candor, his fairness, his interest, if any, in the case, and the result of this trial, and then, with those as guides, give to the testimony of each witness such weight, and to him such credibility, as you, in your good judgment, believe it entitled to receive.

Now, I shall consider and comment upon some of the evidence in this case, having you clearly understand that I do not do so for the purpose of indicating what the impression of the court is as to what the facts are, but simply, after having heard a trial continued over some four or five days, of briefly calling attention to the prominent facts that you will necessarily have to take into consideration, and calling attention, perhaps, to some conflicting testimony in the case, for the purpose of having you consider these conflicts when you retire to determine what the facts are and what your verdict shall be.

Some of these inscriptions on the package containing the Radio-Sulpho represent it to be a remedy for certain diseases. Those representations must be taken in their popular sense because the evident purpose of the representations on those different packages were representations to the public and not simply to professional men who are schooled in chemistry and physics, and the word remedy, in its ordinary sense, means that which cures a disease—any medicine or application which puts an end to disease and restores health.

Now we come to notice the inscriptions first on the Radio-Sulpho; it is said to be a remedy for rheumatism; several witnesses testified that they had taken it for rheumatism and in their belief they had been cured. The weight of that testimony, when considered in the sense in which it was represented on the package as being a remedy for rheumatism, cannot, of course, be properly determined until we know in a given case whether or not first the patient actually had rheumatism. These witnesses were permitted to testify that they had rheumatism, it is for you to determine whether or not in fact they did have rheumatism; if you believe that that ailment is of such common prevalence, and has reached such common knowledge among men, that any man, and especially these witnesses who came before you and testified that they did have rheumatism, that they were able to diagnose and correctly tell you that their ailment at the time was rheumatism, then you have established that fact, and the only other fact for your consideration in reference to that ailment would be the inquiry as to whether or not the use of Radio-Sulpho, or Radio-Sulpho in connection with Radio-Sulpho Brew, effected the cure. If you so found, that would go far to sustain a finding on your part that Radio-Sulpho is a remedy for rheumatism.

It also represents that it is a remedy for diseases of the skin, ulcers, running sores, bloody flux, and chronic dysentery. There were one or two witnesses who testified to having some sort of affection of the skin; I believe one witness yesterday, the old gentleman, said he had eczema for many years and that Radio-Sulpho cured him almost instantly. The same rule, the same suggestions, that I have made in reference to rheumatism, of course, apply to each of these others, first, the inquiry as to whether or not he had a disease of the skin; secondly, whether or not there is evidence in this case that Radio-Sulpho will cure such a disease. Now, as against this testimony of these witnesses who told you that they had had some of these ailments and had been cured by taking these remedies, you have the positive testimony of men who have been schooled in the profession of medidine and in chemistry, and they tell you that the analysis made by Dr. Kimberly and Dr. Hill does not disclose anything that could possibly be a remedy, or cure, or help in any respect for any of the diseases mentioned on the bottles offered in evidence. You cannot weigh the testimony and reach a correct determination as to rheumatism by considering the testimony alone of the witnesses who came before you and said that they had rheumatism and were cured of it, without considering with it the testimony of these gentlemen who have made it a life study, who have pursued at schools instituted for that purpose the different effects of the different drugs, and compounds of the different drugs, that may possibly be any aid in the kind of diseases mentioned on these packages. Men may be mis-

taken about as simple a disease as rheumatism. I do not say they were mistaken; it is for you to consider whether or not, in connection with the testimony of the witnesses on the part of the Government their statements that they had rheumatism and that these remedies cured that rheumatism are convincing to that effect.

It is also claimed on those packages that this Radio-Sulpho is a remedy for certain forms of cancer. A great deal of evidence has been devoted in describing to you what cancer is. Mr. Schuch was permitted to testify that he was competent to diagnose cancer, and his competency, as disclosed, was obtained, as he said, by studying that particular disease under eminent specialists who had made it their life work, and among others Dr. W. T. Bull, of New York. You will recall what he said about that, what Dr. Bull did—gave him private lectures or instructions and took him with him to see his patients. It was contended on the part of the Government, and some evidence was offered for the purpose of showing that the defendant did not know Dr. Bull, couldn't possibly have been with him, because, as counsel for the Government say, he was described by the defendant in appearance a different man than the description given of him by Dr. Powers, who was his associate and partner for some 11 years. And that you must determine. It was also claimed by the defendant that he studied this same disease at Chicago under some two or three physicians who had made it a specialty, and in connection somewhat with Doctor Harper. Some testimony was given as to the profession and the life work of Doctor Harper, and that it was wholly devoted to biblical investigations, and while at Chicago, during the time the defendant says he met him and associated with him and paid him $350 to introduce him to these other physicians and give him some special instructions, he was then president of Chicago University. That is questioned by the Government. It is for you to determine the weight that you will give to the conflicting evidence, if it be conflicting, upon that question. I mention this to you for the purpose of indicating that Mr. Schuch was permitted to testify that he could diagnose cancer because he had studied under specialists in the treatment of cancer. If you should find that he did not investigate this disease under men who were competent to instruct him in that respect, it would only go to affect the question as to whether or not he knows cancer when he sees and examines a case of cancer. He also testified that he studied chemistry under other specialists, and I do not recall that there is any contradiction of that. And he also says that he studied it on independent investigations made by himself.

Now witnesses have testified that they had cancer, or were treated for cancer, and were cured by the use of these remedies; they were permitted to say that because the defendant had already testified, qualifying himself in the particulars just referred to, that they had cancer; but if he were unable to determine whether or not they had cancer, none of those witnesses testifying that they knew anything about cancer, there wouldn't be much left on which you could base a finding that any of these witnesses, who testified that they had cancer and had been cured by the use of these remedies, did in fact have cancer. And as against that, and to be considered along with it in determining whether or not these remedies have ever been used successfully in a case of cancer, we have the testimony of, I think,

practically all of the witnesses offered by the Government, physicians and surgeons of many years' practice, who say that the only possible way to diagnose cancer is with the microscope, which was not the way adopted, as I recall the testimony, in any of the cases treated by the defendant. And it has been questioned whether or not some of the cases which were claimed to have been treated by the defendant had cancer, and in the case of the witnesses who testified whether or not it was cancer at all. You will recall that counsel read extracts from the standard authorities defining cancer, and the kinds of cancer, and the instances in which a case may be properly considered a cancer or not a cancer at all. Witnesses for the Government also testified, some of them, if not all of them, that science has not yet disclosed a remedy for cancer unless it be the use of the knife. I believe the witness offered by the defendant, Dr. Smolenski, said that there was no known remedy. Therefore, gentlemen of the jury, if you find and believe from the testimony that these preparations were put into interstate commerce by shipment by express from Colorado to the District of Columbia, and that the one called Radio-Sulpho had on it the representation that it was a remedy for certain forms of cancer, which was false, and that it was not, and is not, a remedy or cure for any kind of cancer, then it will be your duty to find the defendant guilty, even if you find all of the other inscriptions on these packages were true representations as to the curative properties in controversy.

A further inscription was that it was a remedy for syphilis in any form. I do not recall any specific evidence that Radio-Sulpho would cure syphilis in any form; it may be that the defendant, in his testimony that these compounds had contents not disclosed by the analyses, which he did not describe to us, had certain elements which, in his belief, which in his knowledge, as he claims, so operated upon the system in a case of that disease that it would cure it; but it is for you to search your memories and determine whether or not there is any evidence in the case that Radio-Sulpho is a remedy for syphilis in any form. And if there be such evidence, then to consider with it the evidence offered by the Government, its witnesses testifying that there was nothing in either of these compounds, or in this Radio-Sulpho, that was a cure or remedy for syphilis in any form.

You understand, gentlemen of the jury, that the testimony of the physicians, such men as Dr. Freeman and Dr. Hall and Dr. Bergtold, and perhaps one or two others, to the effect that these preparations were not cures for any of these diseases, was based upon the analyses made by Dr. Kimberly and Dr. Hill. These physicians, of course, have not analyzed these medicines; they are separate professions; they act as they told you, upon the analyses furnished by the chemists, and having technical knowledge as to the effect of each drug and taking the analyses made by the chemists and each drug that they may see fit to use, they accept what he says about its contents, and then apply their knowledge as to the effect of each element in the compound. So that, if you should find and believe from the testimony, beyond a reasonable doubt, that that is not a remedy for syphilis in any form, and that it was so represented upon this package, then that is a misbranding within the sense of the Food and

Drugs Act, and the defendant is guilty and you should so state in your verdict.

Congress, of course, has no power to control the use of these drugs and preparations, under this act, except when they become introduced into interstate commerce, that is, shipment from one State to another. The Constitution of the United States vests Congress with the power to regulate interstate commerce, and in that manner it can reach the question; but if they are kept out of interstate commerce it is a matter purely for the several States. It can say, it has the power to say, under the Constitution, and it has said, that when drugs or foods are introduced into interstate commerce they shall be truly labeled so that the public will not be deceived—they must not be misbranded—that is what it did by this act.

This Radio-Sulpho, as already said, also is branded to the effect that it will dissolve and remove poisons absorbed into the skin of printers, painters, artists, and metal workers. It represents that it is a remedy for rheumatism, skin diseases, ulcers, running sores, uric acid, and blood poison. We are not concerned, gentlemen of the jury, with any other kinds of patent medicines; we are not to determine the issues in this case, as to this defendant, in any sense by our prejudices in favor of or against patent medicines. We are to consider the facts in this case alone and the law applicable to it, and decide it in accordance with the facts and the law in this case.

We pass to the second count. The first count is a charge as to the Radio-Sulpho, the second count as to the Radio-Sulpho Brew. The fore part of the inscription as to the Radio-Sulpho Brew is not as broad in its representations as that with reference to Radio-Sulpho. The fore part does not specifically claim that it is a remedy or cure for the diseases which I now mention, but says that it is a blood purifier and tonic for indigestion, constipation, catarrh, nervousness, bloating, turbid liver, and kidney disorders, and is a laxative. The testimony shows that the Radio-Sulpho Brew, as I recall it, contains 5 percent epsom salts, and I believe the testimony fairly indicates that epsom salts is a recognized remedy for constipation. I do not recall whether or not the testimony shows that it is used for indigestion or not, outside of the claim of the defendant that he used it for that purpose. But that same part of the inscription on that package then continues and says "and prevents appendicitis." I will not attempt to review, even in a general way, the testimony of the physicians who told us what science, as they understand it, has disclosed up to the present time about appendicitis, but leave it to you to determine, under all the facts in this case, whether or not Radio-Sulpho Brew will prevent appendicitis. If you find from the testimony, beyond a reasonable doubt, that it will not prevent appendicitis then that was a misbranding, in violation of the act, and you will find the defendant guilty on that count, otherwise he is not guilty as to that particular part of the inscription.

That package containing Radio-Sulpho Brew, as charged in the indictment, also contained this inscription: "This great Remedy is Highly Beneficial for Sufferers with Asthma and Consumption, for it rids the System of all Obnoxious Substances." I believe we had one witness on the part of the defense who testified that he had had

consumption in a very advanced stage, and took this Radio-Sulpho Brew and he believed he had been cured. We must recur again to the inquiry as to whether or not he had consumption, and if you so find, then the inquiry whether or not he has been cured; and then again the inquiry, even if he did have it and has been cured whether or not he was cured by the use of Radio-Sulpho Brew. If not, then there is but slight, if any, evidence, as I recall it, you may recall some, to the effect that Radio-Sulpho Brew will prevent consumption, not prevent it but is highly beneficial for consumption in any stage. The testimony on the part of the Government was to the effect that there was nothing in Radio-Sulpho Brew, according to the analyses made by Dr. Hill and Dr. Kimberly, that would be in any particular beneficial or helpful or at all affect the disease known as consumption. So that, if you should find and believe from the testimony that this Radio-Sulpho Brew, as testified by Dr. Morgan, and I believe also so stated by the defendant, was shipped from Colorado by express to Dr. Morgan in the District of Columbia, thereby becoming an article of interstate commerce, and that one of the inscriptions on it was that it was a remedy highly beneficial for sufferers with consumption, and you should further find and believe from the evidence, beyond a reasonable doubt, that it was not highly beneficial for sufferers with consumption, then it was misbranded in that particular; although you might find that it was not misbranded in any other particular, yet if misbranded in this particular the defendant is guilty of having violated this Pure Food and Drugs Act in this shipment, and you must return a verdict of guilty.

This same part of the label, in this same sentence, also represents "This Great Remedy is Highly Beneficial for Sufferers with Asthma." You will recall and apply the testimony in the case as to the effect, if any, Radio-Sulpho Brew might have on asthma. Of course, gentlemen of the jury, as contended by the defendant's counsel, every honest man is hopeful that some remedy will be discovered for the cure of cancer, and perhaps it may not be of great weight in considering whether or not a remedy may be discovered today that one had not been discovered before today, but simply because a man says he has a remedy, and in his opinion it will cure, that he has tried it on cases that he thought were cancer and in his opinion it cured those cases, isn't any evidence that there are any such properties in that so-called remedy unless and until he has shown himself capable of diagnosing cancer, the remedy has been tried sufficiently to demonstrate that it effected the cure, and that the cure was not effected from some other cause.

The defendant declined to disclose other contents which he said could be found in these packages; he declined to tell us because, he said, it was a great secret that belonged to the Radio-Sulpho Company. I do not say to you that that is a sufficient reason why he should not have told you, I leave that to you. I can understand that from a financial point of view that would be a very powerful incentive for a man, where he knew that he had a remedy unknown to any one else, because in the case of any of these diseases it would necessarily afford a marvelous income. You must determine whether or not that was a sufficient reason, and whether or not his mere word

that there are other ingredients in it which he has failed to disclose is such testimony as will convince you that there are other ingredients in it. He says that it takes him 40 days to make the Radio-Sulpho and 30 days to make the Brew. According to the analyses of the chemists the contents are simple, the analysis was not difficult, and they apparently speak with confidence when they say that they found all there was in it, except they do say that there was a small amount of solids which they said were inert or inactive for anything.

You will be given, gentlemen of the jury, two forms of verdict on each count; one on the first count, which relates to the Radio-Sulpho alone, of guilty and one of not guilty. You will use one of those forms of verdict, and when you have agreed on your verdict on that count your foreman, whom you will select, will sign it. You will also be given two like forms of verdict on the second count, and your foreman will also sign your verdict on that count, and when you have reached a verdict on each count you will return them into court.

Mr. WARD. May it please Your Honor, I would like to suggest that Your Honor at this time instruct the jury as to the legal effect of the use by Dr. Morgan of the name Joy for use in getting this medicine.

The COURT. I think that is hardly necessary. Gentlemen of the jury, the district attorney asks that I call the attention of the jury to the fact that the shipment of the two bottles of Radio-Sulpho and Radio-Sulpho Brew were obtained by Dr. Morgan under a false name; that, gentlemen of the jury, is utterly immaterial. Congress passed this law and it is the duty of the officers in every capacity, who have anything to do with the prosecution of crime or with the enforcement of the different acts of Congress, to use whatever means they think may be most successful in enforcing the act and suppressing what Congress intended should be suppressed; therefore the fact that Dr. Morgan wrote under an assumed name, the fact that he stated in his letters things that perhaps were not true, is not to be considered by the jury at all in arriving at a verdict. The sole question in the case is whether or not the defendant introduced these articles into interstate commerce, as charged, and whether or not they were misbranded, as provided in the Pure Food and Drugs Act; if he did he is guilty, if he did not he is not guilty.

UNITED STATES v. GEORGE SPRAUL & CO.

(Circuit Court of Appeals, Sixth Circuit, Mar. 7, 1911)

185 Fed. 405; N.J. Nos. 1044 and 1271

Error to the District Court of the United States for the Southern District of Ohio. Decree reversed.[32]

Before KNAPPEN, Circuit Judge, and COCHRAN and SATER, District Judges.

KNAPPEN, *Circuit Judge.* The United States filed this libel in the United States District Court for the Southern District of Ohio under the Food and Drugs Act of June 30, 1906, ch. 3915, 34 Stat.

[32] Reversing *United States* v. *275 Cases of Tomato Catsup,* p. 141, *ante*

768, for the seizure and condemnation of the articles named in the above title.

Section 10 of the act referred to provides:

That any article of food, drug, or liquor, that is adulterated or misbranded within the meaning of this act, and is being transported from one State, Territory, District, or insular possession to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, or if it be sold or offered for sale in the District of Columbia, or the Territories, or insular possessions of the United States, or if it be imported from a foreign country for sale, or if it is intended for export to a foreign country, shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. * * * The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury on any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States.

The section in question contains provisions for the destruction or sale of the articles if condemned as adulterated or misbranded, as well as for the return of the same to the owner thereof upon the payment of the costs of the proceedings and the giving of a bond that the articles shall not be sold or disposed of contrary to the provisions of the act, or the laws of any State, Territory, District, or insular possession.

The libel in question, referring to the articles of food as "contained in original unbroken packages", alleges that that said packages were transported in interstate commerce; that the same were illegally held within the jurisdiction of the court; and that the articles of food contained therein are adulterated in violation of the act referred to "and liable to seizure and condemnation as provided therein, for the reason that each and every bottle and jug in said two hundred and seventy-five, more or less, cases, contains an article of food and food product consisting wholly or in part of a filthy, decomposed and putrid vegetable substance and is unfit for food." It prayed "the process of attachment in due form of law, according to the course of this court in cases of admiralty and maritime jurisdiction, so far as is applicable to this case."

An attachment was issued to the marshal, commanding the seizure of the property, and notice to claimants. The marshal returned that he had seized the articles mentioned, and held the same in his custody subject to the further order of the court. The claimants named in the title appeared and demurred, "for the reason that it does not appear from an inspection of said libel that the catsup described therein had, prior to the filing of said libel and the issuance and service of process in this case, been seized in any way by any officer of the United States." The libel contains no allegation of previous seizure. The court made an order sustaining the demurrer and dismissing the libel. The United States excepted to this order, and brings this writ of error to review the same.

The sole question presented here is whether previous executive seizure of the goods is necessary to give the court jurisdiction of the libel, as was held by the district judge in an able and elaborate opinion.

In the case of *The Brig Ann*, 9 Cranch 289, 3 L.Ed. 734, which was a case of an information against certain merchandise alleged to

have been imported contrary to the Nonimportation Act of March 1, 1809, it was held that the court had no jurisdiction over the condemnation proceedings until after executive seizure. The statute which was involved in that case expressly provided for seizure by the collector and declared a forfeiture of the offending articles. Act March 1, 1809, ch. 24, 2 Stat. 528. Mr. Justice Story based the necessity of previous executive seizure upon the Judiciary Act of September 24, 1789 (ch. 20, sec. 9, 1 Stat. 76), which conferred upon the district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, where the seizures are made on waters navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas." The learned justice interpreted this section of the Judiciary Act as conferring jurisdiction over the condemnation proceedings upon the district courts only of the district in which the seizure was made, saying that: "Before judicial cognizance can attach upon a forfeiture in rem, under the statute, there must be a seizure; for until seizure, it is impossible to ascertain what is the competent forum." In a large number of cases since the decision in the case of *The Brig Ann*, it has been held that in proceedings in rem for forfeiture and confiscation previous executive seizure is necessary to jurisdiction, although there are cases not in harmony with this view. Among the cases in which such previous executive seizure has been held necessary to jurisdiction are the following: *Gelston* v. *Hoyt*, 3 Wheat. 246, 4 L.Ed. 381; *The Silver Spring*, Fed. Cas. No. 12,858; *The Washington*, Fed. Cas. No. 17,222; *The Fideliter*, Fed. Cas. No. 4,755; *The Tug May*, 6 Biss. 243, Fed. Cas. No. 9,330; *The Idaho* (D.C.), 29 Fed. 187, 191; *The Josefa Segunda*, 10 Wheat. 312, 6 L.Ed. 329; *Dobbin's Distillery* v. *United States*, 96 U.S. 395, 24 L.Ed. 637; *United States* v. *Larkin* (6th Circuit), 153 Fed. 113, 82 C.C.A. 247. The rule has also been extended to proceedings under laws providing for seizure and confiscation of "the property of rebels." *Pelham* v. *Rose*, 76 U.S. 103, 19 L.Ed. 602; *The Confiscation Cases*, 87 U.S. 92, 22 L.Ed. 320; *United States* v. *Winchester*, 99 U.S. 372, 25 L.Ed. 479. In all or nearly all of the cases above cited there is found either express statutory authority for the seizure, or express statutory declaration that the property shall be, or becomes, forfeited to the United States by reason of the acts complained of, and in some cases both such statutory authority and statutory declaration are found. The statute involved in the case of *The Silver Spring* expressly provided for a forfeiture of the boat "if found within the district", although not for an executive seizure: Act July 29, 1813, 3 Stat. 51, sec. 6. In the statute involved in *Gelston* v. *Hoyt*, express provision was made for seizure by the revenue officer whenever it should appear that a breach of the laws of the United States had been committed whereby the ship or the goods on board might become liable to forfeiture. The act relating to navigation of steam vessels (Rev. Stat. sec. 4499), as construed by District Judge Deady in the case of *The Idaho*, expressly authorizes a seizure by the proper officer of the Government in advance of judicial proceeding. *The Josefa Segunda* involved a statute providing that the property

subject to confiscation was liable to be "seized, prosecuted and condemned, in the district where the said ship or vessel may be found or seized." *Dobbin's Distillery* v. *United States* arose under an internal revenue act which expressly provided for forfeiture: Act July 20, 1868, 15 Stat. 125, ch. 186. The statute involved in *United States* v. *Larkin* arose under Revised Statutes, section 3072, which makes it "the duty of the several officers of the customs to seize and secure any vessel or merchandise which shall become liable to seizure by virtue of any law respecting the revenue." In the act for the seizing and confiscating of property of rebels express provision is made for executive seizure. See *Pelham* v. *Rose*, *The Confiscation Cases*, and *United States* v. *Winchester*.

The present Judiciary Act (Rev. Stat. sec. 563, subdiv. 8) gives the district courts jurisdiction "of all civil causes of admiralty and maritime jurisdiction * * * and of all seizures on land and on waters not within admiralty and maritime jurisdiction", the subdivision mentioned thus omitting the provision found in the section of the Judiciary Act of 1789 to which we have referred, as to seizures "within their respective districts," and including cases of "seizures on land and on waters not within admiralty and maritime jurisdiction." In cases of seizures on land, however, the district court proceeds, not as a court of admiralty, but as a court of common law upon a trial by jury. *The Sarah*, 8 Wheat. 391, 5 L.Ed. 644; *United States* v. *Winchester*, 99 U.S. supra. In *Dobbin's Distillery* v. *United States*, Mr. Justice Clifford said:

> Judicial proceedings in rem, to enforce a forfeiture, cannot in general be properly instituted until the property inculpated is previously seized by executive authority, as it is the preliminary seizure of the property that brings the same within the reach of such legal process. *The Schooner Anne*, 9 Cranch. 289.

In the *Dobbin's case* due executive seizure had in fact been made for breach of the internal revenue laws, and the above statement was clearly obiter.

Assuming for the purpose of this opinion that—in navigation, customs, and revenue cases—the right of executive seizure for violation of the statute exists, even without express statutory provision therefor, and that in such cases such seizure must precede judicial action for condemnation, the real and decisive question before us is simply what was the intention of Congress in this regard as expressed in the Food and Drugs Act. It is noticeable that the act nowhere declares the goods ipso facto forfeited by an infraction of the act. On the contrary, express provision is made for the re-delivery of the goods to the owner, by order of the court, upon the payment of the costs and the giving of bond, even in cases where they are found to offend against the act. The act provides that the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor "shall make uniform rules and regulations for carrying out the provisions of this act, including the collection and examination of specimens of foods and drugs manufactured or offered for sale * * * or which may be submitted for examination by the chief health, food or drug officers of any State, Territory, or the

District of Columbia * * *"; that the examination of such specimens shall be made in, or under the direction and supervision of, the Bureau of Chemistry of the Department of Agriculture for the purpose of determining whether such articles are adulterated or misbranded, and, in case such adulteration or misbranding appears, for the giving of notice by the Secretary of Agriculture "to the party from whom such sample was obtained", with opportunity to be heard. The act nowhere provides for executive seizure of property offending against the act. On the contrary, the only duty enjoined upon the Secretary of Agriculture (and upon him only) in case it shall appear to him that any of the provisions of the act have been violated is to "at once certify the facts to the proper United States district attorney" (sec. 4.). Not only is the district attorney given no power of seizure, but section 5 of the act expressly makes it his duty, on receiving from the Secretary of Agriculture (or certain other officers) report of a violation of the act, "to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States, without delay, for the enforcement of the penalties as in such case herein provided", thus suggesting by implication the exclusion of right of executive seizure. Nor has the marshal implied power to make executive seizures under the act. He is not by statute charged with the enforcement of the act, as are revenue and customs officers with respect to laws relating to those subjects.

We are not concerned with the question whether the proceedings and notice provided by sections 3, 4, and 5 of the act are necessary prerequisites to action by the district attorney, nor whether they apply to a proceeding under section 10 of the act. See *United States* v. *50 Barrels of Whisky* (D.C.), 165 Fed. 966; *United States* v. *65 Casks of Liquid Extracts* (D.C.), 170 Fed. 449. We call attention to these provisions because they are the only ones expressly relating to proceedings for the enforcement of the penalties provided by the act, as distinguished from criminal prosecutions. The considerations to which we have adverted seem to us to repel, rather than sustain, an inference that en executive seizure is necessary, or even contemplated, previous to judicial proceedings in condemnation. In the case of a law of this character, while it would not be unnatural to provide for an executive seizure, and while such power of seizure would seem of advantage in the enforcement of the act, on the other hand, if authority to make such seizure was intended, it would be the natural course to expressly so declare. There is no express declaration to that effect and none by implication, unless contained in the clause of section 10, providing that the offending articles "shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation", or in the provision that "the proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty. * * *" It is clear that, as the former clause is punctuated, there is no necessary implication of previous executive seizure. According to the punctuation, the seizure for confiscation would seem to be "by a process of libel"; and although such punctuation is by no means conclusive, and should not be controlling as

against the intent of the act as otherwise shown, it is entitled to consideration.

It is urged that the clause "the proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty", refers to the practice under admiralty rule 22, which provides that:

> The information and libels of information upon seizures for any breach of the revenue, or navigation, or other laws of the United States, shall state the place of seizure * * * and the district within which the property is brought and where it then is.

But, while this rule recognizes the practice of informations and libels upon seizures, it is not declaratory of the necessity of such previous executive seizure. There is in our opinion nothing in the reference to "proceedings in admiralty" contained in section 10 of the Food and Drugs Act which adopts rule 22 rather than rule 23, which latter rule applies to "all libels in instance cases, civil or maritime", and which provides that the libel shall state "if the libel be in rem, that the property is within the district." Under rule 23 jurisdiction is obtained by the presence of the property within the district (Henry on Admiralty, secs. 127, 132; *The Rio Grande*, 23 Wall. 458, 23 L.Ed. 158), and the court acquires its jurisdiction over the libel by its filing, and over the res by seizure of the same under a process issued after the libel is filed. (*The Queen of the Pacific* (D.C.), 61 Fed. 213; *Pacific Coast S.S. Co.* v. *Bancroft-Whitney Co.* (9th Circuit), 94 Fed. 180, 36 C.C.A. 135.)

The proceeding before us was not in admiralty. The Food and Drugs Act merely provides for conformity of all proceedings for confiscation thereunder "as near as may be, to the proceedings in admiralty." Previous executive seizure is no part of admiralty proceedings. The language in question, to our minds, falls far short of declaring by necessary implication that a condition precedent to jurisdiction in case of forfeitures under the laws relating to impost, navigation, or trade, viz, an executive seizure, is necessary to jurisdiction over judicial proceedings in confiscation under the Food and Drugs Act. Nor is there anything in the language of the present Judiciary Act which limits jurisdiction over condemnation proceedings in rem to the district where the property has been previously seized.

Taking into account the nature of the act and the various considerations to which we have referred, as well as the embarrassment which might well result from an executive seizure whose validity must depend not only upon the determination by the court of the question of fact of misbranding or adulteration, but also upon the existence of the other facts necessary to bring the articles under the Federal statutes, we are of opinion that the act should not be construed as making a previous executive seizure necessary to the jurisdiction of the court over proceedings for confiscation. We are the better content with this conclusion from the fact that it has been the general, if not the universal, practice, under this act, for seizures to be made on warrant issued after the filing of the libel.

In our opinion the order sustaining the demurrer should be reversed.

HIPOLITE EGG CO. v. UNITED STATES

(Supreme Court of the United States, Mar. 13, 1911)

220 U.S. 45; N.J. No. 1043

In error to an appeal from the District Court for the Southern District of Illinois. Decree affirmed.[33]

Mr. Justice McKenna delivered the opinion of the court.

The case is here on a question of jurisdiction certified by the district court.

On March 11, 1909, the United States instituted libel proceedings under section 10 of the act of Congress of June 30, 1906, ch. 3515, 34 Stat. 768, against 50 cans of preserved whole eggs, which had been prepared by the Hipolite Egg Company of St. Louis, Missouri.

The eggs, before the shipment alleged in the libel, were stored in a warehouse in St. Louis for about 5 months, during which time they were the property of Thomas & Clark, an Illinois corporation engaged in the bakery business at Peoria, Ill.

Thomas & Clark procured the shipment of the eggs to themselves at Peoria, and upon the receipt of them placed the shipment in their storeroom in their bakery factory along with other bakery supplies. The eggs were intended for baking purposes, and were not intended for sale in the original, unbroken packages or otherwise, and were not so sold. The Hipolite Egg Company appeared as claimant of the eggs, intervened, filed an answer, and defended the case, but did not enter into a stipulation to pay costs.

Upon the close of libelant's evidence, and again at the close of the case, counsel for the egg company moved the court to dismiss the libel on the ground that it appeared from the evidence that the court, as a Federal court, had no jurisdiction to proceed against or confiscate the eggs, because they were not shipped in interstate commerce for sale within the meaning of section 10 of the Food and Drugs Act, and for the further reason that the evidence showed that the shipment had passed out of interstate commerce before the seizure of the eggs, because it appeared that they had been delivered to Thomas & Clark and were not intended to be sold by them in the original packages or otherwise.

The motions were overruled and the court proceeded to hear and determine the cause and entered a decree finding the eggs adulterated, and confiscating them. Costs were assessed against the egg company.

The decree was excepted to on the ground that the court was without jurisdiction *in rem* over the subject matter, and on the further ground that the court was without jurisdiction to enter judgment *in personam* against the egg company for costs.

The jurisdiction of the district court being challenged, the case comes here directly.

Section 2 of the Food and Drugs Act prohibits the introduction into any State or Territory from any other State or Territory of any article of food or drugs which is adulterated, and makes it a mis-

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[33] Affirming *United States* v. *50 Cans Preserved Whole Eggs*, p. 74, *ante*.

demeanor for any person to ship or deliver for shipment such adulterated article, or who shall receive such shipment, or, having received it, shall deliver it in original unbroken packages for pay or otherwise.

In giving a remedy section 10 provides that—

> any article of food that is adulterated and is being transported from one State * * * to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, * * * shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. * * * The proceeding of such libel cases shall conform, as near as may be, to the proceedings in admiralty * * * and all such proceedings shall be at the suit of and in the name of the United States.

The shipment to Thomas & Clark consisted of 130 separate cans, each can corked and sealed with wax. The eggs were intended to be used for baking purposes. The only can sold was that sold to the inspector for the purpose of having the eggs analyzed. They contained approximately 2 percent of boric acid, which the court found was a deleterious ingredient, and adjudged that they were adulterated within the meaning of the Food and Drugs Act of June 30, 1906, ch. 3915, 34 Stat. 771.

The egg company, whilst not contending that the shipment of the eggs was not a violation of section 2 of the act, and a misdemeanor within its terms, and not denying the power of Congress to enact it, presents three contentions: (1) Section 10 of the Food and Drugs Act does not apply to an article of food which has not been shipped for sale, but which has been shipped solely for use as raw material in the manufacture of some other product. (2) A United States district court has no jurisdiction to proceed *in rem* under section 10 against goods that have passed out of interstate commerce before the proceedings *in rem* were commenced. (3) The court had no jurisdiction to enter a personal judgment against the egg company for costs.

It may be said at the outset of these contentions that they insist that the remedies, provided by the statute are not coextensive with its prohibitions, and hence that it has virtually defined the wrong and provided no adequate means of punishing the wrong when committed. Premising this much, we proceed to their consideration in the order in which they have been presented. The following cases are cited to sustain the first contention: *United States* v. *65 Casks of Liquid Extracts*, 170 Fed. 449, affirmed by the Circuit Court of Appeals in *United States* v. *Knowlton Danderine Company*, 175 Fed. 1022, and *United States* v. *46 Packages and Boxes of Sugar*, in the District Court for the Southern District of Ohio, not yet reported.

The articles involved in the first case were charged with having been misbranded and consisted of drugs in casks, which were shipped from Detroit, Michigan, to Wheeling, West Virginia, there to be received by the Knowlton Danderine Company in bulk in carload lots and manufactured into danderine, of which no sale was to be made until the casks should be emptied and the contents placed in properly marked bottles.

It was contended that the articles, not having been shipped in the casks for the purpose of sale thus in bulk, but shipped to the owner from one State to another for the purpose of being bottled into small

packages suitable for sale, and when so bottled to be labeled in compliance with the requirements of the act, were not transported for sale, and were therefore not subject to libel under section 10 of the act.

The contention submitted to the court the construction of the statute. The court, however, based its decision upon the want of power in Congress to prohibit one from manufacturing a product in a State and removing it to another State "for the purpose of personal use and not sale, or for use in connection with the manufacture of other articles, to be legally branded when so manufactured"; and concluded independently, or as construing the statute, that the danderine company, being the owner of the property, shipped it to itself and did not come within any of the prohibitions of the statute. The case was affirmed by the Circuit Court of Appeals, 175 Fed. 1022. The court, however, expressed no opinion as to the power of Congress. It decided that the facts did not exhibit a case within the purpose of the statute, saying:

> No attempt to evade the law, either directly or indirectly or by subterfuges, has been shown, it appearing that the manufacturer had simply transferred from one point to another the product he was manufacturing for the purpose of completing the preparation of the same for the market. Under the circumstances disclosed in this case, having in mind the object of the Congress in enacting the law involved, we do not think the liquid extracts proceeded against should be forfeited. In reaching this conclusion we do not find it necessary to consider other questions discussed by counsel and referred to in the opinion of the court.

In *United States* v. *46 Packages and Boxes of Sugar* the court construed the statute as applying only to transportation for the purpose of sale. To explain its view the court said:

> Following the words "having been transported" is an ellipse, an omission of words necessary to the complete construction of the sentence. These words are found in the preceding part of the section and, when supplied, the clause under which this libel is filed reads and means, "any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act, having been transported from one State to another *for sale* [italics ours], remains unloaded, unsold, or in original, unbroken packages, * * * shall be liable", etc.

And the court was of opinon that this view was in accord with the other two cases which we have cited. This may be disputed. It may well be considered that there is no analogy between an article in the hands of its owner or moved from one place to another by him, to be used in the manufacture of articles subject to the statute and to be branded in compliance with it, and an adulterated article *itself* the subject of sale and intended to be used as adulterated in contravention of the purpose of the statute.

A legal analogy might be insisted upon if cakes and cookies, which are the compounds of eggs and flour which the record presents, could be branded to appraise of their ingredients like compounds of alcohol. The object of the law is to keep adulterated articles out of the channels of interstate commerce, or, if they enter such commerce, to condemn them while being transported or when they have reached their destination, provided they remain unloaded, unsold, or in original unbroken packages. These situations are clearly separate, and we cannot unite or qualify them by the purpose of the owner to be a sale. It, indeed, may be asked in what manner a sale? The question suggests that we might accept the condition, and yet the instances

of this record be within the statute. All articles, compound or single, not intended for consumption by the producer, are designed for sale, and, because they are, it is the concern of the law to have them pure.

It is, however, insisted that "the proceeding *in personam* authorized by the law was intended to be, and no doubt is, capable of giving full force and effect to the law"; and, further, that a producer in a State is not interested in an article shipped from another State which is not intended to be sold or offered for consumption until it is manufactured into something else. The argument is peculiar. It is certainly to the interest of a producer or consumer that the article which he receives, no matter whence it come, shall be pure, and the law seeks to secure that interest, not only through personal penalties but through the condemnation of the article if impure. There is nothing inconsistent in the remedies, nor are they dependent. *The Three Friends*, 166 U.S. 1, 49.

The first contention of the egg company is, therefore, untenable.

2. Under this contention it is said that "the jurisdiction of the Food and Drugs Act in question can go no farther than the power given to Congress under which it was enacted", and that the district court, therefore, had no jurisdiction *in rem* because at the time of the seizure the eggs had passed into the general mass of property in the State and out of the field covered by interstate commerce."

To support the contention, *Waring* v. *The Mayor*, 8 Wall. 110, is cited. That case involved the legality of a tax imposed by an ordinance of the city of Mobile upon merchants and traders of the city equal to one half of 1 percent on the gross amount of their sales, whether the merchandise was sold at public or private sale. Waring was fined for nonpayment of the tax, and he brought suit to restrain the collection of the fine, alleging that he was exempt from the tax on the ground that the sales made by him were of merchandise in the original packages, as imported from a foreign country, and which was purchased by him, in entire cargoes, of the consignees of the importing vessels before their arrival, or while the vessels were in the lower harbor of the port. He obtained a decree in the trial court which was reversed by the supreme court of the State of Alabama. A writ of error was sued out from this court and the decree was affirmed, on the ground that Waring was not the shipper or consignee of the imported merchandise, nor the first vendor of it, and it was the settled law of the court "that merchandise in the original packages once sold by the importer is taxable as other property", citing *Brown* v. *Maryland*, 12 Wheat. 443; *Almy* v. *California*, 24 How. 173; *Pervear* v. *Commonwealth*, 5 Wall. 479. This also was said:

> When the importer sells the imported articles, or otherwise mixes them with the general property of the State by breaking up the packages, the state of things changes, as was said by this court in the leading case, as the tax then finds the articles already incorporated with the mass of the property by the act of the importer. Importers selling the imported articles in the original packages are shielded from any such State tax, but the privilege of exemption is not extended to the purchaser, as the merchandise, by the sale and delivery, looses its distinctive character as an import.

This case is clear as far as it goes, but the facts are not the same as those in the case at bar.

In the case at bar there was no sale of the articles after they were committed to interstate commerce, nor were the original packages broken. Indeed, it might be insisted that we need go no farther than that case for the rule of decision in this. It affirms the doctrine of original packages which was expressed and illustrated in previous cases and has been expressed and illustrated in subsequent ones. It is too firmly fixed to need or even to justify further discussion, and we shall not stop to affirm or deny its application to the special contention of the egg company. We prefer to decide the case on another ground which is sustained by well-known principles.

The statute declares that it is one "for preventing * * * the transportation of adulterated * * * foods * * * and for regulating traffic therein"; and, as we have seen, section 2 makes the shipper of them criminal and section 10 subjects them to confiscation, and, in some cases, to destruction, so careful is the statute to prevent a defeat of its purpose. In other words, transportation in interstate commerce is forbidden to them, and, in a sense, they are made culpable as well as their shipper. It is clearly the purpose of the statute that they shall not be stealthily put into interstate commerce and be stealthily taken out again upon arriving at their destination and be given asylum in the mass of property of the State. Certainly not, when they are yet in the condition in which they were transported to the State, or, to use the words of the statute, while they remain "in the original unbroken packages." In that condition they carry their own identification as contraband of law. Whether they might be pursued beyond the original package we are not called upon to say. That far the statute pursues them, and, we think, legally pursues them, and to demonstrate this but little discussion is necessary.

The statute rests, of course, upon the power of Congress to regulate interstate commerce, and, defining that power, we have said that no trade can be carried on between the States to which it does not extend, and have further said that it is complete in itself, subject to no limitations except those found in the Constitution. We are dealing, it must be remembered, with illicit articles—articles which the law seeks to keep out of commerce, because they are debased by adulteration, and which law punishes them (if we may so express ourselves) and the shipper of them. There is no denial that such is the purpose of the law, and the only limitation of the power to execute such purpose which is urged is that the articles must be apprehended in transit or before they have become a part of the general mass of property of the State. In other words, the contention attempts to apply to articles of illegitimate commerce the rule which marks the line between the exercise of Federal power and State power over articles of legitimate commerce. The contention misses the question in the case. There is here no conflict of national and State jurisdictions over property legally articles of trade. The question here is whether articles which are outlaws of commerce may be seized wherever found, and it certainly will not be contended that they are outside of the jurisdiction of the National Government when they are within the borders of a State. The question in the case, therefore, is, What power has Congress over such articles?

Can they escape the consequences of their illegal transportation by being mingled at the place of destination with other property? To give them such immunity would defeat, in many cases, the provision for their confiscation, and their confiscation or destruction is the special concern of the law. The power to do so is certainly appropriate to the right to bar them from interstate commerce, and completes its purpose, which is not to prevent merely the physical movement of adulterated articles, but the use of them, or rather to prevent trade in them between the States by denying to them the facilities of interstate commerce. And appropriate means to that end, which we have seen is legitimate, are the seizure and condemnation of the articles at their point of destination in the original, unbroken packages. The selection of such means is certainly within that breadth of discretion which we have said Congress possesses in the execution of the powers conferred upon it by the Constitution. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Lottery Case*, 188 U.S. 321, 355.

3. Had the court jurisdiction to adjudge costs against the egg company? This is contended, and in support of the contention the claimant assimilates this proceeding to one in admiralty. In consequence, it may be supposed of the provisions of section 10 of the Food and Drugs Act that the proceedings "shall conform, as near as may be, to the proceedings in admiralty", and *The Monte A*, 12 Fed. 331, and *The Alida*, 12 Fed. 343, are cited as deciding that in a proceeding *in rem* the court has no jurisdiction to assess the costs *in personam* against the claimant, who simply files an answer, but who does not enter into a stipulation to pay the costs of the proceeding. Too broad a deduction is made from these cases. They undoubtedly decide that a process *in rem* and *in personam* cannot be joined in admiralty in the same libel, but it was not held that this was because of a want of jurisdictional power in the court. Such view was disclaimed in *The Monte A*, and to show that the framing of a libel against the owner *in personam* and against the vessel *in rem* was not jurisdictional, the court said that a breach of a contract of affreightment could have been so framed "long before the adoption of the Supreme Court rules in admiralty."

It is stated in Benedict's Admiralty, section 204, that "the distinction between proceedings *in rem* and *in personam* has no proper relation to the question of jurisdiction." It may be, as stated in section 359 of the same work, that "in a suit *in rem*, unless some one intervenes, the power and process of the court is confined to the thing itself and does not reach either the person or property of the owner." If, however, the owner comes in, or an intervenor does, his appearance is voluntary. He becomes an actor and subjects himself to costs, and this even if his ownership be averred in the libel. Waple Proceedings In Rem, page 100, sec. 73; *United States* v. *422 Casks of Wine*, 1 Pet. 547.

And such seems to be the necessary effect of Admiralty Rules 26[34] and 34.[34] It is provided (rule 34) that if a third person intervene, for his own interest, he is required to give a stipulation with sureties to abide the final decree rendered in the original or appellate court.

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[34] For these rules in full see 210 U.S. 552, 554.

It is in effect conceded that if such a stipulation be given, a judgment for costs can be rendered. But, upon what theory? The concession confounds the relation between the stipulation and the judgment, and makes the security for the payment of the judgment the source of jurisdiction to render it—jurisdiction according to the contention, which the court does not have as a Federal court.

Even, therefore, upon the supposition that the principles of the admiralty law are to apply to the proceedings under section 10, we think the court had jurisdiction to render a judgment for costs against the egg company.

So far our discussion has been in deference to the contention of the egg company, but it is disputable if the certificate presents a question of jurisdiction as to costs. The district court gets its jurisdiction of the cause from section 10 of the Food and Drugs Act, and whether the libel may be *in rem* and *in personam*, or whether a personal judgment for costs can be rendered, may be said to be simply a question of the construction of the section, and not one which involves the jurisdiction of the court. In other words, the rulings of the court may be error only, not in excess of its power. It certainly had jurisdiction of the person of the egg company.

Decree affirmed.

UNITED STATES v. LEHN & FINK

(Circuit Court, S.D. New York, Mar. 17, 1911)

Circular No. 49, Office of the Solicitor

Information charging violation of section 2 of the Food and Drugs Act. Demurrer to the information overruled. Information dismissed on motion of the attorney for the United States.

HOUGH, *District Judge.* The demurrer admits that defendants shipped from one State to another an article called jalap. The third count alleges that this jalap (being a drug) was "adulterated, in that it was sold under and by a name recognized in the United States Pharmacopœia or National Formulary, and it differs from the standard of strength, quality and purity as determined by the test laid down in (said Pharmacopœia) *official at the time of investigation.*"

The fourth count alleges that the same jalap "was misbranded in that (the) label (upon its container) would indicate that said product contains 12.81 percent resin soluble in ether, whereas in truth and in fact said drug contains 0.82 percent resin soluble in ether and only 5.21 total resin.

Three questions of law are raised by the demurrers:

1st. That so much of the act as is necessary to support the counts mentioned is unconstitutional as being ex post facto.

2d. That the same portion of the act is unconstitutional as containing an improper delegation of legislative authority.

3d. That the fourth count is defective in that it does not state that said alleged misbranding was false *and* misleading, which is said to be the proper reading of the words "false *or* misleading" in section 8 of the act.

The argument which seeks to condemn (partially at all events) the act as ex post facto legislation is this: The information is for shipping an adulterated drug, and section 7 of the statute declares that for the purpose of the act a drug is deemed adulterated when "sold under or by a name recognized in the United States Pharmacopœia (and differing) from the standard of strength, quality or purity as determined by the test laid down in (said) Pharmacopœia * * * *official at the time of investigation.*"

The book called a Pharmacopœia changes from time to time; its tests may be one thing today and another a month hence. Therefore a man may ship a drug which answers the statutory test at the time of shipment, and yet a month or so later when an investigation into the matter is had, it may be found that owing to a change in the book, the same unchanged drug has become adulterated; thus converting a shipment innocent when made, into a criminal offense.

If this be the proper statutory construction, such legislation is plainly ex post facto as subjecting the citizen to punishment for something which when accomplished was obnoxious to no statute.

Admittedly it is the duty of this court to uphold the constitutionality of any congressional provision if it can possibly be done with reason; even if it be not the duty of all trial courts to leave such constitutional questions to the higher tribunals—as has so often been said. In this instance defendant's argument rests upon the assumption that that which constitutes the crime is the state of facts found when an investigation is had, and upon the further assumption that the "investigation" mentioned in section 7 of the act is identical with the "examination" referred to in sections 3, 4, and 11 of the same statute.

It seems to me that neither of these assumptions is necessary, and if they are not necessary then the act is not open to the objection of being ex post facto.

If by "time of investigation" (under section 7) be meant the time of "examination" made by the Department of Agriculture (under section 4) it does not follow that the crime is *then committed.* It may be that months after shipment, a drug is to be deemed adulterated under the conjoint effect of section 7 of the act, plus a recent amendment to the Pharmacopœia—but it is not true that the act declares the mere existence of such adulteration to be an offence. The offence is stated and completely defined (so far as this case is concerned) in section 2 of the act and (applying the statute to the facts here) it is there said that "any person who shall ship * * * from any State * * * to any other State * * * any * * * drugs * * * adulterated or misbranded within the meaning of this act" shall be guilty of a misdemeanor. The offender is guilty by the act of shipment, for the whole statute depends for validity upon the commerce clause of the Constitution. If he is not guilty when the shipment takes place and by reason of the shipment he is not guilty at all. If the statute be construed to convert a shipment lawful when made into an illegality after the shipment is accomplished, it is not only ex post facto but without any warrant as a regulation of commerce. It may well be, therefore, that when any given drug is found to be adulterated within the meaning of section 7 by reason of a recent change in the Pharmacopœia, that it "shall

be deemed to be adulterated ", but it can only be deemed to be adulterated either by common sense or by the very language of the act in the future tense. Any further shipment of that drug may instantly subject shipper and receiver to the penalties of the act, but the provision in question cannot apply to an already accomplished shipment made at a time when the drug did comply with the Pharmacopœia for the time being.

Also it is not necessary to identify the word " investigation " in section 7 with the word " examination " in other sections. Investigation is much the wider word; it includes not only an examination into the nature of the article shipped, but into all the circumstances of shipment. The examination of the drug itself is but a part of the investigation which must necessarily be held, to ascertain the matters necessary to the formulation and proof of an information or indictment.

It is therefore held that the act is not open to the objection of being ex post facto, and it follows from such holding that no conviction can be had thereunder, unless it is shown by competent evidence that (in this instance) the drug when shipped was adulterated within the meaning of the act.

The contention that the act is void as an unconstitutional delegation of legislative authority rests upon a somewhat different basis. It is pointed out, and truly, that the act contemplates changes from time to time in the Pharmacopœia, and declares as of the date of its passage in 1906 that (for example) that may be a crime in 1916 which was not a crime when the statute became law, because of an intervening change in the " test laid down in the United States Pharmacopœia."

On this point the decision in *Ohio* v. *Emery*, 55 Ohio. St. 364, is interesting and instructive. There the legislature of that State had passed a pure food and drug act which almost in the language of the national statute defined adulteration as a departure from standard of the United States Pharmacopœia. But it did not provide for any future changes in the Pharmacopœia itself. Quite naturally the court in the case cited held that reference must be had solely to the book in existence at the time of the passage of the statute; so that the question here is whether Congress can do that which the legislature of Ohio omitted to do.

From the multitude of decisions on the subject of delegation of legislative authority it seems to me necessary to make very few citations:

> The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power and must therefore be a subject of inquiry and determination outside of the halls of legislation. *Locke's Appeal*, 72 Pa. at 498, cited with approval in *Union Bridge Co.* v. *United States*, 204 U.S., at 383.

The Federal decision cited reviews the whole matter. That also was a case of criminal information, and in my judgment is controlling authority here. A comparison also of the much relied upon decision in *United States* v. *Eaton*, 144 U.S. 677, with *Matter of Kollock*, 165 U.S. 526, is instructive.

To me there could not be a plainer instance than this act of the legislature's having made a complete and perfect criminal statute, not dependent at the time of its passage on the act of any other power or person and of them providing for changes in the meaning of the word "adulterated"; a word which in the nature of things may and should change its signification with advancing knowledge or increasing civilization.

It is just as true that the meaning of "adulterated" in 1906 may be unsuitable to 1916, as that the phrase "unreasonable obstruction to free navigation" should have had a meaning as applied to the Monongahela and Allegheny Rivers in 1874, different from that found proper in 1902. And it is just as reasonable and lawful for the pure food statute to operate on the meaning of the word "adulterated" as given from time to time by experts in chemistry and hygiene, as it was held to be for the meaning of "unreasonable obstruction to navigation" to depend for its signification upon the opinion of the Secretary of War for the time being when fortified by the opinions of the engineers of his department.

As to the third contention, I do not find either the word "false" or the word "misleading" used in the fourth count of the information, but am of the opinion that the two words as used in section 8 of the act are of the same import and one or the other or both may be indifferently used. The appropriate meaning of the word "false" as extracted from the dictionary is "adapted or intended to mislead", and the word "misleading" means "tending to lead astray, deceptive." I perceive no difference in these significations for the purpose of the statute in question.

The demurrers are therefore overruled; but it may be added that it seems to me from a comparison of the counts with the Pharmacopœia, that the jalap label of which the Government here complains is a grotesque mistake, something flowing from a printer's error or the ignorance of an unskilled chemist. The proportion of resin soluble in ether stated in the label, is so enormous and impossible, as to deceive no one to whom the label would mean anything, and such puerile errors ought never to have been made the subject of criminal procedure. A charge based on this kind of mistake is well calculated to bring into disrepute those weapons of the law which ought to be reserved for intentional wrongdoers.

UNITED STATES v. TWO BARRELS OF DESICCATED EGGS

(District Court, D. Minnesota, Mar. 20, 1911)

185 Fed. 302

Libel under section 10 of the Food and Drugs Act. Exceptions filed by Armour & Co., claimants. Exceptions overruled.

WILLARD, *District Judge*. This is a proceeding under section 10 of the Food and Drugs Act of June 30, 1906 (Act June 30, 1906, ch. 3915, 34 Stat. 771). Armour & Co. appeared as claimant of the property, and has filed exceptions to the libel.

1. The first exception is as follows:

> That it appears upon the face of said libel that at the time of the filing thereof no seizure of the property therein described had been made by the libelant, and that this court has, therefore, no jurisdiction over said property.

The claimant says that for the last 100 years it has been the rule in admiralty that in seizure cases the jurisdiction depended upon the fact that a seizure had been made before the libel was filed, and that, no prior seizure having been made in this case, the court has no jurisdiction.

It may be said, in the first place, that this is not a case of admiralty or maritime jurisdiction. The jurisdiction of the district court is conferred by the act itself. The only connection that the proceeding has with admiralty is due to the fact that section 10 provides that the proceedings in such cases shall conform as near as may be to proceedings in admiralty. Section 7 of the Confiscation Act of July 17, 1862, ch. 195, 12 Stat. 589, contained a similar provision; it being there stated that the "proceedings shall conform as nearly as may be to proceedings in admiralty or revenue cases." It was said, however, in *The Confiscation Cases*, 20 Wall. 92, at page 110, 19 L.Ed. 196, that:

> Strict conformity is not required. No doubt in cases of seizure upon land resort should be had to the common-law side of the court, and such, in substance, was, we think, the case here.

But, admitting that in cases of this kind the procedure in admiralty requires a prior seizure, it is, of course, unquestioned that Congress could change such procedure, and provide that the libel should be first filed, and then a warrant issued for the arrest of the property, making the proceeding in that respect similar to a proceeding in rem in admiralty between private persons. The only question therefore is, What in this respect does the act itself provide? If there is to be a seizure prior to any proceeding in court, there must be some provision, either in this act or in some other act, authorizing some one to make such seizure. There is nothing in the law which authorizes anyone, either a private person or a public officer, to do so. By section 4 the Secretary of Agriculture is authorized to make investigations, and, if he finds that any provision of the act has been violated, he is required to certify the facts to the United States district attorney, but there is nothing here which gives him or any agent power to seize the property. Section 5 requires the district attorney, upon being informed that the act has been violated, to cause appropriate proceedings to be commenced in the proper court. This does not authorize him or the marshal or any other person to seize the property before such proceedings are commenced in court. No other law has been referred to by counsel authorizing any officer to make the seizure provided for by this act prior to a proceeding in court. It is true that in *Gelston* v. *Hoyt*, 3 Wheat. 246, 4 L.Ed. 381, Mr. Justice Story, delivering the opinion of the court, said, on page 308, "at common law, any person may, at his peril, seize for a forfeiture to the Government"; but he added:

> In the absence of all positive authority, it might be proper to resort to these principles in aid of the manifest purposes of the law. But there are express statutable provisions, which directly apply to the present case.

It appeared there that the seizure was made by the collector and surveyor of the port of New York, who it was held by the court were expressly authorized to make a seizure by the act of February 18, 1793. The same justice delivering the opinion of the court in *The Josefa Segunda*, 10 Wheat. 312, said on page 329, 6 L.Ed. 329:

> Under this clause, standing alone, it cannot be doubted that any person might lawfully seize such a vessel at his peril.

But it was distinctly held that the Collection Act of 1799, ch. 128, sec. 70, made it the duty of customhouse officers to make seizures of all vessels violating the revenue laws, and the seizure was in fact made by the collector of the port of New Orleans. A fair construction of the Food and Drugs Act does not require a holding that the seizure mentioned therein can be made by a private person. Such a provision would seem to be contrary to the general policy of the law in seizure cases. As is seen hereafter, in almost all of them, specific statutory provisions have authorized determined persons to make such seizures. To allow a private person to enter upon the premises of another, without any warrant or authority of law whatever, and to search and to seize any property which he might think was subject to confiscation, even though he did so at his peril, might lead to breaches of the peace and the disturbance of the public order. Whether the common law which allowed such a proceeding would be consistent with our constitutional provisions relating to seizures and searches presents a question of some difficulty. It cannot be held that the act in question intended to allow such a proceeding. There is nothing therefore in the law which authorizes any private person or public officer to make the seizure prior to the commencement of some proceeding in court.

An examination of the cases decided by the Supreme Court, and cited by the claimant, shows that in each one of them there was some specific provision in the law authorizing the person who did make the seizure to so make it prior to the filing of the libel The case principally relied upon in support of the exception is *The Brig Ann*, 9 Cranch 289, 3 L.Ed. 734. In that case the Intercourse Act of March 1, 1809, ch. 24, 2 Stat. 528, under which the seizure was made, expressly authorized in section 8 every collector, naval officer, surveyor, or other officer of the customs to seize any property imported contrary to law; and the merchandise in question in that case was in fact seized by a revenue cutter. In the *Josefa Segunda*, above cited, the ship was seized for a violation of the act of March 3, 1807, ch. 22, 2 Stat. 426, relating to the slave trade. Section 7 of that act authorized the President of the United States to direct the commanders of armed vessels of the United States to seize and bring into ports of the United States any such vessels. In *Clifton* v. *United States*, 4 How. 242, 11 L.Ed. 957, goods imported into New York and transferred to Philadelphia were seized by the customs officers there, under a claim of forfeiture by reason of undervaluation. That seizure was expressly authorized by the act of March 2, 1799, ch. 22, sec. 66, 1 Stat. 677. In the case of *United States* v. *43 Gallons of Whisky*, 93 U.S. 188, 23 L.Ed. 846, the property was seized by an Indian agent. This seizure was expressly authorized by section 20 of the act of March 15, 1864, ch. 33, 13 Stat. 29. In *Coffey* v. *United States*, 116 U.S. 427, 6 Sup. Ct. 432, 29 L.Ed. 681, the distilling apparatus was seized by a deputy

collector of internal revenue. He was expressly authorized to make such a seizure by section 3453 of the Revised Statutes. In *United States* v. *Winchester*, 99 U.S. 372, 25 L.Ed. 479, the cotton in question was seized by the naval forces of the United States in 1863, and afterwards condemned in the district court. It was claimed by the Attorney General that the condemnation could be sustained under the Confiscation Act of July 17, 1862, ch. 195, 12 Stat. 589. That act declared in section 6 that it should be the duty of the President to seize property so made subject to confiscation.

Section 7 of that act provided that, after the property should have been seized, a proceeding in rem should be instituted in the district court. It was held that the decree of condemnation was invalid because there was no previous seizure of the property under any order of the executive. It will be noted that in that case there was a seizure in fact, but the court held that the seizure could not confer jurisdiction upon the district court, because it was not made by a person who was authorized to make it. This would seem to support the view hereinbefore stated, to the effect that under the law now existing in the United States a private person cannot seize property forfeited to the Government. When the terms of the Food and Drugs Act, which relate specifically to the seizure, are considered, it will be seen that they lend no support to the theory that there must be a seizure before the filing of the libel. If the phrase "for the enforcement of the penalties," found in section 5, can be said to include a forfeiture, it is still to be observed that the district attorney is required to cause the appropriate proceedings to be commenced in court. Section 10 nowhere provides that the property shall be seized, and then a libel filed for condemnation. It, on the contrary, provides that the article if adulterated shall be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. This language indicates that the procedure shall be commenced in the district court before the property is seized. In most of the cases which have arisen under the act to which my attention has been called, it seems that libels were filed before the seizure. *United States* v. *779 Cases of Molasses*, 174 Fed. 325, 98 C.C.A. 197; *United States* v. *100 Cases of Tepee Apples* (D.C.) 179 Fed. 987; *United States* v. *5 Boxes of Asafœtida* (D.C.) 181 Fed. 561; *United States* v. *68 Cases of Syrup* (D.C.) 172 Fed. 781; *United States* v. *65 Casks Liquid Extracts* (D.C.) 170 Fed. 449; *United States* v. *50 Barrels of Whisky* (D.C.) 165 Fed. 966.

The first exception to the libel is therefore overruled. A similar exception was sustained in a case in the Southern District of Ohio reported in a bulletin issued by the Department of Agriculture on January 12, 1911, entitled Notice of Judgment, No. 697, Food and Drugs Act.[35] For the reasons hereinbefore stated, I cannot agree with the conclusion reached in that case.

2. The second exception to the libel is as follows:

> That the libel herein was not verified by any person having knowledge of the facts therein set forth, and that no probable cause for the seizure of said property is shown.

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[35] See *United States* v. *Eight Packages and Casks of Drug Products*, p. 149, *ante*.

The libel was, in fact, verified by the district attorney as of his own knowledge. Moreover, rule 1 of the admiralty rules of this court provides that libels shall be verified, except those filed on behalf of the United States. It may be added, also, that whatever objections might have been made to the issuance of the warrant to the marshal founded upon such a verification, the want of a sufficient verification is no ground for exception or demurrer to the substance of the libel.

The second exception is overruled.

3. The third exception is based upon the fact that the date when the eggs were shipped from Chicago is not stated; that, therefore, this shipment might have been made before the Food and Drugs Act went into effect; and that the property is not sufficiently identified. In *The Confiscation Cases*, 20 Wall. 92, it was said on page 106, 19 L.Ed. 196:

> In admiralty proceedings a libel in the nature of an information does not require all the formality and technical precision of an indictment at common law.

And on page 107 of 20 Wall., 19 L.Ed. 196:

> In proceedings in admiralty the same strictness is not required as in proceedings in common-law courts. And where the seizure is on land [said he], although the proceedings would seem to be analogous to informations in the Exchequer, yet I do not know that in our courts the rigid principles of the common law applicable to such informations have been solemnly recognized.

In *Oakes* v. *United States*, 174 U.S. 778, 790, 19 Sup. Ct. 864, 868, 43 L.Ed. 1169, it was said:

> The proceedings were in conformity with the practice in admiralty, and were not governed by the strict rules that prevail in regard to indictments or criminal informations at common law.

The defense suggested by these exceptions can without difficulty be raised by the claimant in its answer. They are accordingly overruled.

4. It is said in claimant's brief that the fourth, fifth, and sixth exceptions are founded upon the same omission in the libel, namely, that it does not allege that the eggs have been transported for sale. During the hearing it was stated at the bar that as a matter of fact the Loose-Wiles Biscuit Company did not intend to sell the eggs, but to use them in manufacturing. At the time the exceptions were argued (March 10th) this contention presented a serious question. But three days thereafter (March 13, 1911) the Supreme Court decided the case of the *Hipolite Egg Co.* v. *United States*, 220 U.S. 45, 31 Sup. Ct. 364, 55 L.Ed. 364. The facts of that case are therein stated, as follows:

> On March 11, 1909, the United States instituted libel proceedings under section 10 of the act of Congress of June 30, 1906, ch. 3915, 34 Stat. 771, against 50 cans of preserved whole eggs which had been prepared by the Hipolite Egg Company of St. Louis, Mo. The eggs before the shipment alleged in the libel were stored in a warehouse in St. Louis for about five months, during which time they were the property of Thomas & Clark, an Illinois corporation engaged in the bakery business at Peoria, Ill. Thomas & Clark procured the shipment of the eggs to themselves at Peoria, and upon their receipt of them placed the shipment in the storeroom in their bakery factory along with other bakery supplies. The eggs were intended for baking purposes, and were not intended for sale in the original, unbroken packages or otherwise, and were not so sold. The Hipolite Egg Company appeared as claimant of the eggs, intervened, filed an answer, and defended the case, but did not enter into a stipulation to pay costs.

The claims of the egg company, as far as they are material here, are stated by the court as follows:

> The egg company, whilst not contending that the shipment of the eggs was not a violation of section 2 of the act, and a misdemeanor within its terms, and not denying the power of Congress to enact it, presents three contentions: (1) Section 10 of the Food and Drugs Act does not apply to an article of food which has not been shipped for sale, but which has been shipped solely for use as raw material in the manufacture of some other product. (2) A United States district court has no jurisdiction to proceed in rem under section 10 against goods that have passed out of interstate commerce before the proceeding in rem was commenced.

After discussing the cases cited by the claimant upon the hearing in the case at bar, the Supreme Court declared that the first contention of the egg company was untenable.

The fourth, fifth, and sixth exceptions are accordingly overruled.

5. The seventh exception is based on the claim that it nowhere appears that the eggs in question are still subject to the provisions of the act. It is said that the power of the Federal Government over interstate shipments ceases when the shipments become a part of the State property. It will be noticed that this question also was raised in the case of the *Hipolite Egg Co.* v. *United States*, *supra*. In answer to the second claim of the egg company, which has heretofore been stated, the court said:

> There is here no conflict of national and State jurisdictions over property legally articles of trade. The question here is whether articles which are outlaws of commerce may be seized wherever found, and it certainly will not be contended that they are outside of the jurisdiction of the National Government when they are within the borders of a State. The question in the case, therefore, is: What power has Congress over such articles? Can they escape the consequences of their illegal transportation by being mingled at the place of destination with other property? To give them such immunity would defeat, in many cases, the provision for their confiscation, and their confiscation or destruction is the especial concern of the law. The power to do so is certainly appropriate to the right to bar them from interstate commerce, and completes its purpose, which is not to prevent merely the physical movement of adulterated articles, but the use of them, or, rather, to prevent trade in them between the States by denying to them the facilities of interstate commerce. And appropriate means to that end, which we have seen is legitimate, are the seizure and condemnation of the articles at their point of destination in the original, unbroken packages. The selection of such means is certainly within that breadth of discretion which we have said Congress possesses in the execution of the powers conferred upon it by the Constitution. *McCulloch* v. *Maryland*, 4 Wheat. 316 [4 L.Ed. 579]; *Lottery Case*, 188 U.S. 321, 355 [23 Sup. Ct. 321, 47 L.Ed. 492].

The seventh exception is accordingly overruled.

The claimant is given 10 days within which to answer the libel.

UNITED STATES v. SCHRAUBSTADTER ET AL.

(District Court, N.D. California, Apr. 5, 1911)

N.J. No. 1020

Indictment in three counts alleging violation of the Food and Drugs Act. The indictment charged that the defendant sold and delivered to McDonald & Cohn, on or about November 23, 1909, two

cases of half bottles of champagne, and that on January 22, 1910, the defendants, in addition to the printed guaranty upon the main label on each of the bottles in the two cases of champagne, gave a written guaranty that the goods conformed to the provisions of the Food and Drugs Act, which guaranty was false and illegal, under section 9 of the act.

The label on the neck of each of the bottles in five cases shipped by defendants contained the words: "Champagne Brand Dufleur Fils & Cie. Grand Vin Royal. Guaranteed under the Pure Food and Drugs Act, June 30th, 1906, Serial No. 7016" (with a design of a fancy coat of arms).

The label on the neck of each of the bottles in the other five cases shipped by the defendants contained the words "Extra dry" (with a design of a crown), and the main label on each of the bottles contained the words: "Crown brand champagne" (with the design of a crown and crossed scepter), and underneath the words "Guaranteed under the National Pure Food and Drugs Act, June 30th, 1906."

The label on the neck of each of the bottles in the two cases specially guaranteed by the defendants to McDonald & Cohn, and shipped by them as indicated, contained the words "Extra dry champagne" (with a design of a shield and the monogram A. F. W.), and the main label on each bottle contained the words "Cuvee Special E. L. Mercier & Cie. Brand Extra Dry. Guaranteed under the Pure Food and Drugs Act, June 30th, 1906. Serial no. 7016."

Examination by the Bureau of Chemistry of samples of every one of the three shipments of the product showed that the article was not champagne, but a white wine artificially carbonated, and of domestic manufacture. Misbranding was therefore charged by the indictment for the reason that the product was labeled and branded so as to deceive and mislead the purchaser, and purported to be a foreign product when it was of domestic origin. False and illegal guaranty by the defendants was charged because they gave to the dealer, McDonald & Cohn, a guaranty signed by them, to the effect that the product was not misbranded within the meaning of the Food and Drugs Act when in fact it was misbranded.

After general demurrer to the indictment, which was overruled, and waiver of a jury by the defendants, the case was tried by the court. Judgment of guilty.[36]

DIETRICH, *District Judge.* That my views upon certain questions discussed at the trial may not be misunderstood they are stated to be as follows:

First. In an indictment charging the violation of the provisions of section two of the "Pure Food Act", approved June 30, 1906, it is not incumbent upon the Government either to charge or to prove compliance by the administrative officers with the provisions of section 4 of the act, whether the hearing therein prescribed has or has not taken place.

Second. By reason of the provisions of section 9 of the act, the third count is deemed to state a public offense.

Third. The term "Champagne" when used alone and apart from any qualifying or descriptive words is commonly understood to

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[36] Affirmed, *Schraubstadter et al.* v. *United States,* p. 398, *post.*

describe an effervescent or sparkling wine produced in a province of France, the gas therein being the result of natural fermentation. It is therefore thought that a bottle containing wine produced in California and labeled "Champagne" without any other qualifying or descriptive words, tends to mislead and deceive and is "misbranded" under the provisions of the Pure Food Act.

Fourth. It is further thought that a bottle containing a wine having substantially the same qualities as the champagne manufactured in France and produced substantially in the same way, although originating in California, should not be held to be misbranded if it is labeled "California Champagne", or if by some other device conspicuously displayed in connection with the word champagne, purchasers are clearly advised that the bottle does not contain a produce of France.

Fifth. Upon the question whether or not a wine artificially carbonated, may, upon any circumstances or wherever produced, be legitimately labeled champagne, I express no opinion. It is doubted whether the record here presents the question with such fullness as its very great importance requires.

Sixth. Specifically I find that the label on each of the three bottles received in evidence in support of the three several counts of the indictment, is misleading. Considering the form and dress of each package as a whole there is little room for doubt of a design upon the part of the originator to create in the minds of consumers the impression that they are purchasing a foreign and not a domestic product.

UNITED STATES v. 40 BARRELS AND 20 KEGS OF COCA-COLA

(District Court, E.D. Tennessee, S.D., Apr. 6, 1911)

191 Fed. 431; N.J., No. 1455

Libel under section 10 of the Food and Drugs Act. Motion for directed verdict sustained. Verdict for claimant. Motion for a new trial overruled.[37]

A libel for condemnation was filed in the name of the United States of America by the United States attorney under section 10 of the Food and Drugs Act, June 30, 1906, ch. 3915, 34 Stat. 771, for the seizure for confiscation of 40 barrels and 20 kegs of a food product labeled "Coca-Cola", alleged to be adulterated and misbranded under the said Food and Drugs Act, which the Coca-Cola Company of Atlanta, Georgia, had caused to be transported for sale by an interstate carrier from Atlanta, Ga., to Chattanooga, Tenn., consigned to the Coca-Cola Bottling Works, for the use of itself and other persons, and which then remained in the original unbroken packages in Chattanooga, Tenn. An amended libel was subsequently filed.

The original and amended libels alleged that said food product was adulterated under the Food and Drugs Act in this: (a) That it contained an added ingredient, caffeine, which was a poisonous ingredient and might render said food product injurious to health; (b) that it contained an added ingredient caffeine, which was a deleterious ingredient and might render said food

[37] Judgment affirmed by Circuit Court of Appeals, *United States* v. *40 Barrels and 20 Kegs of Coca Cola*, p. 606, *post*. Judgment of Circuit Court of Appeals reversed by Supreme Court, *United States* v. *Coca Cola Co.*, p. 741, *post*.

product injurious to health; and (c) that said food product had been mixed, colored, coated or stained by the use of caramel and other coloring and flavoring substances, whereby damage or inferiority of said food product was concealed.

The libels further alleged that said food product was misbranded under the Food and Drugs Act in this: (1) That the label on each package contained the statement "Delicious and Refreshing Coca-Cola," the expression "Coca-Cola" thus employed being a representation of the presence in said food product of the substances coca and cola, substances known under their own distinctive names; whereas said food product contained no coca and little, if any, cola, and said food product was therefore an imitation of the articles or substances coca and cola, and offered for sale under the distinctive names of said two substances and said statement was a false and misleading statement regarding the ingredients and substances contained in said food product; and (2) that the label on each package also had a pictorial design of coca leaves and cola nuts, being a suggestion and representation of the presence in said food product of both coca, the leaves of the coca plant, and cola, the nut or fruit of the cola plant, when in truth said food product did not contain any coca, and little, if any, cola, in its composition, and said pictorial design was thus a false and misleading design regarding the ingredients and substances contained in said product.

After seizure of the food product the Coca-Cola Company intervened as its claimant and filed answers to the original and amended libels in which it admitted the shipment and labeling of the food product Coca-Cola as alleged. It further admitted that one of the ingredients contained in said Coca-Cola was a small proportion of caffeine, but denied that as contained in said product it was a deleterious ingredient or rendered the product injurious to health, and further denied that it was an "added ingredient"; and averred that said Coca-Cola was a mixture or compound of which caffeine was an essential constituent, whose presence did not constitute an adulteration under the Food and Drugs Act. It further admitted that said product did not contain the chief active principle of coca leaves, but denied that the name was intended to indicate that it did contain said principle, and denied that the name Coca-Cola was a representation of the presence of the substances coca and cola, or that there were substances known as coca and cola, but averred that it did contain certain elements or substances derived from coca leaves and cola nuts, and that no valuable constituent under the formula of Coca-Cola had been abstracted from the compound. It further averred that the name Coca-Cola as contained on the labels was a reproduction or facsimile of the registered trade-mark under which said product has been made and sold for more than twenty years; that said product was a mixture or compound which had been widely and generally known under the aforesaid name, which was its own distinctive name, and an arbitrary and fanciful name clearly distinguishing it from any other food product, mixture or compound; and that the name was accompanied on the labels with a statement of the places where it was manufactured or produced; that it did not contain any added poisonous or deleterious ingredient, and was not an imitation of or offered for sale under the distinctive name of any other article. All other allegations as to the alleged adulteration or misbranding of the food product were denied.

The claimant having demanded a trial by jury of the issues of fact joined in the case, a trial was had before the court and jury. At the conclusion of all the evidence the claimant moved the court for peremptory instructions to the jury to return a verdict in its favor.

SANFORD, *District Judge*. 1. The chief question in this case arises under the allegations of the Government's libel that the food product, Coca-Cola, which it seeks to condemn, is adulterated in that it contains "an added ingredient, caffeine," which is alleged to be a poisonous and deleterious ingredient that may render such food product injurious to health.

Assuming for the purpose of determining this motion, that if the caffeine, which is admittedly contained in the Coca-Cola in the proportion of about one and one fifth grains to each fluid ounce of the syrup, is an "added" ingredient within the meaning of the Food and Drugs Act, there is such conflict in the evidence as to whether

it is a deleterious ingredient which may cause injury to the health, that the question of its qualities and effect should be submitted to the jury for determination, as a question of fact and not of law, the preliminary question arises, whether, upon the undisputed evidence in this case, it can be deemed an "added" ingredient to the Coca-Cola within the meaning of the Food and Drugs Act, so that its presence can in any event cause an adulteration of that article within the meaning of the act.

The material provisions of the act, in so far as they bear upon this question, are as follows:

By section 6 it is provided that the term "food," as used therein, shall include all articles used for food, drink, confectionery or condiment by man or other animals, whether simple, mixed or compound.

By section 7 it is provided that confectionery shall be deemed to be adulterated if it contain any "mineral substance or poisonous color or flavor, or other ingredient delterious or detrimental to health"; and that an article of food shall be deemed to be adulterated "if contain any added poisonous or other added deleterious ingredient which may render such article injurious to health."

By section 8 it is provided that an article of food shall be deemed to be misbranded—

> If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:
>
> First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced;

and—

> *Provided further*, That nothing in this act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding.

And by section 11 it is provided that if it shall appear to the Secretary of Agriculture upon examination of samples, "That any article of food or drug offered to be imported into the United States is adulterated or misbranded within the meaning of this act, or is otherwise dangerous to the health of the people of the United States such article shall be refused admission."

In determining the meaning and effect of these provisions of the act, I have been greatly aided by the argument of counsel for both parties, who have clearly and forcibly stated their respective contentions, and who have conducted the case throughout with signal ability, learning, and effectiveness.

Comparing then these several provisions of the act, so as to give each its reasonable and just meaning, consistently with each other and in accordance with the general purpose of the act, I am constrained to conclude that the use of the word "added" as applied to poisonous and deleterious ingredients in articles of food other than confectionery, in sections 7 and 8 of the act, cannot be regarded as

meaningless; and that, by contrast with the provision in section 8 that confectionery, which is usually an artificial compound, shall be deemed to be adulterated if it contain any "ingredient deleterious or detrimental to health", and with the provision in section 11 that admission may be refused to any food or drug offered to be imported into the United States if it be adulterated or misbranded within the meaning of the act or "otherwise dangerous to the health of the people of the United States", it was intended to provide by sections 7 and 8 that any articles of food manufactured and sold in this country in interstate commerce should not be deemed to be adulterated merely because they contained a poisonous or deleterious ingredient, except in the case of confectionery, but that all other articles of food, whether simple or compound, were not to be deemed adulterated on account of the presence of a poisonous or deleterious ingredient unless such ingredient was "added" to the article of food in question, that is, was an ingredient foreign to its natural or normal constituency; and that this distinction applies, by the specific provisions of section 8, to compound articles of food known under their own distinctive names, not an imitation of or offered for sale under the distinctive name of any other article, and properly labeled as to the place of manufacture. Thus a natural article of food, for example, coffee, cannot be deemed adulterated, even although the average cup contains a larger amount of caffeine than an ordinary drink of Coca-Cola, and even if caffeine may be properly regarded as a deleterious ingredient injurious to health, since such caffeine is clearly not an added ingredient to the coffee, foreign to its composition, but is one of the essential ingredients naturally and normally entering into its composition. So an article of food which is not sold under a distinctive trade-name but under a well-recognized name that has acquired a distinct meaning in general popular usage, as for example, sausage, cannot be deemed adulterated within the meaning of the act, however deleterious to health some of its normal ingredients may be, provided that, as manufactured and sold, it does not contain any other poisonous or deleterious ingredients, added to its normal and customary constituents. And so, likewise, I think it is clear from the provisions of the act that a compound article of food which is manufactured and sold under its own distinctive name and properly labeled, with whose qualities and effect the public has been familiar, and for which they see fit to buy it, is not to be deemed adulterated within the meaning of the act, provided that when manufactured and sold under this distinctive name it contains no poisonous or deleterious ingredients in addition to its normal and customary constituents, as it has been habitually and regularly manufactured and sold to the public under such distinctive name; although, of course, if it were attempted to add to an article of food thus sold under its distinctive name another ingredient which it had not regularly and habitually contained under the distinctive name under which it had been sold to the public, and such added ingredient were poisonous or deleterious, it would thereby become subject to condemnation under the provisions of the act.

To hold otherwise would, in my opinion, render the word "added" as repeatedly used in the act in connection with poisonous and dele-

terious ingredients, entirely meaningless, and would involve an irreconcilable contradiction in the clauses of the act in which it is expressly provided that a mixture or compound known as an article of food under its own distinctive name, not an imitation of or offered for sale under the distinctive name of another article of food, and not containing any "added" poisonous or deleterious ingredient, shall not be deemed to be adulterated. The conclusion is, to my mind, unavoidable, that by the use of this language Congress intended to provide that a compound article of food thus known, labeled and sold under its own distinctive name, should be assimilated to a natural product and not be deemed to be adulterated, whatever the character of its ingredients, if it contained no ingredients other than those habitually and regularly entering into it as constituents under the form and with the characteristics with which it had acquired its distinctive name and become known to the public. In this case, as in the case of a natural food product, if the article is sold under the same distinctive name, with the same constituents and with the addition of no other ingredients whatever, the public in purchasing the article is not deceived—as it would be if an essential constituent ingredient were left out—but on the contrary obtains exactly the article which it has been accustomed to buy under this distinctive name, and which possesses exactly the qualities and produces exactly the effect which renders it in the mind of the public a desirable article of consumption, without addition, change or adulteration. And while it is true that a purchaser of Coca-Cola, for example, may not know either that it contains caffeine at all or the actual quantity of caffeine that it contains, the same thing may be true of the purchaser of coffee, or of other natural foods containing poisonous or deleterious ingredients. However, in the one case, as in the other, the purchaser obtains the article which he desires in its entire make-up and composition, without addition or subtraction, and without the addition of any deleterious ingredient with whose effect he is unaccustomed, and which he does not desire. In short, in the one case, as in the other, the public obtains without deception exactly the article which it wishes to buy, producing the effect which it desires; and in the one case as well as in the other, I think the article cannot be properly said to be adulterated within the meaning of the Food and Drugs Act, and the plainly expressed intention of Congress on this subject.

To hold otherwise, in my opinion, would be beyond the province of the court and an attempt to reach by judicial construction a supposed evil in the composition of articles of food sold under their distinctive names, which, if a remedy be required, can only properly be obtained by legislation. It is well settled that the function of the court in the enforcement of a statute is limited to the ascertainment of the legislative intent as expressed in the act, and cannot extend to either legislation or amendment; and that consideration of apparent hardship will not justify a strained interpretation of the law as it is written. The question therefore as to whether the act as drawn is lacking in essential provisions for the protection of the public health in failing to provide that other articles of food, as well as confectionery, shall be deemed adulterated if they contain any in-

gredient deleterious or detrimental to health, is clearly a legislative question which is not within the province of the court to determine.

Applying the act as thus construed to the undisputed facts in evidence, I find the facts established, without any contradictory evidence, to be: That the name "Coca-Cola" is a "trade name" which has for many years been given by the manufacturer to the food product in question, and upon which name a trade-mark was many years ago obtained; that this food product is an artificial compound used in the preparation of beverages, consisting of a sweet syrup, colored with caramel, with some phosphoric acid, lemon juice, and other minor ingredients, with perhaps some ingredients or qualities derived from the coca leaves and cola nuts which are used to a certain extent in its preparation, after being subjected to a process by which the cocaine and certain other ingredients are extracted, and also containing as an essential ingredient of the compound, caffeine, obtained in the main by chemical extraction from theine; that this compound has been for many years manufactured under a formula prescribing certain definite proportions of such caffeine as one of its essential ingredients; that for many years as so manufactured and sold it has regularly and habitually contained the same approximate amount of caffeine, being about one and one fifth grains to each fluid ounce of the syrup, although slightly less caffeine is contained in the syrup prepared for use in bottles than in that prepared for use at soda fountains, and although the percentage of caffeine in each individual container may vary slightly owing to process of manufacture employed, the average caffeine content being, however, substantially as above stated; that for many years this compound containing such caffeine has been sold under this trade-mark name of "Coca-Cola," has been extensively advertised under this name, and has under this name become generally known to the trade and to consumers in the United States; that no other article of food or beverage has been either manufactured or sold under the name of "Coca-Cola"; that it imitates no other article and is not sold under the distinctive name of any other article and that this name distinguishes this particular product from all other beverages and articles and clearly identifies it as a particular kind and brand of beverage made by its manufacturer and sold under this name, and distinguishes it from all other beverages or food products manufactured and sold by other persons.

I therefore find, as a conclusion of law, from these facts, that the name "Cola-Cola", is and was at the time this libel was filed, a distinctive name which clearly distinguishes this particular compound from any other food product; and I further find from the undisputed facts in evidence that the "Coca-Cola" sought to be condemned in this case is and was when the libel was filed, a compound known as an article of food under its own distinctive name; that it is and was not an imitation of or offered for sale under the distinctive name of any other article; that the name on the label is and was accompanied with a statement of the places where the article was manufactured; and that the caffeine which it contained is and was not an "added ingredient" within the meaning of the Food and Drugs Act, but is and was a usual and normal constituent of the article that had been and was known to the public under the distinctive name of "Coca-

Cola." And I therefore conclude that as a matter of law the Coca-Cola in question is not to be deemed as adulterated by the presence of caffeine as an "added" ingredient within the true intent and meaning of the act.

The conclusion thus reached is strengthened by a consideration of the pleadings in this case. In the libel it is alleged that the food product "Coca-Cola" which it was sought to condemn is adulterated in that it contained an "added ingredient" caffeine, which was and is both poisonous and deleterious, yet the entire proof unquestionably shows that the caffeine contained in the article Coca-Cola is one of its regular, habitual and essential constituents, and that without its presence, that is, if it were de-caffeinized, so to speak, the product would lack one of its essential elements and fail to produce upon the consumers a characteristic if not the most characteristic effect which is obtained from its use. In short Coca-Cola without caffeine would not be Coca-Cola as it is known to the public and would not produce the effect which the Coca-Cola bought by the public under that name produces, and if it were sold as "Coca-Cola" without containing caffeine the public buying it under this name would be in fact deceived.

The Government's contention then, under the proof, leads to this—there being, it is to be observed, no issue raised in the pleadings as to the amount of caffeine contained—that an entire compound containing a certain ingredient, which is one of its essential ingredients, and without which the compound would lose its characteristic qualities, is, as an entire compound, to be deemed adulterated because it contains such ingredient, on the theory that such ingredient is added to the compound, as distinguished from being contained in it as an essential constituent of the entire compound. It is difficult to see, however, how any part which is an essential of an entire article, and without which the entire article would not exist, can be properly deemed to be added to the entire article, or in short, to be added to or adulterate itself.

The case would be different, of course, if the libel alleged that any other constituent element of the compound as for example the syrup, was sold as syrup, and in fact adulterated with caffeine. That, however, is not this case. The libel specifically alleges that the food product "Coca-Cola" is adulterated by the addition of caffeine, and the proof unquestionably shows that the caffeine is not an addition to this compound, but is one of its essential and normal ingredients under the distictive name under which it has been sold and is known to the public.

It results that in so far as the libel charges that Coca-Cola is adulterated because it contains caffeine as an added ingredient, the claimant's motion for peremptory instructions must be sustained.

2. It is also alleged in the libel that the name "Coca-Cola" as used on the label suggests and represents the presence in this food product of coca, meaning the leaves of the coca plant, and that this product does not in fact contain any coca in its composition, thereby constituting a false and misleading statement regarding the ingredients and substances contained in the "Coca-Cola."

Assuming for the purposes of determining this motion that there may be a disputed question of fact as to whether the use of the word

"coca" in the name contained upon the label is to be regarded intrinsically and originally as a statement of suggestion of the presence in the product of the leaves of the coca plant or of some material element or quality derived therefrom, and further assuming that there may be a conflict in the evidence as to whether or not there is contained in "Coca-Cola" any portion of the leaves of the cola plant or any substance or quality derived therefrom to any material degree, the preliminary question arises as to whether, upon the other undisputed facts in evidence these issues of fact shall be submitted to the jury for their determination, as questions of fact, or whether under the other undisputed evidence in the case, these allegations, if true, are, as a matter of law, immaterial.

Without stating my reasons in detail it is sufficient at this time to say that after careful consideration of the question I have, for reasons directly analogous to those which determined my conclusions in reference to the adulteration of an article sold under the distinctive name, concluded that it was the intention of Congress to provide that where a compound article of food was known under its own distinctive name, was not an imitation of any other article of food or sold under the distinctive name of any other article, was properly labeled as to the place of manufacture, and contained no "added" poisonous or deleterious ingredient, it should not be deemed misbranded within the meaning of the Food and Drugs Act in so far as any statement or suggestion contained in the name itself is concerned. To hold otherwise would, in my opinion, involve an absolute and irreconcilable contradiction between the several clauses in section 8 of the act, and would render meaningless the express provision of the section that a compound known as an article of food under its own distinctive name, not an imitation of or offered for sale under the distinctive name of another article, properly labeled with the place of manufacture, and not containing any added poisonous or deleterious ingredients, shall not be deemed to be misbranded. Obviously if the article contains the same constituents as those normally and regularly contained under the distinctive name under which it is sold and under which it is known to the public, the distinctive name indicating this distinctive article, is not misleading, but on the contrary serves to directly inform the public that it is the specific article which the public knows under that name and desires to buy.

It results from the facts hereinbefore found from the undisputed evidence that in so far as the libel charges the misbranding of the Coca-Cola by reason of any false statement or suggestion contained in the name itself, the claimant's motion for peremptory instructions must be sustained.

3. It also results from what has been heretofore stated that in so far as the libel charges that the Coca-Cola is misbranded because of being an imitation of or offered for sale under the distinctive name of another article, in the entire absence of evidence to show that this is the case, the claimant's motion for peremptory instructions in so far as this charge of the libel is concerned must also be sustained.

4. With reference to the charge that the Coca-Cola was misbranded by reason of being mixed, colored or stained by the use of coloring substance whereby damage or inferiority of the mixture was con-

cealed, without expressing any opinion upon the weight of the evidence, I am of the opinion that the evidence is not so undisputed as to constitute the solution of this question a mere matter of law, but that this question should be left to the jury under the issues raised by the pleadings.

So far, therefore, as this charge in the libel is concerned, claimant's motion must be overruled.

5. As to the charge in the libel that the pictorial design of coca leaves on the labels is misleading in that it represents and suggests the presence of the substance coca in the "Coca-Cola" product I have had great difficulty. While it is apparently true that under the provision of the act heretofore quoted that no compound food product sold under its own distinctive name shall be deemed to be misbranded, when it contains no added poisonous or deleterious ingredient and is otherwise sold and labeled in accordance with the act, it would apparently follow, as a matter of the strict letter of the law, that in the absence of any added poisonous or deleterious ingredient, a product thus sold under its distinctive name cannot be deemed misbranded upon any ground. I have concluded, however, that giving a fair and reasonable construction to the somewhat conflicting provisions of the act, it was only intended to protect an article sold under its distinctive name from the charge of misbranding in so far as any statement or suggestion contained in the name itself is concerned, and that it was not intended to prevent the condemnation of the article as misbranded, even though sold under its own distinctive name, if in addition to such distinctive name the label contains other misleading statements, designs or devices. Without expressing any opinion as to whether the pictorial design on the label in question is misleading in any particular as to the presence of coca leaves or any ingredient or quality derived therefrom, I am of the opinion that under the evidence in the case this is not purely a question of law, but is a question of fact, which, under all the evidence, should be submitted to the jury for its determination. Therefore in so far as the charge of misbranding based upon the pictorial design of coca leaves upon the label is concerned, the claimant's motion for peremptory instructions will be overruled.

To the extent hereinabove stated the claimant's motion for peremptory instructions is accordingly sustained; otherwise it is overruled.

Thereupon counsel for libelant stated to the court that it was desired by the Government to test, as speedily as possible, the question as to whether the Coca-Cola which it seeks to condemn is adulterated in that it contains "an added ingredient, caffeine", which is alleged to be a poisonous and deleterious ingredient that may render such food product injurious to health, and to facilitate an appeal, and therefore moved the court to dismiss, without prejudice, as to the matters involved in paragraphs numbered 4 and 5 of the above opinion, which motion was allowed. The court then proceeded to instruct the jury as follows:

The COURT. In pursuance of my action on the claimant's motion for peremptory instructions, and in consequence of the dismissal by the Government in open court and in your presence of the two ques-

tions of disputed facts in the case, which I think ought to be submitted to you for your consideration, and in consequence of the fact that upon the other questions in the case upon the undisputed evidence in my opinion the Government is not entitled to a verdict at your hands, and in consequence of my action in sustaining the motion for a peremptory instruction as to such other grounds, I now direct you to return a verdict in favor of the claimant, the Coca-Cola Company. You may return that without leaving your seats.

UNITED STATES v. TUCKER

(District Court, S.D. Ohio, April 8, 1911)

N.J. No. 1077

Information in two counts alleging shipment in violation of section 2 of the Food and Drugs Act of a drug product labeled "Nathan Tucker, M.D., specific for asthma, hay fever, and all catarrhal diseases of the respiratory organs." Misbranding was alleged in the first count of the information because said drug contained cocaine and the label bore no statement of the quantity or proportion of cocaine contained in said drug; and in the second count for the reason that the use of the word "specific" on the label was false and misleading and calculated to mislead and deceive the purchaser in that it represented the drug as a complete cure for the diseases named on said label when in fact the ingredients of said drug were not a sure or complete cure for said diseases.

The defendant filed a demurrer to the information, together with a motion to quash the information. Demurrer and motion of defendant overruled by the court. Plea of not guilty. Jury trial. Verdict of guilty as to the first count and not guilty as to the second count of the information. Motions in arrest of judgment and for new trial. Overruled.

SATER, *District Judge* (on motion for a new trial). The defendant delivered at Mt. Gilead, Ohio, and shipped from that place to one Henson (whose real name is Morgan), residing at Washington, D.C., a bottle of medicine containing cocaine. The bottle bore no label or brand indicating the presence of that drug in the medicine. The jury having found him guilty of violating the Pure Food and Drugs Act, June 30, 1906, 34 Stat. 768, he moves to set aside the verdict on the ground that he was engaged in intrastate and not in interstate commerce.

In answer to an inquiry from Henson, the defendant mailed him an examination or symptom blank and what is manifestly a previously prepared stock letter, stating that under a separate cover were forwarded to him circulars fully explaining the defendant's system of relief and cure for asthma, hay fever, and nasal catarrh, and naming the cost of treatment. Henson was requested to fill out the blank and return it with full payment in advance, on receipt of which a treatment would be sent by express without delay. Henson filled out the symptom blank and returned it with a postal order for the sum named. Thereupon the defendant deposited in the mail at

Mt. Gilead a bottle containing two ounces of the medicine, addressed to Henson, and also shipped to him by express an atomizer, both of which were received by Henson at Washington. Later a second bottle of medicine was sent in the same manner as the first. Henson made no suggestion and gave no direction as to the mode of transporting any of the medicine.

Was the transaction in which the defendant engaged interstate commerce? His contention is that the sale and delivery were completed in Ohio, when the medicine was deposited in the mail, and that the title thereto then and there passed to the purchaser, free from any interest of the defendant therein, that the delivery to the postal department for transmission to Henson was a delivery to him, and that consequently the transaction was wholly intrastate and governed by the Ohio law of sales, 99 Ohio L., 413–425, secs. 8381–8455, Ohio General Code. He claims that the fact that the sale was made with the intent that the medicine should be transported from Ohio to the District of Columbia after the sale and delivery were fully completed did not impart an interstate character to the transaction, because the agent by whom the transportation was effected—the United States mail—was the agent of the purchaser and not of himself. To sustain his contention he relies on *State* v. *Mullin*, 78 Ohio St. 358. In that case a resident of Harrison County gave an order by mail to a resident of Jefferson County for a case of beer to be forwarded to the purchaser by express, marked c.o.d. The beer was sent, received, and paid for. It was held that the express company was the agent of the purchaser to receive the goods from the seller and the agent of the seller to receive their price from the purchaser, and that upon delivery to the carrier the title to the goods passed to the purchaser, although he was not entitled to their actual possession until he paid or tendered the purchase price. It was further held that the place of both the sale and delivery was the place of the seller's residence, and that the sale was completed when the seller delivered the goods to the carrier. The transaction was wholly intrastate and the goods were shipped under instructions given by the purchaser. The facts of that case and the law applicable thereto readily distinguish it from the case at bar.

The second section of the Pure Food and Drugs Act is limited in its application to interstate and foreign commerce. The prohibition therein contained runs against the introduction of misbranded drugs into any State, or Territory, or the District of Columbia, from any other part of the United States, or from any foreign country. The offense with which the defendant is charged is the shipment and delivery of such a drug for shipment to a point outside of the State, an offense which is punishable whether the destination of the article shipped or delivered for shipment is within the United States or in a foreign country. He solicited and obtained the defendant's [Henson's?] order for the medicine. He knew that the transaction, if consummated, would necessitate interstate transportation. That the negotiations were conducted by mail is unimportant. Commerce is intercourse, *Gibbons* v. *Ogden*, 9 Wheat. 189, 193, and for the purposes of commercial intercourse parties may avail themselves of the mails as well as of traveling salesmen, *Robbins* v. *Shelby Taxing District*, 120 U.S. 489, 495, or of the telegraph, *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U.S. 1, or the telephone, *Cen-*

tral Union Telephone Co. v. *State*, 118 Ind. 194; Judson on Interstate Commerce, sec. 6.

Neither a sale nor the place of sale and delivery is alone the test of interstate commerce, nor does transportation, although an adjunct essential to commerce, constitute a transaction of interstate commerce. A sale, the parties to which are from different States, is a transaction of interstate commerce, wherever the contract of sale may be made, when the goods are to be transported from one State to another, whether the sale is made before or after shipment. The indispensable element and test of interstate commerce is importation into one State from another. Every negotiation, contract, initiatory and intervening act, trade, and dealing between citizens of any State, or Territory, or the District of Columbia, with those of another political division of the United States, which contemplates and causes such importation, whether it be of goods, persons, or information, is a transaction of interstate commerce. (*United States* v. *Swift & Co.*, 122 Fed. 529, 531; *Butler Bros. Shoe Co.* v. *United States Rubber Co.*, 156 Fed. 1, 17; *Hopkins* v. *United States*, 171 U.S. 578, 597; Cyc. 416; *Globe Elevator Co.* v. *Andrew*, 144 Fed. 871; 882, *Re Charge to the Grand Jury*, 151 Fed. 834, 839.) When the State courts have been called upon to express themselves, their utterances have been in harmony with the foregoing. (*Cooke* v. *Rome Brick Co.*, 98 Ala. 413; *Culverson* v. *American Trust & Banking Co.*, 107 Ala. 464; *Loverin & Browne Co.* v. *Travis*, 136 Wis. 322, 331.) In the last-named case it is said that—

> It cannot now be doubted that "commerce" in the Federal Constitution, comprehends all of the intercourse between the parties necessarily or ordinarily involved in a commercial transaction with reference to merchantable commodities. Nor can it be doubted that the solicitation of the purchaser by the seller, the contract of purchase and sale, and the actual physical delivery to the purchaser by whatever means may be selected are all inherent parts of the intercourse pertaining to trade or traffic in merchandise.

The transaction in which the defendant engaged was interstate commerce. The evidence justified the verdict returned by the jury, and the motion is therefore overruled.

UNITED STATES v. AMERICAN DRUGGISTS' SYNDICATE

(Circuit Court, E.D. New York, April 11, 1911)

186 Fed. 387; N.J. No. 1194

Information charging violation of section 2 of the Food and Drugs Act. Demurrer to information sustained.

VEEDER, *District Judge*. The defendant has demurred to both counts of a criminal information charging it with misbranding a drug in violation of act June 30, 1906, ch. 3915, sec. 2, 34 Stat. 768, known as the Food and Drugs Act. Section 2 of the act prohibits "the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia of any article of food or drugs which is adulterated or misbranded within the meaning of this act", and provides that

any person who shall ship or deliver for shipment, as therein described, any such article so adulterated or misbranded, shall be guilty of a misdemeanor. The offense of misbranding is defined in section 8 as follows:

> That the term "misbranded," as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.
>
> That for the purposes of this act an article shall also be deemed to be misbranded:
>
> In the case of drugs:
>
> First. If it be an imitation of or offered for sale under the name of another article.
>
> Second. If the contents of the package as originally put up shall have been removed, in whole or in part, and other contents shall have been placed in such package, or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilid, or any derivative or preparation of any such substances contained therein.

The remainder of the section deals in similar detail with the case of foods.

The first count of the information alleges that the defendant shipped from the State of New York to the District of Columbia a certain article and drug, which was a mixture of substances for external use, upon which there was a label reading:

> A. D. S. Peroxide Cream. Cleansing, Soothing and Healing to the Skin, Antiseptic, Cooling and Refreshing.

Elsewhere upon the carton, and upon the package or jar inclosed therein, were immaterial variations of this statement of the properties and purposes of the preparation. It is charged that this was a misbranding within the meaning of the act, "in that the label then and there bore statements, designs, and devices regarding the said article and the ingredients and the substances contained therein, which were false and misleading, in that the words 'Peroxide Cream' represent that peroxide is an important ingredient, and tend to lead the purchaser to believe that peroxide is an important ingredient of the article, whereas, in truth and in fact, the article then and there contained only an indication of a very small quantity of same peroxide which said quantity is insignificant."

The scope of the general terms of the definition of misbranding in section 8, "any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular", must be ascertained by construing them in connection with the subject matter and other provisions of the act. It includes, in the first place, not only statements concerning the ingredients or substances contained in the article, but certain other statements "regarding such articles." What such statements are appears in the case of drugs in the paragraph immediately following the definition of misbranding; for instance, drugs in imitation of or offered for sale under the name of another article. The only possible ground for doubting this construction arises from the manner in which the general definition of the term misbranding is followed, in the case of drugs, by specifications which purport to

be additions. The remainder of section 8, dealing with the case of food, is perfectly clear. The first three paragraphs specify the particulars other than statements regarding the ingredients or substances contained therein which shall be deemed misbranding, and then follows the general provision covering any statement "regarding the ingredients or the substances contained therein which shall be false or misleading in any particular." Having regard to the fact, however, that the general definition of the term "misbranded" is expressly applicable to both food and drugs, it does not appear that the difference in phraseology and form of arrangement of the specific provisions for the two articles affects their substantial equality in scope. It is clear that the section does not apply to any statement regarding a drug which does not have reference to the ingredients or substances contained therein, or to any of the particulars specified in the section in the case of drugs. The same process of reasoning discloses the scope of the phrase "false or misleading in any particular." If there is any appreciable difference in the import of the words false and misleading, the scope of the latter term is to be found in the specific provisions of this section in the case of drugs; for instance, where the label fails to state, as required, the quantity or proportion of alcohol contained therein. No statement regarding a drug can therefore be false or misleading in any particular, within the meaning of the act, unless it relates to some one or more of the various particulars expressly enjoined or prohibited by the act.

It appears upon the face of the information that the preparation in question contained some peroxide. There was no statement on the label as to the quantity or proportion, nor does the act require any such statement in the case of peroxide. Certainly, then, the label was not false. *In re Wilson* (C.C.), 168 Fed. 566; *United States* v. *Boeckmann* (C.C.), 176 Fed. 382. But the information alleges that the label is "false and misleading, in that the words 'Peroxide Cream' represent that peroxide is an important ingredient, and tend to lead the purchaser to believe that peroxide is an important ingredient of the article, whereas, in truth and in fact, the article then and there contained only an indication of a very small quantity of same peroxide, which said quantity is insignificant." It is asserted (and it is a fair inference) that the label tends to lead purchasers to believe that peroxide is present to such an extent that the antiseptic and healing qualities of peroxide may be obtained from its use; and it is argued that such is not the fact, and therefore the label is misleading. In other words, the Government contends that the statement on the label with reference to the remedial effect of the article is a misbranding within the meaning of the act because the article is, in fact, ineffectual for the purpose indicated. Assuming that the information is sufficient as a pleading to raise such an issue, this contention is based upon an entire misconception of the scope and purpose of the act. The purpose was to protect the public against deception in the purchase of drugs and food by punishing adulteration and misbranding as therein defined. If the label on a drug is not false or misleading in any of the particulars enjoined or prohibited by section 8, no offense is committed under that section. By no possible construction can the terms of the act be extended to such a boundless field of inquiry as that involved in the accuracy of the remedial effects claimed for a drug. Such an inquiry could be

pursued only through the opinions of contending experts and the experience of those who had used the article, and a conclusive determination could seldom, if ever, be reached. At all events, it is sufficient to say that the act discloses no purpose to hold manufacturers and vendors of preparations like the one in issue here to criminal responsibility for misstatements as to their curative or remedial effects. *United States* v. *Johnson* (D.C.), 177, Fed. 313.

The second count of the information alleges that there was inclosed with the article a circular entitled "A. D. S. Toilet Dainties", containing the following words, under the heading "A. D. S. Peroxide Cream": "It is a pure skin cerate, in which a harmless and efficient whitening agent has been successfully incorporated"; and asserts that this was a misbranding "in that the circular accompanying the article bore statements, designs, and devices regarding the said article, and the ingredients and substances contained therein, which were false and misleading, in that the statement 'is a pure skin cerate' is false and misleading in that it represents the article to contain wax, whereas, in truth and in fact, the said article did not then and there contain wax, and was not then and there a cerate." In other words, the information shows that the alleged false and misleading statement constituting misbranding appeared, not upon the label of the article itself, or upon the package in which the article was contained, but upon a separate circular (the title of which indicates that it advertised other articles) which was inclosed with the article in the enveloping package.

The terms brand and label as used in this connection are perfectly clear and definite; they indicate a statement, design, or device affixed to an article. Confusion can only arise from the failure to employ uniform phraseology throughout the different paragraphs of section 8 to express the same idea. In the second numbered paragraph relating to food the phraseology is "if the package fail to bear a statement on the label." In the fourth numbered paragraph relating to food the phraseology is, "if the package containing it or its label shall bear any statement." Doubtless these variations in expression were employed in view of the fact that such articles are commonly sold either in bottles, jars, or cans, in which case the statement, design, or device would ordinarily appear on a printed label attached thereto, or in an enveloping carton or package, when the statement would ordinarily be printed on the package. But the clearest provision in the section (the third numbered paragraph relating to food) omits the word "label" altogether:

> If in package form, and the contents are stated in terms of weight or measure they are not plainly and correctly stated on the outside of the package.

The plain sense of the language in question is that it embraces any statement, design, or device regarding the article, which appears on the outside of the package in which the drug is offered for sale, whether such statement be printed upon or otherwise affixed to the package itself or impressed upon a separate label which is then affixed to the package. An advertising circular inclosed with an article inside the carton in which it is offered for sale, does not induce the sale or deceive the intending purchaser, and is not within the purview of the act.

The demurrer is sustained.

UNITED STATES v. 10 BARRELS OF VINEGAR

(District Court, E.D. Wisconsin, Apr. 19, 1911)

186 Fed. 399; N.J. No. 1050

Libel under section 10 of the Food and Drugs Act. Demurrer to libel overruled.

This is a case arising under the Pure Food Act, so called. A demurrer has been interposed to the libel, which raises the question whether the vinegar in question was misbranded, under the terms of section 8 of said act, which provides substantially that the term "misbranded" as used in the act, shall apply to all drugs or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular, etc.

The vinegar in question was labeled as follows: "Gal. Established 1875. Dayton, O. We Warrant Our Vinegar to test 40 Grains in strength. B. T. Chandler & Son, 27 East 55th Street, Chicago. Manufacturers and Wholesale Dealers in Saratoga Brand Vinegar. A blend of Pure Boiled Apple Cider and Distilled Vinegar. We guarantee the Vinegar sold under our brand to comply with the requirements of the National and State Pure Food Laws."

QUARLES, *District Judge* (after stating facts as above). The contention of the Government is that the label is so framed as to mislead the average customer who reads the same casually. The eye naturally rests upon the words in large print, "Saratoga Brand Vinegar," then, in smaller type "Pure Boiled Apple Cider," and in the third line, in larger print, "Distilled Vinegar." Without the aid of marks of punctuation, it is contended that the words "A blend of Pure Boiled Apple Cider and Distilled Vinegar" may naturally describe two brands of vinegar that are blended, and the words "Pure Boiled Apple Cider" are merely descriptive of one of such ingredients.

It is a matter of common knowledge that cider vinegar is far superior to distilled vinegar. The popularity of cider vinegar is so general that this brand, not subjected to critical examination, would naturally arouse the expectation that cider vinegar has been blended with distilled vinegar. That, like the Delphic oracle, the label, in the absence of punctuation, may be read either way, and the average buyer might naturally be misled in the premises.

If, as a matter of first impression, the label naturally conveys the idea that cider vinegar is one of the ingredients, then it is calculated to deceive, although a deliberate reading of the label might correct such impression. It is matter of common observation that the average retail purchaser of such commodities does not delay to make a careful analysis of the label, but contents himself with a hasty glance or cursory examination. If therefore, this label would lead such purchaser at first blush to the conclusion that here was a blend of two vinegars, one of which was cider, it would fall within the definition of "misbranding" under section 8. In other words, the ordinary purchaser reading this label, would not be led to suppose he was buying distilled vinegar compounded with a foreign element.

He is comforted with the assurance: "We guarantee the Vinegar sold under our brand to comply with the requirements of the National and State Pure Food Laws."

There is another subdivision of the pure food act which must be considered *pari materia* wth the clause already under consideration. Section 8, subdivision 4, paragraph 2, is in substance as follows: An article of food which does not contain any poisonous or deleterious ingredients shall not be deemed misbranded if labeled, branded or tagged so as to plainly indicate that they are compounds, imitations or blends, and the word "compound", "imitation", or "blend", as the case may be, is plainly stated on the package in which it is offered for sale. Up to this point the label in question conforms with the act and, if legislative conditions ended here, there could be no just cause of complaint. But Congress added another requirement in the case of a blend—"provided that the terms blend as used herein shall be construed to mean a mixture of like substances", etc. If the substances so blended are not similar, the statement on the label that they are blended is not sufficient to secure immunity.

The defendants contend that this restrictive proviso applies only where the blend is claimed without disclosure of ingredients, and has no application where as here, the component parts of the blend are disclosed. This construction seems to be too narrow. One prime object of this legislation is to prevent the public from being misled or deceived. In view of the language of the act we are justified in saying that the term "blend", as here displayed on the label, is an assurance to the public that the mixture consists of like substances; and in the present case it is an assurance that the "Saratoga Brand Vinegar" consists of two like substances, that is, distilled vinegar and a vinegar derived from apple cider. In this regard the label is false and misleading.

We have seen how naturally the buyer might be misled by a casual examination of the label. The use of the term "blend" coupled with a specific reference to the Pure Food Act, is well calculated to confirm such mistake, in view of the guaranty that the vinegar sold under this brand meets all the requirements of the national pure food law. Special significance is thus given to the statutory definition of the term "blend". It is true that boiled apple cider might be used as a harmless agent to give color or flavor to the distilled vinegar; but in such a case the boiled cider would be an infusion as distinguished from a "blend", and the public would be entitled to notice of its use for that qualified purpose. Here it is presented to the public as a blend, which is falsely misleading, because it is conceded that no cider vinegar whatever is contained in these packages.

Defendants cite, in support of their contention, *In re Wilson* (C.C.), 168 Fed. 556; *United States* v. *Boeckmann* (C.C.), 176 Fed. 382; *United States* v. *68 Cases of Syrup* (D.C.), 172 Fed. 782.

The *Wilson Case* is not in point, because there the substances comprising the "Gold Leaf Syrup" were both like substances, and under the terms and provisions of the act could properly be blended. The ingredients were maple and white sugar, and it is apparent that there was no misbranding in that case.

In the *Boeckmann Case*, *supra*, the product was labeled "Compound" "Pure Comb and Strained Honey and Corn Syrup." It will be observed the representation in that case was that it was a compound, as distinguished from a blend. So that has no bearing on the instant case.

In *United States* v. *68 Cases of Syrup*, *supra*, the court treated the extract of maple wood as a saccharine substance which might be blended with refined cane sugar, and that they constituted a blend within the meaning of the act. In the case at bar, we have no two similar substances, but only one substance, namely, distilled vinegar, which has been mixed with a product wholly unlike distilled vinegar. While the reasoning in that case is not satisfactory, a careful examination will show that it does not rule the instant case.

The Government cites the case of *United States* v. *Scanlon* (D.C.), 180 Fed. 485. This is a very interesting and well-reasoned case and goes far to sustain the conclusion we have already reached in this case. The defendant in that case manufactured syrup of cane sugar flavored to imitate maple syrup by the introduction of an extract from maple wood after it had been chopped down. The syrup was put up in bottles labeled "Western Reserve Ohio Blended Maple Syrup". The words "Ohio" and "Maple Syrup" had between them the word "Blended," and then in small type the statement, "This syrup is made from the sugar maple tree and cane sugar." The court held that the label was misleading, in that purchasers would ordinarily understand that the article contained in part maple syrup made from the sap drawn from live maple trees, and therefore the articles was misbranded.

I am constrained to hold that the vinegar in this case was misbranded within the meaning of the Pure Food Act, and therefore the demurrer will be overruled, with leave to respondent to answer within 20 days, if so advised.

UNITED STATES v. 74 (OR 20) CASES OF GRAPE JUICE

(Circuit Court of Appeals, Second Circuit, May 8, 1911)

189 Fed. 331; N.J. No. 1045

Appeal from a decree of the District Court for the Western District of New York entered upon the verdict of a jury, rendered in accordance with the direction of the court, in proceedings instituted by the United States for the condemnation, as being adulterated and misbranded, of 74 cases of grape juice, under the provisions of the Food and Drugs Act. Decree affirmed.[38]

It was stipulated upon the hearing of the appeal in this court that the proceedings were instituded by the district attorney for the Western District of New York, solely upon and by reason of a report made to him by the Secretary of Agriculture of a violation of said act. It was also conceded that the steps prescribed in section

[38] Affirming *United States* v. *74 Cases of Grape Juice*, p. 144, *ante*.

4 of said act with respect to notice and hearing had not been taken as a basis for the report made by the Secretary of Agriculture. The District Judge ruled that it was a condition precedent to the institution of proceedings under section 10 of the act upon a report from the Secretary of Agriculture that said steps prescribed in section 4 should have been taken and, consequently, directed a verdict for the respondents.

Before LACOMBE, WARD, and NOYES, *Circuit Judges.*

NOYES, *Circuit Judge* (after stating the facts as above). The different sections of the Food and Drugs Act while relating to different subjects are consistent and, in many respects, interdependent. The second section—the relevant portions of which have been shown—provides that any person violating the provisions of the act shall be guilty of a misdemeanor and subject to fine and imprisonment. The tenth section provides that articles sold or transported in violation of the provisions of the act shall be liable to seizure and condemnation. Both sections relate to penalties for violations of the act. .The penalty under one section is a fine and imprisonment. The penalty under the other section is the forfeiture of the misbranded or adulterated goods. Both sections are penal in their nature. Punishment is as well inflicted by the forfeiture and loss of property as by a fine. The two sections taken together (with the first section which relates to manufacture in territories) cover the subject of the punishment imposed for breaches of the provisions of the statute.

Section 5 of the act must also be read in connection with sections 2 and 10. The latter, as we have seen, relate to penalties. The former provides for the enforcement of such penalties. It makes it the duty of the proper district attorney upon the presentation of "satisfactory evidence" of a violation of the act by any State health or food officer to cause appropriate proceedings to be instituted and prosecuted. It also provides that the district attorney shall institute such proceedings in case the Secretary of Agriculture shall report to him any violation of the act. But in this case it is not required that evidence of a violation of the act shall be presented. The report of the Secretary is in itself made the basis of proceedings.

Now if section 5 stood apart from other provisions of the statute it would contravene a practice so long and well established as almost to amount to a fundamental right, viz: that proceedings for the punishment of the citizen should be instituted only after investigation by some public official. To compel a district attorney to institute proceedings upon the report of another official without requiring the latter to investigate before making such report would be most extraordinary. And this act does not so require. It is made the duty of the district attorney to act upon the report of the Secretary of Agriculture without the presentation of evidence required in other cases only because section 4 of the act throws the duty of making investigation upon the Secretary before he makes his report. The preliminary examination in such case is made by the Secretary instead of the district attorney. The sections are interdependent and must

be read together, and when so read they are found to present an orderly and a just procedure. As then the "report" of the Secretary of Agriculture referred to in section 5 is the certificate of facts which he is required to make under section 4, it necessarily follows that the steps required to be taken preliminary to certifying the facts—including notice and hearing—must be taken before such a report as the law requires can be made. And it also follows, upon principles already considered, that when such report is at all a prerequisite to proceedings under section 5, it is necessary to proceedings for the enforcement of penalties by way of forfeiture as by way of fine or imprisonment.

Looking at the question involved from a slightly different point of view the same conclusion must be reached. Section 4 of the act—as we have seen—provides for the examination of articles by the Bureau of Chemistry of the Department of Agriculture for the purpose of determining whether they are adulterated or misbranded. If they are found to be adulterated or misbranded, notice and an opportunity to be heard must be given to the party from whom they were obtained. If it then appears that the act has been violated the Secretary of Agriculture must certify the facts to the proper district attorney. This is the only report of the violation of the act which the statute requires the Secretary to make. When made it affords, without further investigation, the basis for the institution by the district attorney of appropriate proceedings for the enforcement of the penalties prescribed in the act. But it is just as necesary that the report which is the basis for the condemnation proceedings should be made according to law as it is that such report should be a lawful one when it affords the basis for a criminal prosecution.

It must be distinctly borne in mind that the requirements of a preliminary investigation including notice and hearing applies only when the district attorney acts upon the report of the Secretary of Agriculture. It is not required when he acts upon evidence furnished by any State health officer and undoubtedly would not be required in proceedings taken at his own initiative.[39] Apparently the statute does not contemplate reports by the Secretary except when due examinations have been made, and leaves the ordinary cases requiring immediate prosecution or seizure to the action of local authorities. We perceive no ground whatever for the contention of the Government that if its position in this case be not sustained, section 10 of the act may as well be treated as a dead letter.

We are aware that decisions have been rendered in several district courts contrary to the conclusions reached in this opinion. It is sufficient to say that the reasoning of those cases does not commend itself to our approval and that we are unable to follow them.

The decree of the district court is affirmed.

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[39] It is not necessary to be determined in this case whether sec. 5 of the act in any way limits district attorneys in their right as the prosecuting officers of the United States to institute criminal proceedings or proceedings in rem when satisfied by satisfactory evidence obtained from other persons than health officers that the provisions of the act have been violated; and nothing in this opinion is to be considered as holding that the proceedings in this case could not have been taken by the district attorney as the result of his own investigation. Our opinion is based wholly upon the stipulation that the district attorney acted altogether in pursuance of the report of the Secretary of Agriculture.

UNITED STATES v. HYGIENIC HEALTH FOOD CO.

(District Court, N.D. California, May 12, 1911)

N.J. No. 1265

Indictment alleging violation of section 2 of the Food and Drugs Act. Demurrer to indictment sustained.

De Haven, *District Judge.* The indictment charges that the defendant upon a date named, shipped from the Northern District of California, to one J. P. Watson, at El Paso, Texas, five cases, labeled:

"Grants Hygienic Crackers," which were then and there intended as an article of food. That each package in each case was then and there misbranded under the provisions of the Food and Drugs Act of June 30, 1906, section 8 thereof, in that it contained false and misleading statements, for the following reasons: The label on each package in each of the five cases aforesaid bore the following inscription: "Sold in Packages only. Grant's Hygienic Crackers. No predigested stuff are they, but solid food for work or play. Just read what leading doctors say of Grant's Hygienic Crackers for Constipation, Indigestion, Dyspepsia and Sour Stomach. Ideal food for general family use. A daily regulator. A week's trial will convince you. Eaten daily in place of bread will keep the system in perfect order. Recommended & prescribed by leading physicians & dentists. Manufactured by the Hygienic Health Food Co., Inc., Berkeley, Cal. Sold in Packages only."

The indictment then charges—

that whereas in truth and in fact, the said so-called Hygienic Crackers consist largely of wheat and do not, and did not contain any ingredients possessing therapeutic properties for the cure of such diseases as are mentioned in the aforesaid label, other than those possessed by ordinary wheat, and the said statements are calculated to mislead the purchaser into the belief that the said crackers are in fact possessed of rare medicinal properties unwarranted by the composition of the said crackers.

The defendant has demurred to this indictment upon the ground that it does not state an offense under section 8 of the act of June 30, 1906, and I am of the opinion that the demurrer must be sustained.

Subdivision 4 of section 8 of the act referred to in the indictment provides that an article of food shall be deemed to be misbranded—

if the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

First: In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

I think the indictment may be fairly construed as alleging that the packages therein mentioned contained articles of food known as Grant's Hygienic Crackers, and there is no averment that such described crackers contained any poison or deleterious ingredient; and in my opinion such an averment is necessary to charge an offense where the label upon the package containing an article of food states where it was manufactured or produced, and describes such food by

its own distinctive name without stating the ingredients of which such article of food is composed.

The demurrer is sustained.

UNITED STATES v. ANTIKAMNIA CHEMICAL CO.

(Court of Appeals, District of Columbia, May 29, 1911)

37 App.D.C. 343; N.J. No. 1056

Appeal from the Supreme Court of the District of Columbia. Judgment affirmed.[40]

SHEPARD, *Chief Justice.* This is an appeal by the United States from a judgment sustaining exceptions to, and dismissing a libel.

The libel prayed the seizure and condemnation of 100 packages of a certain drug describing the same as follows:

Twenty packages, more or less, of said drug, labeled and branded as follows:

Antikamnia Tablets, Contain 305 grains of acetphenetidin, U. S. P. per ounce, Guaranteed by the Antikamnia Chemical Company, under the Food and Drugs Act, June 30th, 1906, U. S. Serial Number 10. The Antikamnia Tablets in this original ounce package contain no acetanilid, antifebrin, antipyrin, morphine, opium, codein, heroin, cocaine, alpha or beta eucaine, arsenic, strychnine, chloroform, cannabis indica, or chloral hydrate. Antikamnia Tablets five grains. One ounce Antikamnia Tablets. Manufactured in the United States of America by the Antikamnia Chemical Company, St. Louis, U. S. A.

Also seventy other packages, more or less, of said drug, labeled and branded as follows:

Antikamnia and Codein Tablets. Contain 296 grains acetphenetidin, U. S. P. per ounce. Contain 18 grains supl. codein per ounce. Guaranteed by the Antikamnia Chemical Company, under the Food and Drugs Act, June 30th, 1906, U. S. Serial No. 10. The Antikamnia and Codein Tablets in this original ounce package contain no acetanilid, antifebrin, antipyrin, morphine, opium, heroin, cocaine, alpha or beta eucaine, arsenic, strychnine, chloroform, cannabis indica, or chloral hydrate. One ounce Antikamnia and Codein Tablets. Manufactured in the United States of America by the Antikamnia Chemical Company, St. Louis, U. S. A.

Also ten other packages, more or less, of said drug, labeled and branded as follows:

Antikamnia and Quinine Tablets. Contain 165 grains acetphenetidin, U. S. P. per ounce. Guaranteed by the Antikamnia Chemical Company, under the Food and Drugs Act, June 30th, 1906, U. S. Serial No. 10. The Antikamnia and Quinine Tablets in this original ounce package contain no acetanilid, antifebrin, antipyrin, morphine, opium, codein, heroin, cocaine, alpha or beta eucaine, arsenic, strychnine, chloroform, cannabis indica, or chloral hydrate. One ounce Antikamnia and Quinine Tablets.. Manufactured in the United States of America by the Antikamnia Chemical Company, of St. Louis, U. S. A.

The libel charges that the packages of said drugs are subject to condemnation as misbranded in violation of the provisions of the Food and Drugs Act, approved June 30, 1906.

Because each and all of said packages of drug contain a large quantity and proportion of acetphenetidin, which your libelant charges is a derivative of acetanilid, and that under the provisions of the said act of Congress and of the

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[40] Affirming *United States* v. *100 Packages of Antikamnia Tablets*, p. 178, *ante*. Judgment of Court of Appeals reversed by U.S. Supreme Court, *United States* v. *Antikamnia Chemical Co.*, p. 552, *post*.

regulations lawfully made thereunder, it is provided and required that the label on each of said packages should bear a statement that the acetphenetidin contained therein is a derivative of acetanilid; and yet your libelant charges that each and all of said packages fail to bear a statement in any form that the acetphenetidin contained therein, is a derivative of acetanilid, or that the drug contains any derivative of acetanilid.

Your libelant further charges that each and all of said packages of drug are further misbranded in that the labels thereon are false and misleading, for the reason that each and all of the said labels bear the statement that no acetanilid is contained therein, and that said statement imports and signifies that there is no quantity or proportion of any derivative of acetanilid contained in said drug.

Under the warrant ordered to issue, the marshal siezed 93 packages, in all, bearing the labels aforesaid. By leave of the court, the Antikamnia Chemical Company, alleging itself to be the owner of the packages was permitted to appear as party defendant.

The exceptions on which the libel was dismissed are substantially: That the act does not require that the label on each of said packages shall have a statement that the acetphenetidin contained therein is a derivative of acetanilid, nor is it necessary under said act that a derivative of any parent substance should state that it is a derivative of such substance, provided the derivative itself is named by its proper name. That the statement on the packages that it contains no acetanilid is neither false nor misleading, but true, and the libel, while charging that acetphenetidin is a derivative of acetanilid, does not charge that there is any acetanilid in acetphenetidin.

Section 1 of the Food and Drugs Act makes it unlawful to manufacture within any Territory, or the District of Columbia, an article of food or drug which is adulterated or misbranded, "within the meaning of this act", and imposes a penalty therefor.

Section 2 prohibits the introduction into any State or Territory, or the District of Columbia, and the shipment from the same to any other State, Territory, etc., or foreign country, any article of food or drug, in the original packages, adulterated or misbranded within the meaning of this act, and the sale or offer for sale in the District of Columbia or Territories of any such adulterated or misbranded foods or drugs; and provides a penalty therefor.

Section 3 provides: "That the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this act, including the collection and examination of specimens of foods and drugs", etc.

Section 4 provides for the examination of foods and drugs, and the giving of notice if found to be adulterated or misbranded.

Section 5 makes it the duty of the district attorney to whom report shall be made of any violation of the act, to cause appropriate proceedings to be commenced, without delay, for the enforcement of the penalties provided in the act.

Section 6 defines the meaning and inclusion of the terms drug and food.

Section 7 declares that for the purposes of this act an article shall be deemed to be adulterated:

In case of drugs:

First. If when a drug is sold under or by a name recognized in the United States Pharmacopœia, or National Formulary, it differs from the standard of strength, quality, or purity, as determined by the test laid down in the United

States Pharmacopœia, or National Formulary, official at the time of investigation; *Provided*, That no drug defined in the United States Pharmacopœia, or National Formulary, shall be deemed to be adulterated under this provision if the standard of strength, quality, or purity be plainly stated upon the bottle, box, or other container thereof, although the standard may differ from that determined by the test laid down in the United States Pharmacopœia, or National Formulary.

Second. If its strength or purity fall below the professed standard or quality under which it is sold. [Other portions of the section relate to confectionery and foods.]

SEC. 8. That the term "misbranded" as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

That for the purposes of this act an article shall also be deemed to be misbranded:

In case of drugs:

First. If it be an imitation of or offered for sale under the name of another article.

Second. If the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilid, or any derivative or preparation of any such substances contained therein. [Remainder of section applies to foods.]

Section 9 relates to guaranties by wholesalers, jobbers, and manufacturers.

Section 10 provides for the seizure and condemnation of adulterated or misbranded foods, drugs, and liquors through proceedings instituted for the purpose, which proceedings "shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of an issue of fact joined in any such case, and all such proceedings shall be at the suit of, and in the name of the United States."

Sections 11, 12, and 13 have no possible bearing on the questions involved.

Acting upon the recommendation of the commission of experts, the Secretaries of the Treasury, of Agriculture, and of Commerce and Labor, respectively, adopted certain rules and regulations for carrying out the provisions of the foregoing act, on October 17, 1906, and published the same.

Regulation 28 was amended to take effect on April 1, 1910. This states the derivatives of the several drugs enumerated in section 8 and names the several preparations containing them respectively. Derivatives of or from, and preparations containing acetanilide, are enumerated as follows:

Acetanilide (Antifebrine, Phenylacetamide).

Derivatives: Acetphenetidine, citrophen, diacetanilide, lactophenin, methoxyacetanilide, methylacetanilide, para-iodacetanilide, and phenacetine.

Preparations containing acetanilide or derivatives: Analgesics, antineuralgics, antirheumatics, cachets, capsules, cold remedies, elixirs, granular effervescent salts, headache powders, mixtures, pain remedies, pills and tablets.

The regulation concludes as follows:

> In declaring the quantity or proportion of any of the specified substances the names by which they are designated in the act shall be used, and in declaring the quantity or proportion of the derivatives of any of the specified substances, in addition to the trade name of the derivative, the name of the specified substance, shall also be stated, so as to indicate clearly that the product is a derivative of the particular specified substance.

1. A preliminary contention on behalf of the appellants is, that the act being remedial and not penal, should be liberally construed. This contention seems to be of little or no practical importance in the present case, as the substantial question presented is one of power rather than construction. Without discussion, therefore, it may be conceded that the act, while it contains penal provisions without which it could not be enforced, was enacted to remedy the great mischief resulting from the unrestricted sale of adulterated drugs and articles of food and ought to be given, where possible, a construction that will effect the general legislative intention.

2. The substantial questions for determination arise upon two propositions that have been submitted in support of the contention of error in the dismissal of the bill on the exceptions stated. The first of these is: That the packages of the drug are misbranded, because the labels fail to recite that acetphenetidine contained therein is a derivative of acetanilide.

It seems clear that this omission is not in express violation of the requirement of section 8 of the act, for the reason that the label states the true name of the drug—acetphenetidine, which, though not one of those specifically named in the section, is a derivative of one of them—acetanilide.

Now, while persons skilled in chemistry and pharmacy would know that acetphenetidine is a derivative of acetanilide, it is certain that the average purchaser and user of drugs would not. For this reason, no doubt, the commission of expert chemists, whose recommendations were adopted by the three Secretaries, suggested the regulation requiring the label of a derivative of one of the drugs specified in section 8 to show not only the trade name of the same, but also the name of the substance of which it is a derivative. It is well settled that where an act of Congress has for its object the raising of revenue, the administration of the affairs committed to an executive department, as of the public lands, and the like, or the execution of the power over commerce, matters of detail looking to the promulgation of regulations for carrying the law into effect, as, for example providing for the proceedings thereunder, the fixing of standards, brands and labels, or the ascertainment of necessary facts upon which the law may operate, may be expressly delegated to an executive officer. In such instances Congress legislates on the subject as far as is reasonably practicable, and from the recognized necessities of the case is compelled to leave to executive officers the duty of bringing about the result pointed out by the statute. (*United States* v. *Bailey*, 9 Pet. 239; *United States* v. *Caha*, 152 U.S. 211; *In re Kollock*, 165 U.S. 526; *Field* v. *Clark*, 143 U.S. 470; *Union Bridge Co.* v. *United States*, 204 U.S. 364; *St. L. & I. M. Ry. Co.* v. *Taylor*, 210 U.S. 281; *Bong* v. *Campbell Art Co.*, 214 U.S. 236; see also *Coopersville Co-operative Creamery Co.* v. *Lemon*, 163 Fed. 145; *Prather* v. *United States*, 9 App.D.C. 82; *Kollock* v. *United States*, 9 App.D.C. 420.)

On the other hand, it is equally well settled that the power conferred to make regulations for carrying the law into effect must be exercised within the powers delegated, that is to say, confined to details for regulating the mode of proceeding to carry into effect the law as it has been enacted by Congress. It cannot be extended to amending, or adding to the requirements of the act itself. *Morrill* v. *Jones*, 106 U.S. 466; *United States* v. *Symonds*, 120 U.S. 46; *United States* v. *Eaton*, 144 U.S. 677; *Williamson* v. *United States*, 207 U.S. 425.)

The decisions cited mark the general boundary line between the powers that may be delegated to administrative officers and those that may not be. It remains to determine on which side of that line the power claimed in the present case falls.

It must be borne in mind that the Food and Drugs Act does not confer upon executive officers the power to prescribe the forms of brands and labels upon drugs, as was done by the Oleomargarine Act, that was considered in *Kollock's case*, *supra*. The only power conferred is that in section 3, which provides that the three Secretaries named, "shall make uniform rules and regulations for the carrying out of the provisions of this act, including the collection and examination of specimens of food and drugs", etc. * * *

Section 8 declares when an article shall be deemed to be misbranded: "First: If it be an imitation of, or offered for sale under the name of another article." "Second: If (among other things) the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or any derivative or preparation of any such substances contained therein."

In so far as the regulation designates the several derivatives of the drugs enumerated in section 8, and the preparations containing the same, we are of the opinion that it is within the power conferred in section 3 to make uniform rules and regulations for carrying out the provisions of the act It was not reasonably practicable for Congress to ascertain and declare these several derivatives and preparations, which might then have existed, much less to anticipate those, which might later come into existence and use. Having declared that the quantity or proportion of the several derivatives of the named drugs shall be stated on the labels, the ascertainment of such derivatives was a matter of detail properly confided to the executive officers in carrying out the provisions of the law. The regulation having named acetphenetidine as a derivative of acetanilide, the manufacturer complied therewith to the extent of naming the proportion of said derivative contained in the antikamnia tablets, but did not comply with the requirement of the same that it should also recite that it was, in fact, a derivative of acetanilide. The last requirement was, in our opinion, an amendment of, or an addition to the act itself, and therefore beyond the powers of the executive authority. Congress reserved to itself the statement of the contents of the labels and did not require that when a drug was a derivative, merely, the name of the drug from which derived should also be recited. Had it intended that this should be done, it would have so declared distinctly. In this respect the case is clearly differentiated from *In re Kollock*, *supra*, and comes within the rule governing the

second class of cases before recited, including *United States* v. *Eaton*, 144 U.S. 677–688; and *Williamson* v. *United States*, 207 U.S. 425–462. In the case last cited, the question was whether a false oath made in final proof required by a regulation of the Commissioner of the Land Office constituted perjury. The statute made certain requirements in regard to preliminary proofs and reiterated some of them in the section relating to final proofs, but omitted the one, which by the regulations made by the Commissioner under the power conferred by the act to give effect to its provisions, was required. It was held that the power to adopt rules and regulations for the enforcement of the act could not be construed to warrant one that was in fact an addition to the act.

Since the submission of this case, the Supreme Court of the United States has rendered a decision, the opinion in which, delivered by Mr. Justice Lamar, clearly draws the line between those powers which may be delegated by Congress to an executive officer and those which may not. (*United States* v. *Grimaud*, May 1, 1911 [220 U.S. 506].) That was an indictment for violating a regulation of the Secretary of Agriculture relating to the use and occupancy of public forest reservations. It was said that in the nature of things it was impracticable for Congress to provide regulations for the various and varying details of management of the forest reservations, and that it was within its power to authorize the Secretary to make such regulations as would secure the objects of such reservation, namely, to regulate the use and occupancy and preserve the forests from destruction. Having so done, it declared that "Any violation of the provisions of this act, or such rules and regulations shall be punished as provided in section 5388, R.S., as amended." The violation of such reasonable rules and regulations is "made a crime, not by the Secretary, but by Congress. The statute, not the Secretary, fixes the penalty." It is this feature of the act that differentiated the case from *Williamson* v. *United States*, *supra*, and other cases cited, which, in our opinion, furnish the rule of determination for the case at bar. Congress here prescribed what the labels should contain, and conferred no power upon the Secretaries to make a regulation adding anything thereto.

3. The second proposition is this in substance: The statement on the label that the drug "contains no acetanilide," is false and misleading, and constitutes misbrading within meaning of the act. The libel does not expressly charge that acetphenetidine contains acetanilide. If it did, there would be no doubt of the soundness of the proposition, for the exceptions necessarily admit every fact plainly alleged. But it contains no such allegation. The charges that the labels are false and misleading "for the reason that each and all of said labels bear the statement that no acetanilide is contained therein, and that said statement imports and signifies that there is no quantity or proportion of any derivative of acetanilide contained in said drug." It is argued in support of the proposition that acetphenetidine, necessarily contains some appreciable quantity or proportion of the latter drug; and it is further argued that this is a matter of common knowledge of which the court may take notice without proof. We cannot agree that it is a matter of com-

mon knowledge that a chemical derivative necessarily contains, or is of the same nature as the substance whence it may be derived. It was stated on the argument, without dissent, that very many well known substances, including acetanilide, are derivatives of benzene, or benzol. Some of these derivatives are nocuous, others entirely harmless. While, therefore, acetphenetidine is a chemical derivative of acetanilide, and may be derived therefrom in practice, it is in a general sense a derivative of benzene or benzol, and may, for all we know, be derived therefrom in actual practice for commercial use. When one wishes to ascertain the common meaning or signification of a word, resort is ordinarily had to the accredited dictionaries of the language. Murray's English Dictionary defines a chemical derivative thus: "A compound obtained from another, e.g., by partial replacement." The definition of the Standard Dictionary is substantially the same. In the latest edition of Webster's International Dictionary the following definition is given: "A substance so related to another substance by modification or partial substitution as to be regarded as derived from it, even when not obtainable from it in practice." These definitions do not carry us very far. About as far as common knowledge goes is that chemical changes occur in substances through the subtraction or the addition of some particular element. Sometimes the mingling of several substances having chemical affinities, but respectively innocuous, may produce a deadly poison. And sometimes the subtraction of an element from a poisonous substance may produce another that is perfectly harmless. The principles that direct these combinations and control the transformations affected are beyond common knowledge. They can only become known through the special study of the science of chemistry.

Whether, then, the addition or subtraction of elements through which acetphenetidine may, in theory or in practice be derived from acetanilide, produces such a chemical change of substance that it may be truly said to contain no acetanilide; or produces a substance which still contains an appreciable quantity or proportion of the same, presents a question of fact, which in our opinion, must be determined on the evidence of witnesses skilled in the science of chemistry.

To authorize the introduction of evidence an issue must be raised in the pleadings.

As before pointed out, the libel does not charge that the statement that the preparation contains no acetanilide is false, by reason of the fact that acetphenetidine does contain acetanilide. It carefully confines itself to the allegation that the statement is false because it does not recite that there is no quantity or proportion of any *derivative of acetanilide* contained therein. This clearly limits the charge of misbranding to the failure to state that acetphenetidine is a derivative of acetanilide. This is but another form of the complaint that the regulation has been violated. It does not raise an issue of fact as to whether acetphenetidine actually contains a perceptible quantity of acetanilide.

In accordance with these conclusions, the judgment will be affirmed.

UNITED STATES v. JOHNSON

(Supreme Court of the United States, May 29, 1911)

221 U.S. 488; N.J. No. 1058

Error to the District Court of the United States for the Western District of Missouri. Judgment affirmed.[41]

The facts are stated in the opinion.

Mr. Justice HOLMES delivered the opinion of the court.

This is an indictment for delivering for shipment from Missouri to Washington, D.C., packages and bottles of medicine bearing labels that stated or implied that the contents were effective in curing cancer, the defendant well knowing that such representations were false. On motion of the defendant the district judge quashed the indictment (177 Fed. 313), and the United States brought this writ of error under the act of March 2, 1907, ch. 2564, 34 Stat. 1246.

The question is whether the articles were misbranded within the meaning of section 2 of the Food and Drugs Act of June 30, 1906, ch. 3915, 34 Stat. 768, making the delivery of misbranded drugs for shipment to any other State or Territory or the District of Columbia a punishable offense. By section 6 the term drug includes any substance or mixture intended to be used for the cure, mitigation or prevention of disease. By section 8, ch. 3915, 34 Stat. p. 770, the term misbranded

> shall apply to all drugs, or articles of food, * * * the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced. * * * An article shall also be deemed to be misbranded: In case of drugs: First. If it be an imitation of or offered for sale under the name of another article. Second. [In case of a substitution of contents,] or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein.

It is a postulate, as the case comes before us, that in a certain sense the statement on the label was false, or, at least, misleading. What we have to decide is whether such misleading statements are aimed at and hit by the words of the act. It seems to us that the words used convey to an ear trained to the usages of English speech a different aim; and although the meaning of a sentence is to be felt rather than to be proved, generally and here the impression may be strengthened by argument, as we shall try to show.

We lay on one side as quite unfounded the argument that the words "statement which shall be misleading in any particular" as used in the statute do not apply to drugs at all—that the statements referred to are those "regarding such article", and that "article" means article of food, mentioned by the side of drugs at the beginning of the section. It is enough to say that the beginning of the

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[41] Affirming *United States* v. *Johnson*, p. 85, *ante*.

sentence makes such a reading impossible, and that article expressly includes drugs a few lines farther on in what we have quoted, not to speak of the reason of the thing. But we are of opinion that the phrase is aimed not at all possible false statements, but only at such as determine the identity of the article, possibly including its strength, quality and purity, dealt with in section 7. In support of our interpretation the first thing to be noticed is the second branch of the sentence: "Or the ingredients or substances contained therein." One may say with some confidence that in idiomatic English this half, at least, is confined to identity, and means a false statement as to what the ingredients are. Logically it might mean more, but idiomatically it does not. But if the false statement referred to is a misstatement of identity as applied to a part of its objects, idiom and logic unite in giving it the same limit when applied to the other branch, the article, whether simple or one that the ingredients compose. Again, it is to be noticed that the cases of misbranding, specifically mentioned and following the general words that we have construed, are all cases analogous to the statement of identity and not at all to inflated or false commendation of wares. The first is a false statement as to the country where the article is manufactured or produced; a matter quite unnecessary to specify if the preceding words had a universal scope, yet added as not being within them. The next case is that of imitation and taking the name of another article, of which the same may be said, and so of the next, a substitution of contents. The last is breach of an affirmative requirement to disclose the proportion of alcohol and certain other noxious ingredients in the package—again a matter of plain past history concerning the nature and amount of the poisons employed, not an estimate or prophecy concerning their effect. In further confirmation, it should be noticed that although the indictment alleges a willful fraud, the shipment is punished by the statute if the article is misbranded, and that the article may be misbranded without any conscious fraud at all. It was natural enough to throw this risk on shippers with regard to the identity of their wares, but a very different and unlikely step to make them answerable for mistaken praise. It should be noticed still further that by section 4 the determination whether an article is misbranded is left to the Bureau of Chemistry of the Department of Agriculture, which is most natural if the question concerns ingredients and kind, but hardly so as to medical effects.

To avoid misunderstanding we should add that, for the purposes of this case, at least, we assume that a label might be of such a nature as to import a statement concerning identity, within the statute, although in form only a commendation of the supposed drug. It may be that a label in such form would exclude certain substances so plainly to all common understanding as to amount to an implied statement of what the contents of the package were not; and it may be that such a negation might fall within the prohibitions of the act. It may be, we express no opinion upon the matter, that if the present indictment had alleged that the contents of the bottles were water, the label so distinctly implied that they were other than water, as to be a false statement of fact concerning their nature and kind. But such a statement as to contents, undescribed and unknown, is shown to be false only in its commendatory and prophetic aspect, and as such is not within the act.

In view of what we have said by way of simple interpretation we think it unnecessary to go into considerations of wider scope. We shall say nothing as to the limits of constitutional power, and but a word as to what Congress was likely to attempt. It was much more likely to regulate commerce in food and drugs with reference to plain matter of fact, so that food and drugs should be what they professed to be when the kind was stated, than to distort the uses of its constitutional power to establishing criteria in regions where opinions are far apart. See *School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94. As we have said above, the reference of the question of misbranding to the Bureau of Chemistry for determination confirms what would have been our expectation and what is our understanding of the words immediately in point.

Judgment affirmed.

Mr. Justice HUGHES, with whom Mr. Justice HARLAN and Mr. Justice DAY concurred, dissenting:

I am unable to concur in the judgment in this case, for the following reasons:

The defendant was charged with delivering for shipment in interstate commerce certain packages and bottles of drugs alleged to have been misbranded in violation of the Food and Drugs Act of June 30, 1906, chapter 3915, 34 Stat. 768.

The articles were labeled respectively "Cancerine tablets," "Antiseptic tablets," "Blood purifier," "Special No. 4," "Cancerine No. 17," and "Cancerine No. 1,"—the whole constituting what was termed in substance "Dr. Johnson's Mild Combination Treatment for Cancer." There were several counts in the indictment with respect to the different articles. The labels contained the words "Guaranteed under the Pure Food and Drugs Act, June 30, 1906;" and some of the further statements were as follows:

Blood Purifier. This is an effective tonic and alterative. It enters the circulation at once, utterly destroying and removing impurites from the blood and entire system. Acts on the bowels, kidneys, and skin, eliminating poisons from the system, and when taken in connection with the Mild Combination Treatment gives splendid results in the treatment of cancer and other malignant diseases. I always advise that the Blood Purifier be continued some little time after the cancer has been killed and removed and the sore healed.

Special No. 4. * * * It has a strong stimulative and absorptive power; will remove swelling, arrest development, restore circulation, and remove pain. Is indicated in all cases of malignancy where there is a tendency of the disease to spread, and where there is considerable hardness surrounding the sore. Applied thoroughly to a lump or to an enlarged gland will cause it to soften, become smaller, and be absorbed.

Cancerine No. 1. * * * Tendency is to convert the sore from an unhealthy to a healthy condition and promote healing. Also it destroys and removes dead and unhealthy tissue.

In each case the indictment alleged that the article was "wholly worthless", as the defendant well knew.

In quashing the indictment the district court construed the statute. The substance of the decision is found in the following words of the opinion:

Having regard to the intendment of the whole act, which is to protect the public health against adulterated, poisonous, and deleterious food, drugs, etc., the labeling or branding of the bottle or container, as to the quantity or composition of "the ingredients or substances contained therein which shall be

false or misleading," by no possible construction can be extended to an inquiry as to whether or not the prescription be efficacious or worthless to effect the remedy claimed for it.

And the question on this writ of error is whether or not this construction is correct. *United States* v. *Keitel*, 211 U.S. 370.

What then is the true meaning of the statute?

Section 8 provides:

SEC. 8. That the term "misbranded," as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to State, Territory, or country in which it is manufactured or produced.

The words "such article" in this section, as is shown by the immediate context, refer to "drugs" as well as to "food."

"Drugs" are thus defined in section 6:

SEC. 6. That the term "drug," as used in this act, shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use, *and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals.*

Articles, then, intended to be used for curative purposes, such as those described in the indictment, are within the statute, though they are not recognized in the United States Pharmacopœia or the National Formulary. And the offense of misbranding is committed if the package or label of such an article bears any statement regarding it "which shall be false or misleading in any particular."

But it is said that these words refer only to false statements which fix the identity of the article. According to the construction placed upon the statute by the court below in quashing the indictment, if one puts upon the market, in interstate commerce, tablets of inert matter or a liquid wholly worthless for any curative purpose as he well knows, with the label "Cancer Cure" or "Remedy for Epilepsy", he is not guilty of an offense, for in the sense attributed by that construction to the words of the statute he has not made a statement regarding the article which is false or misleading in any particular.

I fail to find a sufficient warrant for this limitation, and on the contrary, it seems to me to be opposed to the intent of Congress and to deprive the act of a very salutary effect.

It is strongly stated that the clause in section 8, "or the ingredients or substances contained therein", has reference to identity and that this controls the interpretation of the entire provision. This, in my judgment, is to ascribe an altogether undue weight to the wording of the clause and to overlook the context. The clause, it will be observed, is disjunctive. If Congress had intended to restrict the offense to misstatements as to identity, it could easily have said so. But it did not say so. To a draftsman with such a purpose the language used would not naturally occur. Indeed, as will presently be shown, Congress refused, with the question up, so to limit the statute.

Let us look at the context. In the very next sentence, the section provides (referring to drugs) that an article shall "also" be deemed

to be misbranded if it be "an imitation of or offered for sale under the name of another article", or in case of substitution of contents or of failure to disclose the quantity or proportion of certain specified ingredients, if present, such as alcohol, morphine, opium, cocaine, etc.

It is a matter of common knowledge that the "substances" or "mixtures of substances" which are embraced in the act, although not recognized by the United States Pharmacopœia or National Formulary, are sold under trade names without any disclosure of constituents, save to the extent necessary to meet the specific requirements of the statute. Are the provisions of the section to which we have referred, introduced by the word "also", and the one relating to the place of manufacture, the only provisions as to descriptive statements which are intended to apply to these medicinal preparations? Was it supposed that with respect to this large class of compositions, nothing being said as to ingredients except as specifically required, there could be, within the meaning of the act, no false or misleading statement in any particular? If false and misleading statements regarding such articles were put upon their labels, was it not the intent of Congress to reach them? And was it not for this very purpose that the general language of section 8 was used?

The legislative history of the section would seem to negative the contention that Congress intended to limit the provision to statements as to identity. The provision in question as to misbranding, as it stood in the original bill in the Senate (then section 9) was as follows:

> If the package containing it, or its label, shall bear any statement regarding the ingredients or the substances contained therein, which statement shall be false or misleading in any particular.

The question arose upon this language whether or not it should be taken as limited strictly to statements with respect to identity. It was insisted that the words had a broader range and the effort was made to procure an amendment which should be so specific as to afford no basis for the conclusion that anything but false statements as to identity or constituents was intended. An amendment was then adopted in the Senate making the provision read:

> any statement as to the *constituent* ingredients, or the substances contained therein, which statement shall be false or misleading in any particular.

With this amendment the bill was passed by the Senate and went to the House. There the provision was changed by striking out the word "constituent" and inserting the word "regarding," so that it should read:

> any statement regarding the ingredients or substances contained in such article, which statement shall be false or misleading in any particular.

Finally, it appears, that in conference the bill was amended by inserting the words "*design, or device*", and also the words "*such article, or*"; and thus the section became a part of the law in its present form—containing the words:

> any statements, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular.

It is difficult to suppose that, with the question distinctly raised, Congress would have rejected the provision of the Senate bill and broadened the language in the manner stated if it had been intended to confine the prohibition to false statements as to identity. Reading the act with the sole purpose of giving effect to the intent of Congress, I cannot escape the conclusion that it was designed to cover false and misleading statements of fact on the packages or labels of articles intended for curative purposes, although the statements relate to curative properties.

It is, of course, true, that when Congress used the words "false or misleading statement" it referred to a well defined category in the law and must be taken to have intended statements of *fact* and not mere expressions of opinion.

The argument is that the curative properties of articles purveyed as medicinal preparations are matters of opinion, and the contrariety of views among medical practitioners, and the conflict between the schools of medicine, are impressively described. But granting the wide domain of opinion, and allowing the broadest range to the conflict medical views, there still remains a field in which statements as to curative properties are downright falsehoods and in no sense expressions of judgment. This field I believe this statute covers.

The construction which the district court has placed upon this statute is that it cannot be extented to any case where the substance labeled as a cure, with a description of curative properties, is "wholly worthless" and is known by the defendant to be such. That is the charge of the indictment.

The question then is whether, if an article is shipped in interstate commerce, bearing on its label a representation that it is a cure for a given disease, when on a showing of the facts there would be a unanimous agreement that it was absolutely worthless and an out and out cheat, the act of Congress can be said to apply to it. To my mind the answer appears clear. One or two hypothetical illustrations have been given above. Others may readily be suggested. The records of actual prosecutions, to which I am about to refer, show the operation the statute has had and I know of no reason why this should be denied to it in the future.

Our attention has been called to the construction which was immediately placed upon the enactment by the officers charged with its enforcement in the Department of Justice and the Department of Agriculture. It is true that the statute is a recent one, and, of course, the question is one for judicial decision. But it is not amiss to note that the natural meaning of the words used in the statute, reflected in the refusal of Congress to adopt a narrower provision, was the meaning promptly attributed to it in the proceedings that were taken to enforce the law. And this appears to have been acquiesced in by the defendants in many prosecutions in which the defendants pleaded guilty. We have been referred to the records of the Department of Agriculture showing nearly thirty cases in which either goods had been seized and no defense made, or pleas of guilty had been entered. Among these are found such cases as the following:

No. 29. Hancock's Liquid Sulphur, falsely represented, among other things, to be "Nature's Greatest Germicide. * * * The Great Cure for * * * Diphtheria." Investigation begun November 22, 1907. Plea of guilty.

No. 180. Gowan's Pneumonia Cure, falsely represented, among other things, that it "Supplies an easily absorbed food for the lungs that quickly effects a permanent cure." Investigation begun November 22, 1907. Criminal information. Plea of guilty.

No. 181. "Eyelin", falsly represented, among other things, that it "Repairs and Rejuvenates the Eye and Sight." Investigation begun February 13, 1908. Plea of guilty.

No. 261. "Sure Thing Tonic", falsley represented, among other things, to be "Sure Thing Tonic. * * * Restores Nerve Energy. Renews Vital Force." Investigation begun June 3, 1909. Pleaded guilty.

No. 424. "Tuckahoe Lithia Water", falsely represented, among other things, to be "a sure solvent for calculi, either of the kidneys or liver, especially indicated in all diseases due to uric diathesis, such as gout, rheumatism, gravel stone, incipient diabetes, Bright's Disease, inflamed bladder, eczema, stomach, nervous, and malarial disorders." Investigation begun July 9, 1908. Plea of guilty.

No. 427. "Cancerine", falsely represented among other things, to be "A remarkable curative extract which if faithfully adhered to will entirely eradicate cancerous poison from the system. * * * A specific cure for cancer in all its forms." Investigation begun about April 12, 1909. Criminal information. Plea of guilty.

I find nothing in the language of the statute which requires the conclusion that these persons who have confessed their guilt in making false and misleading statements on their labels should be privileged to conduct their interstate traffic in their so-called medicines, admittedly worthless, because Congress did not intend to reach them.

Nor does it seem to me that any serious question arises in this case as to the power of Congress. I take it to be conceded that misbranding may cover statements as to strength, quality, and purity. But so long as the statement is not as to matter of opinion, but consists of a false representation of fact—in labeling the article as a cure when it is nothing of the sort from any point of view, but wholly worthless—there would appear to be no basis for a constitutional distinction. It is none the less descriptive—and falsely descriptive—of the article. Why should not worthless stuff, purveyed under false labels as cures, be made contraband of interstate commerce—as well as lottery tickets? *Champion* v. *Ames*, 188 U.S. 331.

I entirely agree that in any case brought under the act for misbranding—by a false or misleading statement as to curative properties of an article—it would be the duty of the court to direct an acquittal when it appeared that the statement concerned a matter of opinion. Conviction would stand only where it had been shown that, apart from any question of opinion, the so-called remedy was absolutely worthless and hence the label demonstrably false; but in such case it seems to me to be fully authorized by the statute.

Accordingly, I reach the conclusion that the court below erred in the construction that it gave the statute, and hence in quashing the indictment, and that the judgment should be reversed.

I am authorized to say that Mr. Justice Harlan and Mr. Justice Day concur in this dissent.

UNITED STATES v. ONE CARLOAD OF CORNO HORSE AND MULE FEED

(District Court, M.D. Alabama, May 31, 1911)

188 Fed. 453; N.J. No. 990

Libel under section 10 of the Food and Drugs Act. Trial before the court. Libel dismissed.

The case was heard on the following agreed statement of facts, and the testimony of a number of manufacturers, millers, middlemen, brokers, and consumers as to the meaning of the term "oat feed", and how it was used and understood in commerce and trade and among the people generally:

That the carload of Corno Horse and Mule Feed against which this libel is filed was contained in original bags or sacks of about 100 pounds and of about 175 pounds each, and that each of said original packages, being said sacks or bags, were branded: "Corno Horse and Mule Feed. Mixture of ground alfalfa, oats, corn, flax bran, oat and hominy feeds, made by the Corno Mills Company, East St. Louis, Illinois. Guaranteed analysis: Protein 10%; sugar and starch 58.5%; fat 3.5%; fiber 12%". Said brand being contained on each sack and label connected therewith. That the said Corno Horse and Mule Feed is an article of food within the meaning of the Food and Drugs Act; that on February 8, 1909, the above described bags or sacks of Corno Horse and Mule Feed were received in the city of Montgomery in the State of Alabama, by Hudson and Thompson, claimants herein, a partnership composed of W. M. Hudson and J. A. Thompson, and that the carload of Corno Horse and Mule Feed, aforesaid, was shipped to said Hudson and Thompson on or about, to wit, February 4, 1909, from the city of East St. Louis, in the State of Illinois, by the Corno Mills Company of said city of East St. Louis, and that said carload or a large portion thereof of the Corno Horse and Mule Feed, aforesaid, at the time of the filing of this libel was in the original unbroken packages and in the possession of said Hudson and Thompson, in the city of Montgomery, State of Alabama, in the Northern Division of the Middle District of Alabama, and within the jurisdiction of this court. It is further admitted that there was present in the Corno Horse and Mule Feed, aforesaid, seized under the libel herein, a quantity of oat hulls in excess of the amount that would have been naturally and normally present in case whole ground oats had been used in lieu of the same amount of oat feed—using the term oat feed here according to the construction contended for by the claimants herein, namely, as a by-product of the oatmeal or rolled-oat factory, said by-product consisting of the entire residue of the oats after the manufacture of the oats into food for human consumption, and consisting of the middlings, nubbins, oat dust, and hulls. By this admission is meant that there was used in the Corno Horse and Mule Feed aforesaid, a quantity of the by-product of the rolled-oat mill consisting of the oat hulls, middlings, nubbins, and dust as above described.

The defense also admitted that "oat feed" contains less of protein and more of hulls than an equal amount of whole ground oats.

JONES, *District Judge* (after stating facts as above). The term "food", as used in the Food and Drugs Act, included all articles used for food by men or other animals, whether simple, mixed, or compound. An "article of food" is deemed to be adulterated, "if any substance has been mixed or packed with it so as to reduce or lower or injuriously affect its quality or strength", or, "if any substance has been substituted, wholly or in part, for the article", or, "if any valuable constituent of the article has been, wholly or in part, abstracted", or, "if it contains any added poisonous or other added deleterious ingredient which may render such article injurious to health", or, "if it be mixed, colored, powdered, coated, or stained

whereby damage or inferiority is concealed", or, "if it consists, wholly or in part, of a filthy, decomposed or putrid animal or vegetable substance", etc.

An article of food is "misbranded" within the meaning of the statute if it be "an imitation of, or offered for sale under the distinctive name of another article", or, "if it be labeled or branded so as to deceive or mislead the purchaser", or, "if in package form and the contents are stated in terms of weight and measure they are not plainly and correctly stated on the outside of the package", or, "if the package or label containing it shall bear any statement, design, or device regarding the substances or ingredients contained therein, which statement, design, or device shall be false or misleading in any particular."

Section 8 contains a proviso—

> that an article of food which does not contain any added poisonous or deleterious ingredient, shall not be deemed to be adulterated or misbranded in the following cases:
>
> First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food under their own distinctive name, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.
>
> Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the words "compound", "imitation", or "blend", as the case may be, is plainly stated on the package in which it is offered for sale.

The manufacturer, without violating any of the provisions of the statute against adulteration, may mix any number of constituents in his compound, so long as these constituents are not poisonous or deleterious to health and he gives the compound a distinctive name and states where it is manufactured. The matter thus produced is "the article of food" whose quality and strength the statute seeks to preserve, and the nature of the product in these respects is fixed and determined by the elements which enter into it. How is it possible, chemically, or in the eye of the law, to "lower or injuriously affect" the quality or strength of the particular "article of food", whose characteristics are thus produced, and safeguarded by the law as thus produced, under its own distinctive name, by mixing in the compound anything which may be lawfully incorporated therein? Putting in a mixture of things which may be lawfully blended therein cannot amount to adulteration of the blend, since, other things aside, the statute declares, its other conditions being complied with, the blend shall not thereby "be deemed to be adulterated."

Corno Horse and Mule Feed is a compound, sold under its own distinctive name. One of the constituent elements which fix and determine the quality and strength of that blend is "oat feed." The incorporation of "oat feed" in the blend, unless it be noxious or deleterious to health, cannot adulterate the blend which has its own standard, quality, and strength, made up in part of "oat feed." To make a case of adulteration it must be shown that "oat feed" contains noxious qualities, as described in the statute. Otherwise, it is manifest that the incorporation of "oat feed" in the blend has not mixed or packed any substance with the blend—"Corno Horse and Mule Feed"—so as to reduce or lower or injuriously affect *its* quality

or strength, or that any valuable constituent of the article of food has, wholly or in part, been subtracted from the blend, or that any substance has been substituted, wholly or in part, for the "article of food." Corno Horse and Mule Feed is not an imitation of, or offered for sale under the distinctive name of, another article, but is sold under its own distinctive name, and the label or brand contains a statement which shows that it is a mixture, and truthfully states its constituents and the place where the article was manufactured or produced. There is no charge or proof of removal of any part of the contents of the package as originally put up. It is not claimed or proved that the matter of which the "oat feed" consists is deleterious in any way to man or other animal, or charged that the provisions of the statute against adulteration have been violated in any way, save by putting "oat feed" on the label. The libel must fail as to the charges of adulteration.

The label here does not contain any design or device of any kind, and whether there has been a misbranding within the meaning of the statute must depend on the words employed in the label to describe the Corno Horse and Mule Feed. Save by the declaration in the statute as to what a label shall not contain, no standards are prescribed for brands or labels, or the minuteness or particularity in which they must indulge in describing an article of food. The statute should be liberally construed to effect its beneficent purposes; but no rule of construction permits us to so construe its language, that the statute shall operate as a snare or trap to the honest manufacturer or producer, who brands or labels his products in descriptive words or devices, which fairly inform the purchaser of the nature and ingredients of the product offered for sale, and are not so framed as to deceive or mislead the ordinary purchaser.

The parties have deemed it important to introduce a vast mass of testimony as to the meaning of the term "oat feed." As the court is sitting both as trier of the law and the facts, it is deemed unnecessary to determine whether the meaning of the term "oat feed", as here used, is a matter of pure law, or whether it is a question of fact, to be ascertained as by a jury from the whole evidence. If it be a matter of law of which the court must take judicial notice, the court may nevertheless resort to any authoritative sources of information to enlighten its judgment, and, on the other hand, if it be a question of fact, the judge sitting as a jury may well determine the meaning of the words here as a question of fact, according to the weight of the evidence.

The Government claims that "oat feed" means the whole grain of the oat, either crushed or ground, and the ordinary purchaser of the blend so understands the term "oat feed" used in the label, though it admits the manufacturer gives a different meaning to it. The manufacturer claims, on the contrary, that "oat feed" means the by-product of the rolled oat or oat meal mills—that part of the grain which remains after the miller subtracts from it the portions useful for human food, consisting of nubbins, middlings, hulls, and oat dust, the entire residue of the grain after the oat is prepared by the manufacturer for human consumption—and that the term has long been so understood in commerce and trade and by the public at large.

The whole trend of the evidence is, that in nearly all by-products the word "feed", when connected with a grain, is used to denote the by-product from that grain, meaning the residue of the grain after it is manufactured into food for human consumption, and that, when it is intended to designate the whole grain or the crushed grain entering into articles of food for man, the thing is spoken of as "food" and not "feed."

The Government admits that the words "hominy feed" mean the by-product from the hominy mills and are so used, known, and understood. It admits that other terms are used in the same way to denote other products. The evidence leaves no doubt that the terms "barley feed", "rye feed", "wheat feed", "buckwheat feed", "mixed feed", and other similar terms, are used to designate those by-products, and are popularly known and understood as such. It shows that "oat feed" is different from whole ground oats or crushed oats, and that the difference is clearly apparent to the naked eye, and that at all times the price of "oat feed" is considerably lower than that of the ground oats. It further shows that "oat feed" seldom reaches the consumer as a separate commodity, but is most generally offered for sale as an ingredient of a mixed feed, or, as it is denominated in many of the State laws, "concentrated feed stuff." It also shows that the term "ground oats" is universally used to designate that product, and that likewise "crushed oats" is used to designate the oats when they are crushed, and that "chopped oats" or "oat chops" is used to designate the chopped oats, and there is no evidence to show that any of the products have ever been designated or understood to mean the same thing as "oat feed." Many of the States have recognized "oat feed" as a by-product of the oat, in their food laws, notably New York, Maine, Louisiana, Iowa, Wisconsin, Virginia, New Hampshire, New Jersey, Texas, Florida, Connecticut, Illinois, Michigan, Massachusetts, Maryland, and Tennessee. Bulletins from various State agricultural experiment stations were offered in evidence, showing that "oat feed" is recognized as a by-product in New Jersey, Georgia, Ohio, Tennessee, and Virginia.

Among other evidence introduced by the defense was a letter of January 27, 1910, from the Board of Food and Drug Inspection, concurred in by all its members, and addressed to counsel in this case. It is given in full because it shows the Government was by no means certain as to the correctness of its contention as to the meaning of "oat feed." It indicates that its inquiries tended to show that "oat feed" in fact means the by-product of the oat mill, but that its opinion was that it should not be known as "oat feed", which the board thought should include ground oats only. In this particular, it is beside the issue, for the question is what "oat feed" describes in our language, and not what it ought to describe. Neither the Secretary of Agriculture nor any official intrusted with the administration of the Food and Drugs Act has any authority to change the meaning of words. The letter, omitting address and signature, is as follows:

> Your letter of January 15, 1910, in reference to the cases reported to the Department of Justice against the Corno Mills Company of East St. Louis, Ill., for prosecution under the Food and Drugs Act, has received careful consideration. Your statement is noted that you are of the opinion that unless the Department of Agriculture has changed its view as to the meaning of the term

"Oat Feed" the proceedings against the shipment of Corno Horse and Mule Feed seized at Valdosta, Georgia, should not be dismissed, in view of the promise of this department of an early judicial construction of the meaning of the term and the completion of your arrangements for the taking of all necessary evidence.

You are advised in reply that the records of the board do not show that a promise has been made by the board that the meaning of the term "Oat Feed" shall be construed by the courts at an early date. As you are aware, such promise, even if made by the board, would be ineffective. The duties of the Board of Food and Drug Inspection end with the collection of evidence and the preparation of reports of violations of the Food and Drugs Act. When the evidence is complete and the circumstances of the violations appear to the Secretary of Agriculture to warrant such action, the cases are reported to the Department of Justice for prosecution, and the time when a particular case may come on for trial rests with the Department of Justice. After cases are so reported, whenever additional evidence bearing on the questions involved comes to the knowledge of the board, such evidence is also brought to the attention of the Secretary of Agriculture for consideration whether the same should be transmitted to the Department of Justice.

When the question was presented to the board whether proceedings should be instituted against the shipment seized at Valdosta, Georgia, such action was recommended on the statement of the Bureau of Chemistry that the term "Oat Feed" properly includes only ground whole oats, and the amount of oat hulls found on examination of samples to be present in the product was considerably in excess of the amount which normally would be present in a product containing ground whole oats. Analysts of the Bureau of Chemistry were of the opinion that the term "Oat Feed" as applied to oat-offal or by-products of the oat meal, is misleading, and the Bureau of Chemistry has in its possession affidavits of dealers in cattle feed and grain who express the opinion that the product sold in the trade as "Oat Feed", which consists largely of oat hulls, should not be known as "Oat Feed", and that the term "Oat Feed" should include ground oats only.

Inasmuch as the foregoing views of the Bureau of Chemistry were earnestly controverted by the Corno Mills Company and other manufacturers of cattle feeds and many dealers in cereal products, letters of inquiry were addressed by the Solicitor of this department to representative manufacturers and dealers, and replies were received indicating that "Oat Feed" is generally understood among the trade to be the by-product of the oat meal mill and consisting of oat hulls, oat nubbins, oat dust and middlings. It further appears from these replies that screenings from oat elevators are also known and sold as "Oat Feed" and that ground whole oats are never sold as "Oat Feed" but as ground oats.

In view of the difference of opinion as to the significance of the term "Oat Feed", as set forth above, the crop technologist in charge of grain standardization in the Bureau of Plant Industry in this department, who has a thorough knowledge of the grain industry in this country, was consulted. The crop technologist stated, so far as he is informed, the term "Oat Feed" in the grain trade means the by-products of the oat mill, including oat hulls, oat nubbins, oat dust, middlings, and screenings from oat elevators; he further stated that ground whole oats are not designated as "Oat Feed" because ground whole oats are a superior product and command a higher price in the market than oat feed.

When, therefore, the United States attorney in charge of the proceedings against the seizure at Valdosta requested the opinion of the Department of Agriculture concerning the disposal of the case, in view of the stipulation which had been entered into with the defendants for the taking of testimony, he was informed by the Solicitor of all the facts hereinbefore related in reference to the meaning of the term "Oat Feed" and was advised that the Department of Agriculture was satisfied to leave to his discretion the question whether the case should be prosecuted or dismissed. After consideration of the matter, the United States attorney decided to dismiss the case.

When the department was advised of this action of the United States attorney, it was deemed advisable to inform the United States attorneys at Montgomery, Alabama, and Danville, Illinois, to whom cases involving the same question had been referred for prosecution, of all the facts within the knowledge of the Department of Agriculture concerning the meaning of the term

"Oat Feed." They have been informed accordingly, and have been requested to advise the Solicitor of this department whether, after consideration thereof, they are of the opinion that the cases pending in their respective districts based on shipments of Corno Horse and Mule Feed, should be prosecuted or dismissed. The department is not yet in receipt of the opinions of the United States attorneys. Pending the decision of the United States attorney at Montgomery, Alabama, and the United States attorney at Danville, Illinois, whether cases can be maintained under the Food and Drugs Act which are based on the significance applied to the term "Oat Feed" by the Bureau of Chemistry, the Board of Food and Drug Inspection has not determined whether cases shall be reported for prosecution in the future in which the same issue is presented. When the replies of the United States attorneys are received, however, the board will consider and determine what attitude shall be taken in this particular, and when a decision has been reached you will be informed accordingly.

The testimony introduced on behalf of the defense was from manufacturers, middlemen, wholesalers, retailers, and consumers, and covered not only the United States, but two foreign countries as well, and showed that in them for a great many years the term "oat feed" has been used and understood not only by the manufacturer and all classes of middlemen, but also by the ultimate consumer, to mean the by-product of the rolled-oat or oatmeal mills, in the same way that other by-products have been known by similar names. No witnesses, except Mr. Brown, testified that he ever heard the term "oat feed" applied to whole, ground, or crushed oats. Dr. Voorhees, of the New Jersey Experiment Station, and Mr. Fuller, of the Indiana Experiment Station, showed very clearly from their examinations and experience the term "oat feed" in commercial usage and wherever used in trade and commerce is known and understood to be the by-product of the oat mill.

The defense also introduced Bulletin No. 108, issued by the Department of Agriculture, April 2, 1908, regarding the "Commercial Feeding Stuffs of the United States." This is a very valuable paper prepared by Dr. J. K. Haywood, Chief of the Miscellaneous Laboratory, and one of the principal witnesses for the Government in this case, Mr. Warner, the Chief Chemist, and Mr. Howard, Chief of the Microchemical Laboratory. The paper is the result of chemical examinations of the various stock foods, their methods of manufacture and analyses of commercial feeding stuffs conducted at a number of the State experiment stations. Table 17 of "Oat Feed" deals with the contents of seven different samples of "oat feed." The bulletin says, on page 12:

> The main source of oat feed is the breakfast food factories. In many cases they are composed almost entirely of the oat hulls and light oats left as waste from oat meal manufacture.

It distinguishes between oatmeal and ground whole oats. In Farmers' Bulletin No. 170, issued by the Department of Agriculture, it is shown that "oat feed" is recognized by the Department as a by-product of oats.

The Government offered testimony of a considerable number of witnesses, consumers, and dealers in feeding stuffs, near Washington, St. Louis, Knoxville, Kansas City, and Montgomery. Almost without exception, the result of the testimony of these witnesses when analyzed amounted to no more than their expression of opinion as to what the term "oat feed" should mean, not disclosing any

knowledge of its actual meaning as understood by customers familiar with the product. Dr. Haywood, chemist of the Board of Food and Drug Inspection, Mr. Lynch, inspector, and Hon. L. F. Brown, of New York, gave the strongest testimony for the Government as to what "oat feed" meant. Upon cross-examination, Dr. Haywood testified, that without first telling the person that "oat feed" was a part of the label describing a compound commodity, or asking whether he was acquainted with the commodity, he would ask him what he would expect to get if he were buying *oat feed?* That practically nobody whom he interviewed had ever heard of that particular commodity, which counsel for the defense called "oat feed," and, when questioned by Dr. Haywood about the term "oat feed", the persons questioned, would immediately answer, "Yes, ground oats." Dr. Haywood further testified on cross-examination, that at the time of his inquiries, a year or two before this proceeding was instituted, he had never heard the term "oat feed" used to designate ground oats, and that in his opinion, the term "oat feed" meant ground oats, and that such was the result of his investigations. He further testified, on cross-examination, that he had never heard of the term "oat feed" being used to designate ground whole oats; but that "ground oats" is a term well understood throughout the length and breadth of the country; that ground oats means the oats ground up, without anything added or subtracted, the whole grain with nothing taken away or added; that he had never heard of anybody offering ground oats, crushed oats, or chopped oats, or oat chops under the name "oat feed."

Mr. Brown, the Chief of the New York State Department of Agriculture, testified that the meaning of the term "oat feed" with the New York State Department of Agriculture was ground oats, either crushed, whole or ground oats, from which nothing had been taken away or added, and that the term was so understood throughout the State. His practical experience, however, was limited to Cobleskill, a town of about 2,500 inhabitants, some fifteen years ago. His testimony on this point is directly opposite to that of the numerous witnesses called by the defense as to the understanding of the term "oat feed" in New York State, and its weight is destroyed by the fact that the laws of the State of New York, relative to feed stuffs, recognize the distinction between oats and oat feed, classing the latter among the by-products. It is not unlikely that Mr. Brown's experiences at Cobleskill was a confusion of the expression "feed of oats" with the commodity term "oat feed."

Mr. Lynch, the inspector, conducted his investigations along the same lines as Dr. Haywood. He would show the person of whom he inquired, a copy of the label and ask what meaning it conveyed; and if the answer should be ground oats, crushed oats, or whole oats, he would ask the person if he found out, in purchasing feed thus labeled, that he had gotton the oat refuse or by-product of an oat meal mill, would he consider that he had been deceived? That he did not first ascertain from the person, of whom he inquired, whether he had any knowledge of the commodity "oat feed." In most instances the person, of whom the inquiry was made, had little, if any, knowledge of by-products or any feeding stuffs except hay and in some instances wheat by-products, and they were the ones

who were asked to give their opinion as to the meaning of the term "oat feed" in the Corno Horse and Mule Feed label. Lynch states that he interviewed about two hundred people in the different Southern States, and, almost without exception, they would expect to get ground or crushed oats, from looking at the term "oat feed" on the label.

The issue, however, is not what such persons with such lack of familiarity with the product would understand "oat feed" meant, but what idea the term ought to convey to persons of ordinary intelligence, who are conversant with our language. The power of Congress to pass the statute is derived solely from its authority to regulate commerce, and it must have uniform operation throughout the United States. It deals with articles of food which enter into interstate commerce. It would be unthinkable that Congress intended that a product could be seized in one district and not in another for a misleading brand, according or not as the generality of persons in those districts understood or were deceived by the brand on the particular product.

Language is "the expression of thought by means of spoken or written words", and words are but signs of ideas. If a person does not know English, he cannot understand the idea or conception or sign meant to be conveyed by a word. So as to a commodity term; people unfamiliar with the term or its meaning, seeing on a label the word which stands for a commodity term, would not know what it meant, and numbers of them would state, quite honestly, that, seeing the word, "oat feed" on the label, they were deceived as to what it meant and thought "oat feed" meant to describe the grain of the oat, rolled, crushed, or chopped.

All words in the beginning were arbitrary signs. They became part of the language only by common usage among the people after they had generally been accepted or taken to express or stand for a particular thought or idea. When a word obtains such currency or general acceptation, the people use it to convey that particular idea to the persons to whom it is addressed, and the word continues to have that meaning and function in the language until common usage among the people accords another and different meaning to it. Language grows and changes with the growth and changes in social and economic conditions, and expressions creep into the language by a gradual process of evolution wrought by the necessity for more precise expressions and greater convenience in depicting old ideas or new conditions and things. Words are thus being constantly coined and put in circulation, and, their meaning being generally understood among the people, they become accepted parts of our speech, sometimes for years, before they are formally acknowledged and incorporated in standard dictionaries. A century ago no one would have understood what idea was meant to be conveyed by the words "chloroform", "telephone", "telegraph", "aeroplane", "automobile", "X-rays", and the like. Now they are common nouns, parts of common speech, and understood by all who speak our language.

The evidence satisfied the court, if that be the only means by which it can ascertain the fact, that when our people speak of the products of a particular grain or vegetable and use the word by which that grain or vegetable is commonly called, and add the suffix "feed" they

mean to convey the idea that the substance described is the by-product of that grain or vegetable—the residue after subtracting from the grain or vegetable those parts which are useful for human food. The evidence shows that this meaning has so long been understood in the dealings between persons who buy and sell feed stuffs, and from the designation given the product, in laws, trade journals, market reports, in the newspapers, and in official publications in reference to food for man or other animals, that the term " oat feed ", and other like terms, have become common nouns in our vernacular, and describe by-products, and therefore, ought not to lead anyone, who understands English and reads the label, to reach the conclusion that the term " oat feed " means the whole, ground, or crushed grain; especially when the term " oat feed " is used in juxtaposition with the word " oats " on the label, and inevitably implies that the " oat feed " contained in the mixture is something different from the " oats " therein.

The term " oat feed " on the label is not false, but truthfully designates that portion of the constituents of the blend which consists of the " oat feed " and is correctly described by those words. The purchaser buys the product for cattle food and knows it is put upon the market for that purpose. On the label here, after giving all the elements which enter into the blend, follows a plain statement of the qualities and nutritive values of the combined product for cattle food. After naming the elements put in the blend, the purchaser is told of the proportions of protein, sugar, starch, fat, and fiber, thus giving him additional means of ascertaining and judging of the nutritive properties and values of the product for cattle food. All who interest themselves in food supplies know, for instance, that protein serves to build up new tissues, replace broken down cells, and may also serve as a source of heat and energy, and so of the properties of sugar and starch, fat, and fiber, and their relative nutritive values. It might as well be said that the stated analysis of the product in these respects was misleading, because the manufacturer did not particularly define, in the statement in reference thereto, the offices which the different elements performed in lowering or increasing the nutritive properties of a particular product—as to the charge that the use of the word " oat feed " was misleading, because it did not go further and descend to minuteness of particulars and description of the thing of which " oat feed " consists and state on this label, descriptive of stock food, that it consisted of the residue of the grain after the most valuable parts of the oat had been subtracted by the manufacturer for human food.

The great object of the statute is to prevent injury to health and deception by putting words or devices on the label which may naturally lead the purchaser to believe that he is getting one thing when in reality he is getting another. Certainly the manufacturer meets all these requirements when he truthfully describes the elements of his product by the use of common nouns which fairly describe the things which enter into it, according to the English vocabulary and adds, as he is not required to do by the Federal statutes, an analysis of the life-giving properties of the different elements, thus affording additional means of judging of the real value of the blend for cattle food, the use for which it is manufactured and put upon the market.

Of course, if "oat feed" meant the whole grain of the oat, either crushed, ground, or rolled, and oat hulls were packed in the blend "in excess of the amount normally present" in whole, ground or crushed oats, the label would be misleading; but there is no ground for such charge when it is ascertained that "oat feed" does not mean the whole grain of the oat in some form, but only the by-product of the oat—"oat feed". The admission as to the quantity of oat hulls "naturally and normally present" in "oat feed" relates only to the whole grain of the oats, and not to the "oat feed", which is a mere by-product, which the term on the label correctly describes. If there were a greater quantity of oat hulls in the by-product, sold under this label as "oat feed", than in such feed as generally sold, the brand "oat feed" might be misleading in that respect; but no such contention was made, and, if it had been, the proof would not sustain it. The admission of the parties as to the quantity of "oat hulls" "naturally and normally present" in "oat feed" is an admission to that extent only in case the whole ground oats had been used in lieu of the same amount of "oat feed."

Under the statute compounds known as articles of food can be sold under their own distinctive names, so long as no deleterious matter is put in the product, and the label states where the product is manufactured, and it is not an imitation sold under the distinctive name of another article. The manufacturer here would have fully obeyed the statute is he had put nothing on his product but the name "Corno Horse and Mule Feed", complying with its requirements in other respects. Such a brand would not give purchasers the hundredth part of the information of the elements and value of the product which is imparted by the more elaborate brand which was put upon the product.

It would be a very harsh construction of the statute to hold that it required the forfeiture of the product on the ground that the label was misleading, because some person, unfamiliar with the commodity and the common use of language in designating it, might believe he was buying the whole oat when he was getting only the by-product, in consequence of the label, which truthfully described the product as "oat feed", not descending into greater minuteness of description and telling the particulars wherein "oat feed" differs from oats.

Let the libel be dismissed.

UNITED STATES v. 300 CANS OF FROZEN EGGS

(Circuit Court of Appeals, Second Circuit, June 6, 1911)

189 Fed. 351

Appeal from the District Court for the Southern District of New York. Decree reversed.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, *Circuit Judge.* This is a libel filed by the United States for the condemnation of 300 cans of frozen eggs under section 10 of the

Food and Drugs Act of June 30, 1906, ch. 3915, 34 Stat. 771. The material allegations are as follows:

(1) This libel is filed by the United States of America in its own right, and prays seizure for condemnation of certain articles of food as hereinafter particularly set forth in accordance with the Food and Drugs Act of Congress, approved June 30, 1906, 34 Stat. 768.

(2) Your libelant represents to the court, that in the city, county and Southern District of New York, and within the jurisdiction of this honorable court, there are owned by the European Egg Company and stored at the Harrison Street Cold Storage Warehouse, no. 7 Harrison Street, Borough of Manhattan, City of New York, 300 cans, each containing an article of food, to wit, frozen eggs, each weighing approximately 28 pounds.

(3) Your libelant further represents that said articles of food so as aforesaid particularly described are illegally held within the jurisdiction of this honorable court, and are liable to condemnation and confiscation, as provided in the said act of Congress:

In that each of the said 300 cans contains an article of food, to wit, frozen eggs, which being animal substance, is in whole or in part, filthy, putrid, and decomposed, contrary to the provisions of subdivision 6 of section 7 of the act of June 30, 1906.

Your libelant further represents that the said articles were shipped from South Omaha, Nebraska, by the European Egg Company, on or about the 3d day of October, 1910, via the Chicago, Burlington & Quincy Railroad Company, the Chicago, Indiana & Southern Railroad Company, and the Erie Despatch, and were thereafter transported and delivered to said European Egg Company at the Harrison Street Cold Storage Warehouse, no. 7 Harrison Street, at the Borough of Manhattan, in the City of New York, on or about the 8th day of October, 1910, and that the said articles remain unsold in their original unbroken packages in the said city, county, and State of New York and in the Southern District of New York.

The European Egg Company, claimant, filed exceptions to the libel as follows:

First Exception. That this honorable court has no jurisdiction of the matters contained in said libel, the same not being matters that come under the Food and Drugs Act of Congress, approved June 30, 1906.

Second Exception. For that the said libelant has not well and sufficiently set forth evidence to warrant the issuance of said libel, in so far as it does not state that said frozen eggs were seized while being used in interstate commerce.

The district judge sustained the exceptions to the libel, saying:

I think that *Hipolite Egg Co.* v. *United States*, 220 U.S. 45, 31 Sup. Ct. 364, 55 L. Ed. 364, covers this case if the eggs had been alleged to have been shipped "for sale." The statute (section 10) says "transported * * * for sale," and the libel does not follow the statute, though it does say that they remain unsold. That is hardly enough. It is not necessary to consider the power of Congress if the transportation was not for sale, but for aught that appears these eggs were not to be sold either as eggs or in any form. Therefore the libelant must amend. Exceptions sustained.

The United States having failed to amend the libel, it was dismissed and this appeal taken from the decree.

We think the learned judge erred in treating the charge in the libel as against the cases while being transported. The second exception seems to proceed on this ground. The act expressly describes the guilty goods in such a case as "being transported * * * for sale." But the charge was against the goods in the original packages after transportation was over. The applicable words of the act are "or having been transported remains unloaded, unsold, or in original unbroken packages." The allegations as to the carriage of the goods

between Nebraska and New York were made for the purpose of showing that they were a subject of interstate commerce.

It would be a very natural construction to hold that the words "for sale" describing the goods seized in course of transportation are to be carried forward to the goods in the next category seized after transportation is over as the claimant contends under the first exception. Indeed, this was the construction adopted by Sater, J., in *United States* v. *46 Bags of Sugar* (*D.C.*) 183 Fed. 642. But the decision of the Supreme Court in *Hipolite Egg Co., Claimant of 500 Cases of Preserved Eggs* v. *United States*, decided March 13, 1911, makes this construction impossible. The opinion of Mr. Justice McKenna and the transcript of record in that case shows that Thomas & Clarke (for whom the Hipolite Egg Company was substituted as claimant) were the owners of 370 cases of "preserved whole eggs" in a cold-storage warehouse at St. Louis, Mo., which they had previously bought from the Hipolite Egg Company of that city; that Thomas & Clarke shipped 50 cases of these eggs from St. Louis to themselves at Peoria, Ill., to be used in their business as manufacturing bakers which were the cans seized in the original packages on their premises after the transportation was over. The charge in the libel was:

> That the said fifty cans, more or less, containing said food product and so adulterated as above set forth, have been transported from the City of St. Louis, in the State of Missouri, to the City of Peoria, in the State of Illinois, in the division and district aforesaid, and remain unsold in this district in the original and unbroken package, in the possession of Thomas and Clarke, in the City of Peoria, in violation of the said act approved June 30, 1906.

Although the district judge found that the eggs were not transported for sale, but for use by the consignees in their business, he entered a decree of condemnation which the Supreme Court affirmed. The case is precisely similar to the one under consideration. Mr. Justice McKenna states the claimant's contention as follows:

> (1) Section 10 of the Food and Drugs Act does not apply to an article of food which has not been shipped for sale but which has been shipped solely for use as raw material in the manufacture of some other product.

He then goes on to say after considering Judge Sater's opinion, supra:

> The object of the law is to keep adulterated articles out of the channels of interstate commerce, or, if they enter such commerce, to condemn them while being transported or when they have reached their destination, provided they remain unloaded, unsold or in original unbroken packages. These situations are clearly separate, and we cannot unite or qualify them by the purpose of the owner to be a sale. It, indeed, may be asked in what manner a sale? The question suggests that we might accept the condition, and yet the instances of this record be within the statute. All articles, compound or single, not intended for consumption by the producer, are designed for sale, and, because they are, it is the concern of the law to have them pure.
>
> It is, however, insisted that "the proceedings in personam authorized by the law was intended to, and no doubt is, capable of giving full force and effect to the law"; and, further, that a producer in a State is not interested in an article shipped from another State which is not intended to be sold or offered for consumption until it is manufactured into something else. The argument is peculiar. It is certainly to the interest of a producer or consumer that the article which he receives, no matter whence it come, shall be pure, and the law

seeks to secure that interest, not only through personal penalties but through the condemnation of the article if impure. There is nothing inconsistent in the remedies, nor are they dependent. *The Three Friends*, 166 U.S. 1, 49, 17 Sup. Ct. 495, 41 L.Ed. 897. The first contention of the egg company is, therefore, untenable.

The district judge dismissed the libel because it did not describe the goods as transported "for sale," whereas this exception should have been overruled. Willard, J., has come to conclusions similar to ours in *United States* v. *Two Barrels of Desiccated Eggs* (*D.C.*), 185 Fed. 302, 307.

It was further suggested at the hearing that these eggs might have been intended for other uses than food uses and that the libel should have alleged that they were to be used for food purposes. It does describe the goods as articles of food and this is quite sufficient to withstand these general exceptions.

Finally, it is said that as the egg company shipped to itself, without sale, the packages were never a part of interstate commerce. We know of no authority for such a proposition. Certainly the case of Hipolite Egg Company is not such. The decree is reversed.

UNITED STATES v. THE RICHIE COMPANY

(Circuit Court, E.D. New York, July 5, 1911)

N.J. No. 2554

Information charging violation of section 2 of the Food and Drugs Act. Demurrer to information overruled. Plea of guilty.

VEEDER, *District Judge* (overruling demurrer). The defendants demur to an information charging them with violation of section 2 of the Food and Drugs Act of June 30, 1906. The drug product alleged to be misbranded bears the following statement on the label:

> This bottle of remedy is 12½ percent alcoholic solution, compounded from the following ingredients: Pepsin, morphina, atropia and salicylic acid. Ingredients and amounts used vary with the needs of each patient, but the proportion of any ingredient is less than 4 percent.

Section 8, subdivision second, of the act specifies that a drug shall be deemed to be misbranded if it fail to bear a statement on the label of the quantity or proportion of morphine contained therein. It is plain that this label does not state the quantity or proportion of morphine contained in the preparation. But the defendants claim that it complies with regulation 28, subdivision (d), which reads:

> A statement of the maximum quantity or proportion of any such substance present will meet the requirements, provided the maximum stated does not vary materially from the average quantity of proportion.

A short answer to this contention is that even if the statement on the label that "the proportion of any ingredient is less than 4 percent" be taken as a statement of the maximum quantity or proportion of morphine contained in the preparation, still, as the label states, the amount varies, and it may appear from the evidence that maximum stated varies materially from the average quantity or proportion.

The demurrer is overruled, with leave to plea over.

UNITED STATES v. 100 BARRELS OF VINEGAR

(District Court, D. Minnesota, July 14, 1911)

188 Fed. 471; N.J. No. 1159

Libel under section 10 of the Food and Drugs Act. Motion of claimant to dismiss the libel denied. Trial before the court. Decree of condemnation and forfeiture.

MOTIONS TO DISMISS THE LIBEL, AND COURT'S RULING THEREON

Now, at the close of all the evidence and after both the libelant and claimant have rested in the above entitled cause comes Spielman Bros. Co., claimant, by its attorneys, and moves the court to dismiss the libel herein because said libel fails to allege and the evidence fails to show that prior to the institution of these proceedings the Secretary of Agriculture caused notice of the alleged misbranding and adulteration of the vinegar seized herein to be given to said claimant or to Barrett & Barrett or to any other person from whom samples were obtained; or that said claimant or said Barrett & Barrett or any other person was given an opportunity to be heard under the rules and regulations prescribed by the three Secretaries mentioned in section 3 of the Food and Drugs Act of June 30, 1906, under which this proceeding is had, on the question of whether or not the said vinegar was adulterated or misbranded within the meaning of said act all as provided in section 4 of said act.

WILLARD, *District Judge.* While I have no case before me in which this matter has been decided, yet I have read the decisions which have been announced, and have considered the matter more or less. After such consideration I have come to the conclusion that in a proceeding under section 10 of the act of June 30, 1906, 34 Stat. 768, a preliminary investigation is not necessary. The construction of the word "penalties" in section 5, is quite enlightening in determining this question. As has been said, section 2 provides for a penalty against the person, and only provides for fines that are improperly called penalties. This investigation for which section 4 provides, is an investigation the result of which must be certified by the Secretary of Agriculture to the district attorney, and the district attorney is then charged with the duty of prosecuting for the penalties. That on its face, in my judgment, would mean that the investigation refers to a case where there is a prosecution against the person, calling for penalties, and that it is not intended to cover a suit in rem for a condemnation and confiscation of the goods. That interpretation is strengthened by the decisions I have read, that notice should be given to the person liable for the penalty, and the person liable shall have an opportunity to be heard.

I will deny the motion accordingly.

Now, at the close of all the evidence in the above entitled cause and after both the libelant and the claimant have rested, comes Spielman Bros. Co., said claimant, by its attorneys, and moves the court to dismiss the libel herein for want of jurisdiction because it appears

from the evidence and the files and records herein that the goods libeled herein were not seized by the marshal of this court until after the libel was filed herein and the monition issued thereon, whereas in order to confer jurisdiction on this court the said goods should have been seized prior to the filing of said libel and the issuance of said monition.

The COURT. I have already decided that question. I will deny the motion.

Now, at the close of all the evidence and after both the libelant and claimant have rested in the above entitled cause, comes Spielman Bros. Co., claimant, by its attorneys, and moves the court to dismiss the libel herein for want of jurisdiction because it does not appear from the evidence that the vinegar seized herein was shipped in interstate commerce for sale in original and unbroken packages or that said vinegar was transported in interstate commerce for sale within the meaning of section 10 of the Food and Drugs Act of June 30, 1906, under which this proceeding is had.

The COURT. I think this is covered by a decision of the Supreme Court. I will therefore deny the motion.

Motions requesting the court to find the issues generally for the claimant and to enter a special finding of fact for the claimant were also denied. The decision of the court follows:

WILLARD, *District Judge.* Bulletin No. 65 of the Department of Agriculture, Bureau of Chemistry, entitled "Provisional Methods for the Analysis of Foods, Adopted by the Association of Official Agricultural Chemists, November 14–16, 1901", contains a statement by William Frear, relating to the determination of the source of a vinegar, and gives some tests by which the genuineness of the cider vinegar can be known. Circular No. 19 of the Department of Agriculture, issued on June 26, 1906, establishes a standard for vinegar. The evidence of the claimant in the case as well as that of the Government establishes the fact that a compound one-half of which is pure cider vinegar, and the other half something else, will answer the tests mentioned in Bulletin No. 65, and meet the requirements of Circular No. 19. Such an adulterated article which would not be pure cider vinegar would nevertheless have to be pronounced such if these tests and standards are the only ones to be applied. The tests and standards contained in other literature upon the subject published prior to 1906, are substantially those stated in the bulletin and in the circular. The testimony of the claimant's experts is based on such tests and standards. It being proved that these are worthless, it follows that the opinions of such experts based on such standards to the effect that this article is pure cider vinegar are entitled to no great weight.

Is there any evidence in the case which shows some other test by reference to which the genuineness of this vinegar can be determined? The Government is not limited to the standards mentioned in the bulletin and circular above referred to. In the trial of litigated cases the Government is not even limited to methods of analysis which may be adopted under regulation No. 4. The question in this case being whether or not the article is pure cider vinegar, the Government can make use of any test which is an accurate one for deciding that

question. Whether it is an accurate one or not must be decided by the court from all the evidence in the case. The testimony shows that practically all commercial vinegar is now made by the generator process. This process, however, is of recent origin, so recent that there is no literature on the subject. Most of the literature relating to cider vinegar has reference to other forms of production.

Does the evidence disclose any accurate test for the determination of pure cider vinegar made by the generator process? It is claimed by the Government that the testimony of the witness Bender and Goodnow, supplemented by that of Doolittle, does show such a test. Without discussing this evidence in detail, it may be said that Bender, while in the employ of the Government, operated commercial cider vinegar factories for several months in New Jersey, Massachusetts, and New York. He was there for the purpose of determining the constituents of cider vinegar. He made analyses every day of the cider stock before it entered the generator, and of the vinegar which came from the generator. Goodnow as an employee of the Government was at generator factories in Michigan, New York, and New Jersey. His purpose was the same as that of Bender, and he made daily analyses extending over months, as Bender did. The result of these experiments was, so far as glycerin is concerned, as follows: The maximum quantity of glycerin found by Goodnow in any sample in Michigan was 0.46, the minimum 0.24; in New York 0.31 and 0.25. Bender's results in New Jersey were maximum 0.45 and minimum 0.32. These experiments, extended through several months, in hundreds of samples, show no sample with less than 0.24 or more than 0.46 of glycerin.

Glycerin is not mentioned in any way, either in the bulletin or in the circular above referred to. The Government, with these experiments as a basis, claims that it has discovered a new test, the accuracy of which has been established by the evidence. This contention is sustained. That glycerin exists in cider stock is not denied by the claimant, though one of its experts claims that it was practically destroyed in the generator process. That claim is not in any way substantiated by the evidence nor by the literature relating to wine vinegar. The evidence in fact shows that but little glycerin is lost by passing the cider through the generator and converting it into vinegar.

The claimant's objections to this test are various. It says that no such test had ever been heard of before, and that there is nothing in the literature upon the subject of cider vinegar which in any way refers to such a test. If such an objection were to prevail it would prevent the application of any new test, no matter how thoroughly its accuracy might be established. Objections as to the knowledge which Bender and Goodnow had as to the character of the stock, to the manner in which they made their experiments, and the seasons of the year when they were made, have all been considered, but they are not deemed sufficient to destroy the value of such experiments.

The evidence having established the glycerin test as an accurate one for the determination of the purity of cider vinegar, it is now to be applied to the vinegar here in question. Samples B, C, and D, were taken on February 1, 1911. The smallest amount of glycerin

found in any of Bender's or Goodnow's experiments being 0.24, these samples show respectively 0.13, 0.11, and 0.13. Samples E and F, known as the composite samples, were taken May 15, 1911. They are a mixture of equal quantities taken from six barrels. These samples show respectively 0.14 and 0.16 of glycerin.

The claimant objected to the method pursued in determining the amount of glycerin, and its experts characterized that method as entirely inaccurate. Such evidence does not substantially weaken that of the Government chemists who testified to its accuracy. Moreover, the fact remains that using the same method in all these experiments, they always found a substance which they called glycerin. Applying precisely the same method to claimant's product, they found precisely the same substance, but in only one half of the minimum quantity.

Claimant points out that the analyses of Bender and Goodnow were made as the vinegar came from the generator, while the samples in this case were analyzed, some of them six weeks after the vinegar was received in barrels in Saint Paul, some ten weeks afterward, and some six months afterward; but the evidence does not show that these lapses of time would materially affect the character of the vinegar stored in closed barrels.

The claim that the character of that vinegar was materially changed during that time by the formation of mother in it is not borne out by the evidence. No serious objection can be made to the manner in which the samples were taken. Even if the barrel had contained solid matter at the bottom of it, and if it had been shaken so as to mix this solid matter with the whole mass, the sample then drawn off would have been filtered before analysis, in order to get rid of that matter. The experts of the Government basing their opinion upon the application of the glycerin test, and upon other facts which appear in the analysis, particularly the high ratio between the ash and the nonsugar solids, testify that the claimant's product is not pure cider vinegar, but is a compound of about one half cider vinegar and the other half distilled vinegar or diluted acetic acid, with the addition of other substances, the identity of which they could not determine. The opinion of the claimant's experts being based, as has been said, upon inadequate standards cannot outweigh the testimony of the Government.

It may be worthy of remark that the evidence shows that the claimant has a cider vinegar factory in Michigan, and a distilled vinegar factory in Chicago; it also may be noted that the claimant presented no evidence to show whether it bought this vinegar, or manufactured it, and if it manufactured it, out of what substance it was made.

The motion of the claimant at the close of the evidence to dismiss the libel, because no proceedings were instituted by the Secretary of Agriculture prior to the filing of the libel, such as are provided for in section 4 of the Food and Drugs Act is denied.

The investigation provided for in section 4 seems to refer to cases in which there is to be a prosecution under section 5 for the enforcement of penalties referred to in section 2. It has no reference to proceedings for condemnation under section 10.

The amendment to regulation No. 5, issued February 6, 1911, evidently is based upon this construction of the law, for that provides that notice shall be given in every case to the party or parties against whom prosecution lies under this act. Moreover, the necessities of the proceeding under section 10 could not abide the delay caused by an investigation such as is prescribed by section 4. While that investigation is being carried on the property might disappear, or the packages be broken and become part of the general property of the State.

The motion of the claimant made at the close of the testimony to dismiss the libel, because the property was not seized before the libel was filed, is denied. *United States* v. *Two Barrels of Desiccated Eggs* (*D.C.*), 185 Fed. 302; *United States* v. *George Spraul & Co.* (*C.C.A.*), 185 Fed. 405.

The motion of the claimant made at the close of the testimony to dismiss the libel, on the ground that it does not appear that the vinegar seized here was shipped in interstate commerce for sale in original unbroken packages, is denied. *Hipolite Egg Company* v. *United States*, 220 U.S. 45, 31 Sup. Ct. 364, 55 L.Ed. 364. The same case 34 Sup. Ct. Rep. 364.

The motions made by the claimant at the close of the testimony for a general finding in its favor and for special findings in its favor, are denied.

I make a general finding in this case in favor of the Government, and find that the vinegar seized under this libel, to wit, 70 barrels, was both adulterated and misbranded.

Let judgment of condemnation and for the costs be entered against the 70 barrels of vinegar seized in this proceeding, as prayed for in the libel.

UNITED STATES v. HALL-BAKER GRAIN CO.

(District Court, W. D. Missouri, July 22, 1911)

N.J. No. 1135

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.[42]

McPherson, *District Judge* (charge to the jury). You have very patiently listened to the testimony introduced in this case, and the arguments of counsel. It now becomes my duty and pleasure to charge you as to the law. Under the system of jurisprudence in vogue in this country, it is the province of the jury to find the facts and base your verdict upon the facts. It is the province of the court to instruct you as to the law involved. The responsibility of determining the facts is upon you, and you alone. The responsibility for the law governing this case is upon me, and I alone must bear that burden. It is very important, therefore, in order that a just and true verdict may be rendered in this case and no injustice done to

[42] Reversed. *Hall-Baker Grain Co.* v. *United States*, p. 391, *post*.

either party that I, in the first instance, shall give my best thought and effort to ascertain what the law is and to instruct you accurately in reference thereto. On the other hand, you cannot be too deeply impressed with the responsibility that is upon you in the discharge of the responsibilities which now rest upon you in determining what the facts are. Both the Government and the defendant are entitled to insist and expect that you shall give to the solution of the problem before you your very best thought and consideration, and I have no doubt but that you are keenly alive to that responsibility and will discharge it in a most satisfactory manner.

It has been stated to you over and over again during the progress of this trial that the information filed by the district attorney against the defendant, the Hall-Baker Grain Company in his case some weeks ago, charges a violation of the act of Congress approved June 30, 1906, which law is popularly known as the "Food and Drugs Act", or "The Pure Food Law." As you are aware, this act in a general way prohibits the manufacture and sale of misbranded and adulterated foods in the District of Columbia, and in the Territories of the United States, and forbids the transportation of misbranded and adulterated foods and drugs from one State of the United States to another of those states in interstate commerce. Congress would have no right or power under the Constitution of the United States to interfere in any way with the sale and transportation of food products within the borders of a single State; but under the Constitution the power to regulate commerce among the States is vested solely in Congress, and it is because of this power given Congress by the Constitution that this law was passed and is made effective in prohibiting the sale of adulterated and misbranded foods and drugs among the States. That is to say, all matters pertaining to the sale and transportation of foods and drugs that are misbranded or adulterated and which are intended for transportation from one State to another State, is left with Congress. It is by virtue of this fact that the United States court has jurisdiction in this case.

The information filed by the district attorney charges that the Hall-Baker Grain Company, a corporation of this State, shipped and delivered for shipment on or about the 3d day of May, 1909, a carload of wheat; that this wheat was transported by the Hall-Baker Grain Company from Kansas City, Missouri, to the Walker Grain Company located at Fort Worth, Texas. If the defendant did ship and offer for shipment the carload of wheat in question and it was transported from Kansas City, Missouri, to Fort Worth, Texas, then that is a matter of interstate commerce and the provisions of the Food and Drugs Act with respect to the misbranding and adulterating of food products applies and this court has jurisdiction.

The information in this case is quite long. It is in two counts, counts one and three having been dismissed, leaving only counts two and four for your consideration. The second count charges a misbranding of an article of food, to wit, one carload of wheat. The fourth count charges an adulteration of a food product, to wit, one carload of wheat. The law relative to misbranding of food products, so far as it is applicable under the allegations of the information in this case, is as follows:

Sec. 8. The term "misbranded," as used herein, shall apply to all drugs or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

And also provides that,

For the purposes of this act, an article shall also be deemed to be misbranded:
In the case of food:
First, if it be an imitation of or offered for sale under the distinctive name of another article.
Second, if it be labeled or branded so as to deceive or mislead the purchaser * * .

Now under these provisions of the law the information charges "that the said wheat and article of food was offered for sale and sold under the distinctive name of another article, to wit, No. 2 red wheat, another and different article of food than the contents of said car, namely, mixed wheat." That is to say, it is the contention of the Government that the defendant in this case shipped and delivered for shipment in interstate commerce a food product, to wit, mixed wheat in bulk, which was sold and offered for sale under the distinctive name of another article of food, to wit, No. 2 red wheat. The issue, therefore, under this aspect of the case for the jury to determine is as to whether or not the defendant sold or offered for sale in interstate commerce mixed wheat under the distinctive name of another article of food, to wit, No. 2 red wheat.

The information further charges in respect to misbranding that said wheat and article of food, was labeled and marked so as to deceive and mislead the purchasers thereof, that is to say, said wheat and article of food, was labeled and marked No. 2 red wheat when in truth and in fact it was not red wheat, but was as a matter of fact mixed wheat.

The contention of the Government in this respect being, as I understand it, that the account of sales and certificate of inspection which passed from the defendant company to the Walker Grain Company constitutes a labeling and branding of the article of food transported in interstate commerce, to wit, wheat, and that this labeling or branding was of such nature as to deceive and mislead the purchaser. In other words, the Government contends that inasmuch as the account of sales rendered by the Hall-Baker Grain Company to the Walker Grain Company for this wheat designates it as No. 2 red wheat; that the certificate of inspection issued by the chief grain inspector of Kansas City, Missouri, a State officer, and consigned by the Hall-Baker Grain Company to the Walker Grain Company at Fort Worth, Texas, designates this food product as No. 2 red wheat, and that this constitutes a misbranding under the subdivision of foods of the Food and Drugs Act.

The above provisions of the law and the allegations of the information all refer to the charge of misbranding in this case, and I will refer more specifically to these matters hereafter in my charge and will now proceed to quote the law with respect to the charge in the information as to adulteration.

Section 7 of the Food and Drugs Act with respect to adulteration, so far as applicable to the charges contained in the information in this case, is as follows:

SEC. 7. That for the purposes of this act an article shall be deemed to be adulterated:

In the case of food:

First. If any substance has been mixed or packed with it so as to reduce or lower or injuriously affect its quality or strength.

Second. If any substance has been substituted wholly or in part for the article.

Third. If any valuable constituent of the article has been wholly or in part abstracted.

Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

The fourth count of the information charges a violation of these four provisions of section 7 of the Food and Drugs Act in the case of foods, as follows:

(a) That other and different substances and articles, to wit, various kinds and grades of wheat, had been mixed and packed with said wheat and article of food so as to reduce, lower and injuriously affect the quality and strength of said wheat and article of food.

(b) That other and different substances, to wit, various kinds and grades of wheat, had been substituted in part for the wheat and article of food represented and pretended to have been sold and shipped, to wit, No. 2 red wheat.

(c) That a valuable constituent or part of the wheat and article of food sold and shipped, and pretended to have been sold and shipped, to wit, No. 2 red wheat, had been in part abstracted and removed, that is to say, a certain portion of No. 2 red wheat had been abstracted and removed therefrom, and a like quantity of various kinds and grades of wheat inferior and less valuable, had been substituted therefor.

(d) That said wheat and article of food was mixed and packed with other kinds and grades of wheat in a manner whereby damage and inferiority were concealed.

In other words, the information charges the violation of the four sections of the Food and Drugs Act quoted above relative to adulteration as to No. 2 red wheat.

Now to re-state to you in simpler form, if I can, the charges in the information with respect to adulteration, I have to say, that as I understand it, the Government charges that the wheat shipped and offered for shipment as detailed to you in the evidence in this case was adulterated because the defendant sold or pretended to sell to the Walker Grain Company in Fort Worth, Texas, No. 2 red wheat; that as a matter of fact there was hard wheat of various kinds mixed and packed with this No. 2 red wheat so as to reduce or lower or injuriously affect its quality or strength.

Second, the Government contends that it was adulterated because a substantial quantity of hard wheat had been substituted in part for the No. 2 red wheat and this mixture was in fact shipped in interstate commerce by the defendant company.

Third, that the wheat in question was adulterated because a valuable constituent, to wit, No. 2 red wheat, which was the article pretended to have been sold, had been wholly or in part abstracted and hard wheat substituted therefor.

And further the Government contends that the wheat in question was adulterated because it had been mixed and packed in a manner whereby damage and inferiority is concealed, that is, that hard wheats of various varieties and kinds had been mixed with No. 2 red wheat, and that this mixing hard wheat with the soft wheat concealed

damage and inferiority. This is, as I understand it, the Government's position with respect to adulteration.

As stated, counts one and three of the information have been dismissed on motion of the United States attorney, leaving counts two and four for your consideration. To both counts two and four, the defendant has entered its plea of not guilty. A plea of not guilty challenges and puts in issue all material allegations in counts two and four of the information, thereby calling from the Government such testimony and evidence as to show the guilt of the defendant beyond a reasonable doubt before you can find a verdict of guilty under either of those counts. A reasonable doubt means, as the term implies, that there must be no reasonable doubt. While this is not a doubt sought after, or a captious doubt, but it means such a doubt as would make you hesitate to act on and concerning some matter of importance to yourself or one of your family. If the evidence on the part of the Government has so satisfied you as to leave no reasonable doubt in the sense to which I have just alluded, then the proofs are sufficient to warrant a conviction. There is a presumption of innocence attending the defendant in all criminal prosecutions like this. This presumption of innocence stands as a fact like any other fact in the case, but by presumption is not meant a conclusive presumption or that which could not be overcome. It is simply a presumption to be given such weight as in your judgment it is entitled to receive, and you will keep in mind that you will consider this question of reasonable doubt and this presumption of innocence, and then take all of the testimony and evidence and say whether or not your mind is satisfied of the guilt of the defendant either under count two or under count four, and if you are so satisfied your verdict will be that of guilty, and if not so satisfied your verdict will be that of not guilty.

I hand you herewith four forms of verdicts, one of guilty and one of not guilty under the second count, and one of guilty and one of not guilty under the fourth count. After reaching a conclusion you will have your foreman sign one of the verdicts as to each of said counts and bring that into court as your verdict, destroying the other two forms.

The defendant in open court conceded that the wheat in question was shipped from Kansas City, Missouri, to Fort Worth, Texas, in car no. 40724 A., T. & S. F., to the Walker Grain Company, Fort Worth, Texas, and that the car was sealed and that the doors had not been opened while the car was in transit for shipment, and was in the same condition when received at Fort Worth, Texas, as when started on its trip from Kansas City, Missouri, and you will take such agreement in open court as facts without further testimony, and you will have no controversy upon that proposition of fact.

Directing your attention now to the charges in the second count of the information with respect to misbranding, you are instructed that the matter of misbranding is under two heads:

First, the information charges that the defendant is guilty of misbranding the wheat in question, because it sold and offered for sale said wheat in interstate commerce as No. 2 red wheat, when as a matter of fact it was mixed wheat. The Government contends that No. 2 red wheat is a distinctive trade name applied to certain quality

of soft wheat and is a term that is distinct and well understood by grain men, millers, and elevator men throughout this section of the country, and that it has in its commercial sense a well understood meaning. The defendant, as I understand it, denies that No. 2 red wheat is a distinctive trade name applied to a particular quality of red wheat, and this forms a question of fact for you to determine. The court instructs you that if you find and believe beyond a reasonable doubt, as that term has been heretofore explained to you, that the defendant did sell and offer for sale in interstate commerce the wheat in question under the distinctive trade name of No. 2 red wheat, and that that term is well understood in a commercial sense by millers and dealers in grain, then said wheat was misbranded and your finding will be in favor of the Government upon this issue. On the other hand, if you find and believe from the evidence that No. 2 red wheat is not a distinctive trade name and is not so understood among dealers in grain, then your finding will be for the defendant as to this phase of the question of misbranding.

You are further instructed on this question as to the second subdivision of misbranding. The food in question, as you are well aware, was that of a carload of wheat in bulk, and was not sacked or in boxes, or packages of any kind, but many hundreds of bushels of wheat in the one car. The Government contends that it would be a physical impossibility, or at least it would be very inconvenient, if it could be done at all, to put or print a written label on such wheat in bulk. If you find that to be so—that is to say, that it would be either impossible or most inconvenient to thus label a car of wheat in bulk—you are instructed that the label in such a case consists of the designation of the quality by an invoice sheet and by a certificate of inspection made by inspectors in the employ of the State of Missouri, and issued to the consignor, and with or separately sent to the purchaser at Fort Worth, Texas; that, within the meaning of the statute, would be the label or brand as designated by the seller to the purchaser in question of the wheat. That is to say, it is the contention of the Government that the designation in the account sales and in the certificate of inspection above referred to, of the wheat in question, as No. 2 red wheat, constitutes a label and brand of the wheat as No. 2 red wheat. You are therefore instructed that if you find and believe from the evidence, beyond a reasonable doubt, that the defendant, at or about the time this wheat was shipped in interstate commerce and sold or offered for sale by it to the Walker Grain Company, at Fort Worth, Texas, rendered an account sales to the Walker Grain Company, wherein the wheat in question was designated as No. 2 red wheat, when, in fact, it was mixed wheat, and sent or caused to be sent to the Walker Grain Company a certificate of inspection issued by the grain inspector of the State of Missouri, and that these papers constitute a part of the transaction connected with the sale of said wheat, then the court instructs you that said wheat was misbranded within the meaning of the statute in question, and your verdict will be for the Government upon this branch of the question of misbranding. If, on the other hand, you find and believe that the account sales and the certificate of inspection were not sent to the Walker Grain Company by the defendant as a part of this transaction, and that the wheat

in question was not designated as No. 2 red wheat, then your verdict will be for the defendant upon this branch of the question.

Upon the question of adulteration, under the fourth count of the information herein, the court instructs you that the information charges, in substance, that the wheat in question was mixed with hard wheat in such way as to reduce and lower and injuriously affect the quality and strength of the wheat; that is to say, that the defendant offered for sale and pretended to sell to the Walker Grain Company, of Fort Worth, Tex., No. 2 red wheat, when, as a matter of fact, it was mixed with hard wheat of various kinds and qualities. You have heard the testimony of the witnesses as to the grading of this wheat. It is the contention of the defendant in this matter that it did not see the wheat that it sold the Walker Grain Company, and that it did not have anything to do with the inspection thereof or the grade that was to be put upon the wheat; that this was a matter entirely within the province of the State officials of the State of Missouri, but that they had no control over that. Furthermore, that it was provided in the contract of sale that the wheat was to be sold in accordance with the Missouri inspection grades and weights. The court instructs you that this is not a matter of defense, but only goes to the amount of fine to be imposed in the event you find a verdict of guilty under this count, and if there is a conviction the amount of the fine is to be determined by the court, and with which you have nothing to do.

You can, gentlemen of the jury, very well understand why this is so. If the national pure food law is to be of any value to the people, and especially to the consumer of the food products that are shipped in interstate commerce in such large amounts throughout this country, it must not depend for its construction upon State officers and contracts between elevator men and millers or other people dealing in food products, other than the consumer himself. Indeed, it is my belief that even if a national officer or employee of the Government should falsely or erroneously misbrand or adulterate a food product which is transported in interstate commerce, it would not avail the defendant as a defense, because, the question comes back for your determination: Was the wheat in question No. 2 red wheat, or was it a mixed wheat containing quite a percentage, more than 25 percent, of hard wheat? This is a question of fact for you to determine from all the evidence that has been introduced in the case. If you find that the No. 2 red wheat was thus mixed with hard wheat of various kinds, then the court instructs you that it was adulterated within the meaning of this law and your verdict will be for the Government upon that issue under the fourth count herein. If, on the other hand, you do not believe from the evidence, beyond a reasonable doubt, that the wheat was mixed with hard wheat in sufficient quantities to make it of a lower grade than No. 2 red wheat, then your verdict will be for the defendant.

There are three other charges of adulteration which are all practically the same. The first of the remaining three charges that if any substance has been substituted, wholly or in part, for the article sold, or if any valuable constituent of the article has been wholly or in part abstracted, and third, if it has been mixed whereby inferiority has been concealed, then there is adulteration. These three matters

are all practically the same thing, stated in different ways. If hard wheat was mixed with the No. 2 red wheat, then, in that sense, hard wheat has been substituted in part for the article sold. Again, if No. 2 red wheat has been taken out and replaced by hard wheat, then a valuable constituent of the article has been abstracted in part, and likewise, if hard wheat has been mixed with the No. 2 red wheat in a manner whereby inferiority is concealed, then it has been adulterated within the meaning of the act. But, whether or not the mixing of hard wheat with soft wheat does conceal inferiority, is a question of fact for you to determine, and if you find and believe from the evidence, beyond a reasonable doubt, that such is the case, then your verdict will be for the Government upon this branch of the case. If, on the other hand, you do not believe that the mixing of hard wheat with the No. 2 red wheat does conceal inferiority, then your verdict will be in favor of the defendant upon that issue.

The defendant herein is a corporation, but you will have no prejudice against it by reason of that fact, and you will not show it any consideration by reason of that fact. But it is entitled to the same fair trial, neither more nor less, than if the defendant was an individual instead of being a corporation.

Many of the States have pure food and drug acts of their own. You see readily that the act of the State legislature, however, cannot be operative against a shipment from Missouri to the State of Texas, as is charged in this case. Therefore, the Congress of the United States, in its wisdom, enacted a national Pure Food and Drugs Act which was approved by the President of the United States June 30, 1906, having now been in force for practically four years and a half. These pure food and drugs acts are for the purpose of enabling the consumer to get and receive what he orders and desires to receive. If the housewife and the servant girl who prepare foods, and the bakers, are of the opinion and believe that No. 2 red wheat is a soft wheat and makes a whiter flour and the product of which, when made into pastry or crackers or biscuits, is more attractive, or superior in quality, or more appetizing to those who are to eat the same, and if they order the flour made from such wheat and are willing to pay for the same, they have the right to receive the same when they order it. And it is the purpose of the act of Congress of June 30, 1906, to protect the consumer in that right. The question is not whether hard wheat or mixed wheat will make a flour as nutritious as the soft wheat flour. The question is not whether hard wheat flour or mixed wheat flour is harmful as compared with the soft wheat flour. The consumer has the right to have what he wants to have that is obtainable and he is willing to pay therefore.

The defendant contends that it sold the wheat under a contract with the Walter Grain Company at Fort Worth, Texas, as No. 2 red wheat, and that it, the defendant, did not know but that such wheat was being shipped in the car, number as before stated, and that it, the defendant, had no intention of shipping any other quality or variety of wheat other than No. 2 red wheat. But such contention, though you may agree with that contention, does not avail the defendant herein as a defense. And that is so because the question is under the fourth count as to adulteration, as well as under count two as to misbranding: Did the defendant ship, in interstate commerce,

in the car of wheat in question, from Kansas City, Missouri, to Fort Worth, Texas, No. 2 red wheat, or did it ship the car of wheat, the same being mixed, a part of it No. 2 red wheat, and 25 or a greater percent thereof hard wheat? And if, regardless of what defendant believed about it, the car was one of mixed wheat as before stated, then it is guilty of adulteration, providing you find the other elements entering into the question of adulteration and misbranding are present and appear, beyond a reasonable doubt, from the testimony in the case as hereinbefore stated.

This is an important case, although the penalty is small. This statute, like all other statutes, is to be enforced if the facts warrant it. If the facts do not warrant it your verdict will be *not guilty*, but if you are satisfied from the evidence that the facts warrant it, you will say so by your verdict. You will not treat the case lightly, but seriously and thoughtfully, giving it your very best judgment, regardless of whom it pleases and who are displeased, showing no favors to either side. Your verdict should express the truth.

UNITED STATES v. BETTMAN-JOHNSON CO.

(District Court, S.D. Ohio, Oct. 6, 1911)

N.J. No. 1664

Informations alleging violations of section 2 of the Food and Drugs Act. Motions to quash informations overruled. Demurrer to informations overruled. Jury trial. Verdict of guilty. Motions in arrest of judgment and for new trial overruled.

SATER, *District Judge* (charge to the jury). These are important cases, as are all criminal cases. In reaching a conclusion you will not be controlled or influenced by the fact that there is, or may be, a large sum of money invested in the manufacture of the product in question. The case is to be determined according to what is right, not according to the amount involved. It arises under the Pure Food and Drugs Act, whose purpose is to prevent deceit and false pretenses in the sale of foods and drugs, and to safeguard the public health.

The charge is that the article of food produced by the defendant is misbranded. Under the act an article of food is deemed to be misbranded if it be an imitation of or offered for sale under the distinctive name of another article, or if it be labeled or branded so as to deceive or mislead the purchaser, or if the package, or container, or its labels, should bear any statement, design, or device regarding the ingredients or substances contained therein, which statement, design, or device shall be false or misleading in any particular. To that there are some exceptions, but we are not interested in them in this case.

You are the triers of the facts of this case; the Constitution makes you such. You are to ddetermine what the facts of this case are, as developed by the evidence given before you.

In the course of the trial, and in the closing argument, counsel stated their recollection and understanding of the facts. In its

charge the court will refer to some—not all—of the facts, for the purposes of illustration and to bring to your minds the issues involved, but you are to use your recollection of what the evidence is, not the recollection of the lawyers or that of the court. You are to consider the whole of the evidence and to determine the issues from the whole of the evidence. In so far as the arguments of the lawyers aided you in analyzing and understanding the evidence, you should avail yourselves of their assistance, but the recollection of it must be yours, and not that of the lawyers or of myself.

In the course of argument allusions were made to the law by counsel. You take your law from the court, and not from the lawyers.

You are the judges of the weight of the evidence and of the credibility of the witnesses. In determining what weight and credibility you will give to a witness, you should consider his opportunities for knowing of matters concerning which he testified; his intelligence; his conduct on the witness stand; the probabilities or improbabilities of his statements; his prejudice or interest, if any, in the result of the suit; whether he is corroborated or uncorroborated; whether he is contradicted or uncontradicted in his evidence; in short, all of the facts and circumstances which reflect on his credibility, and then determine what weight you will give to his statements.

The defendant is presumed to be innocent. This presumption is a fact to be considered in this case along with all of the other facts. It runs in its favor as to every element of the crime charged, and abides with it throughout the trial until removed beyond a reasonable doubt.

To convict, the Government must convince you, and each of you, of the guilt of the defendant beyond a reasonable doubt. A reasonable doubt must be a substantial doubt arising out of the evidence of the case. It is not a mere conjured-up, imaginary doubt, but a doubt for which a reason can be given; such a doubt as would exist in the mind of a reasonable man after a free, full, fair consideration of all the evidence. But the law does not exclude all doubt, because absolute certainty is not possible.

You are to pass upon two cases. They have been tried together and are to be considered on the evidence which was given before you.

It is admitted that the defendant shipped and caused to be shipped and delivered the articles named in the respective informations to the respective parties named in them. They were shipped from one State to another, and passed thereby into interstate commerce. It is also admitted that the bottles so shipped and delivered were branded as set out in the informations. Some of the bottles are offered in evidence, and will be subject to your inspection.

The charge which the Government makes is that the article of food contained in the bottles was misbranded in the following particulars: That it was offered for sale and sold under the distinctive name of another article of food, namely, maraschino cherries, when, in truth and in fact, the article of food was not maraschino cherries and did not consist of cherries packed or preserved in genuine maraschino liqueur or cordial, but that the cherries are packed or preserved in a liqueur or cordial made in imitation of the genuine maraschino, a liqueur or cordial which originated and is produced

in Dalmatia, Austria; that the article of food in question was labeled and branded so as to deceive and mislead the purchaser thereof, in that it purported to be and was represented to be maraschino cherries, or cherries packed in maraschino, or preserved in maraschino liqueur or cordial, while in fact the article of food was not maraschino cherries, and was not packed or preserved in maraschino liqueur; that the label and brand on this article of food bore a statement regarding the article itself and its ingredients and substances which was false, misleading, and deceptive, because it purported and represented such article to be maraschino cherries, or cherries packed in maraschino liqueur or cordial, which liqueur or cordial originated in Dalmatia, Austria, whereas, in fact, the cherries were not maraschino cherries and did not consist of cherries packed or preserved in genuine maraschino liqueur or cordial.

Such are the charges made in the respective informations. To the charges which the Government has undertaken to prove the defendant has entered a plea of "not guilty", and that puts in issue each and every one of such charges.

There grows in Dalmatia, in Austria, a small, dark-colored, bitter cherry with a rather large stone. There may be some variation in the evidence as to the description of the cherry, but you will recall the evidence and be guided by it. The cherry is not edible; at least, not much eaten. It grows on a small tree in places which one of the witnesses, at least, has said are barren. It does not grow in orchards. The Government has introduced evidence to show that the tree is indigenous to Dalmatia, and that efforts to transplant it have not been successful, and that the cherry loses flavor when transplanted. The cherry which grows on the tree is called the marasque cherry. From the pulp of the cherry and the leaves of the tree, so the witness Koch states, is distilled maraschino. Bodman further testifies that maraschino is produced from the cherry and the leaves and bark of the tree.

Maraschino is not a cherry. It is a liqueur or cordial high in alcohol, the percentage of which has been variously stated by different witnesses, some giving as high as 70 percent. Its characteristics, of course, you will determine from the evidence. There is also evidence to show that it has a peculiar flavor; the fact as to that you will also determine from the evidence. Bodman wished to purchase, so he has told you, three thousand gallons of maraschino, and that the capacity of the producing distilleries was such that from twelve to fifteen thousand gallons could have been furnished. He named four distilleries of which he learned while in Dalmatia, three of which, as I recall his evidence, he visited. The witness Koch named six, and testified that the liqueur or cordial is drunk as a beverage, and described the use of paper discs which are used to preserve as long as possible the flavor. Bettman has testified that it cannot be drunk, or at least that it is not used as a beverage. His precise statement you must yourselves determine. It is for you to say which of these two witnesses you believe—which had the best knowledge of its use as a beverage.

The liqueur or cordial maraschino was originally made in Dalmatia a long time ago, and it has been stated here that two of the houses still in existence and producing it are more than a hundred years old.

There is evidence that considerable quantities of the cherries have been dried and exported, mainly to Germany, and that the liqueur or cordial maraschino has been exported to various countries which have been named in your presence. Bodman testified that he bought a quantity of it to be used in his business at Ludlow, Kentucky, and that in the use of it he reduces the percentage of alcohol from about 70 percent to 1 percent. Bettman told you of his inability to find it in this city some time ago but did find some in New York and purchased it. If this occurred, however, after the information was filed, then you should not consider his purchase as reflecting on the extent of the commercial use of maraschino before the suit was brought. You should so consider the evidence of Bodman also, if his purchase occurred subsequent to the filing of the information. Brachman, a Cincinnati merchant, testified that he has handled Luxardo's maraschino since 1873, but that the sales have been limited. The witness Hart testified that he bought maraschino twice; that he had the maraschino distillate 5 or 6 years ago and had seen a few bottles of the maraschino cherries. Hilts conducted examinations of maraschino, perhaps half a dozen of them, he says, in 1909; that in some of the samples that he examined in his study of maraschino he found it present, and in others he did not; that that which was made by Luxardo, of Zara, was strong, genuine maraschino. Thomas testified to assistance rendered his father, an importer of wines, liqueurs, and the like, while doing business in San Francisco, which assistance extended down to about the year 1897. He detailed to you what his services were and that he sampled everything that was bought in that business. He said that for the purposes of that business there were imported both French and Dalmatian maraschino; that cherries in maraschino were also imported by his father and also cherries which were designated as "Cherries au Marasquin."

The evidence has thus been reviewed to reflect on and call your attention to the extent of the commercial use of maraschino and to its properties. I do not pretend to call your attention to all of it, but you will consider all of it, whether reviewed or not; and you will, as I have heretofore said, determine the value of the evidence of each witness.

The defendant claims, as I understand, that the tree which grows in Dalmatia and yields the marasque cherry of that country is not indigenous, but that it grows elsewhere. You will determine from the evidence whether or not the same tree that grows in Dalmatia, the same kind of cherry that grows there, is found growing in other countries.

You will also determine from the evidence whether maraschino is produced in other countries or not, and whether, if it is so produced, it is the same article, the same character of article, as that produced in Dalmatia.

The defendant's position is substantially this: It admits that the cherries used by it and its predecessor partnership are not and have not been maraschino cherries. The cherries used by the defendant in its business are obtained in Greece, France, some of the Western States, and perhaps elsewhere; the names of some of them have been given you, as Queen Anne, Royal Anne, Bigarreaux, etc. There is no maraschino used in the manufacture of the defendant's article.

It is not present at all. The cherries used by the defendant were shipped here in brine, and sulphur in some form appears to be present in such brine. They are washed and prepared in a manner that I do not understand, but which is not important in the determination of these cases. The effect of the early treatment of them is to render them colorless, and, if not tasteless, then so as to remove a portion at least of the taste. They are then colored red, and are placed in a sirup or liquid and a bitter flavor is given them by the use of almonds or oil of bitter almonds, whichever it is.

As I recall the evidence, there is no such cherry grown or known in fruit growing as maraschino cherries—no natural product which bears that name. There is evidence here, given by Thomas, that the article prepared by the defendant does not have the taste or flavor of maraschino, but that both the defendant's article and the true maraschino have a bitter taste. The defendant's article, if I recall the evidence rightly, has no alcohol present. In maraschino there is alcohol. The defendant's product has gone into extensive use in many ways which have been named in your presence. The article is produced and sold annually in large quantities. The manufacture of it began in 1894. The manufactured product was called Maraschino Cherries and has been known by that name ever since. Bettman says that the name was applied as an arbitrary name, as a fanciful name. Keifer, if I recall his evidence correctly, stated that it was made to imitate the French article; that there was an analysis made of the French article to determine its composition, with a view to manufacturing a similar product.

As I have said heretofore, the record fails to show any cherry that is a natural product which bears the name of maraschino cherries. Such a cherry is not known in cherry culture. The defendant, in its use of cherries, has not limited itself to any one kind of cherry. It does not use the marasque cherry. It claims that its cherries are the principal thing in its product and that the sirup may be thrown away. Its position is that it gave a name to its cherry which is unlike and different from the name of any cherry ever theretofore known or sold, and that it first applied the name maraschino cherries; that no cherries packed or preserved in genuine maraschino have ever been known as maraschino cherries; that when it applied the term maraschino to its cherries that term had never been applied to any natural cherry or treated cherry; that their article went into extensive use and became known and used in this country and elsewhere as maraschino cherries; that in commerce, and so far as the public is concerned, the name maraschino cherries, as used by it, is a true name, and not suggested by any other cherry than their own product, and that it is consequently not a fraud or deception or a misleading name; that the term maraschino means, and has come to mean, something else than the distillate of the marasque cherry, and that this is on account of the extensive use of defendant's product, and on account of what the defendant claims is the style or custom of today, and of the little knowledge of the genuine maraschino, and the small supply available for use; that their product named Maraschino Cherries is a food product, a fruit in a liqueur or cordial prepared for such fruit.

Such are the claims made in behalf of the defendant; and if you find that the claims so made are sustained, you need go no further,

but return a verdict for the defendant. If you do not find the defendant's claims sustained, then you must go further and consider in detail the claims of the Government, and I shall now proceed to state them.

The Government claims that maraschino is a liqueur or cordial first made in Dalmatia; that it entered largely into commerce, into that of European countries which have been named and also into the commerce of this country, and that it thereby became known to dealers; that it possesses a peculiar and distinguishing flavor of its own; that when the term "maraschino" is applied to an article it carries by implication the meaning and is understood and has been understood to mean an article packed or preserved in and possessing the flavor and qualities of maraschino; that the cherries of the defendant are not maraschino cherries, as known as a natural product and in fruit culture; that they are not the marasque cherry, from which maraschino is made; that no maraschino whatever is used by defendant in connection with its product, and that no such thing as maraschino cherries is known, as I have just said, in fruit culture or as a natural growth; that the product of defendant has neither the flavor nor quality of maraschino, and that the application and use of the term maraschino to and in connection with the word "cherries" imports and suggests that the cherries are cherries from which maraschino is made—that is to say, marasque cherries—or that the defendant's product is packed and preserved in maraschino and that such is the common understanding, the ordinary purchaser's understanding; that in the commercial world maraschino is so well known, its quality and characteristics so well understood, its name so distinctive, that it occupies a field by itself, and that the name maraschino is limited to the liquor, or liqueur, or cordial, called maraschino, and that the name has never acquired a general, or more general, or different meaning than that arising from its being associated with the distillate of marasque cherry; that the name maraschino could not be appropriated by the defendants, or others, or any other article, without misleading the public; that the name maraschino is the name of a real, genuine, valuable article of commerce, never applied to a natural cherry with natural color and flavor, or to a cherry which, by its earlier treatment, loses its color and flavor and then by subsequent treatment is given color and flavor in preparation for the market, some of the original flavor being perhaps retained, notwithstanding the treatment in shipping and the effect of sulphur, as well as the brine.

The Government claims that the appropriation of the name conveyed and does convey the belief that defendant's article possessed and possesses the flavor of original maraschino; that the name was applied to cherries which have none of the characteristics of maraschino to induce the belief that those qualities are present, and that such use of the name is a misnomer and the placing of it on the label is misbranding, and that the misbranding is done to deceive and mislead the purchaser into the belief that he is buying an article possessing the characteristics and qualities contained in true maraschino, when in fact he is not. The ordinary purchaser is one who gives such attention to the article he wishes to buy as could be reasonably expected, and it is that kind of a purchaser which the Govern-

ment claims is mislead. It claims that the statement and name on the defendant's labels are false, misleading, and deceptive as regards the cherries—the article of food—and the substance or ingredients which compose or enter into it and the liquid which surrounds such cherry; that the term "maraschino" suggests an origin, character, and place of manufacture, which is untrue, and leads the purchaser to believe that what he buys is a thing other than what he gets. That, as I understand, is the Government's claim; and if you find that that claim is sustained by the evidence, beyond a reasonable doubt, then it is your duty to say so, and to do so notwithstanding the length of time the defendant and its predecessor have used the name of maraschino cherries. For, if the name put on the label is a misbranding, a false, deceptive, and misleading name, then its continued use would not make it legal.

You will decide whose contentions are correct, and whether, under the facts and the law, defendant is guilty of a misbranding and mislabeling, or not. You will act impartially and conscientiously. When you retire to the jury room you will name one of your number as foreman, and when you have reached a conclusion you will report your verdict.

UNITED STATES v. DR. J. L. STEPHENS CO.

(District Court, S.D. Ohio, Oct. 10, 1911)

N.J. No. 1891

Information charging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty by direction of the court.[43]

AGREED STATEMENT OF FACTS

That since March 4, 1907, Dr. F. E. Crosier, president and medical director of said company, has had charge of the sanitarium owned and conducted by said defendant company, and has had charge of all the patients at said sanitarium, and also all patients that have been treated away from the institution by correspondence. The said Dr. Crosier is a graduate of the medical department of Columbia University, New York City, and was licensed to practice medicine by the University of the State of New York, on the 10th day of July, 1894, after an examination by the New York State Regents. He served on the surgical staff of Bellevue Hospital for 18 months, and on the medical staff of the same hospital for 6 months. He is a member of the society of "Some of the Alumni" of Bellevue Hospital. Later, he served six months on the staff of the Lying-in Hospital in New York City. He practiced medicine in Springfield, Massachusetts, for a short time. He was appointed Acting Assistant Surgeon of the United States Army during the Spanish-American War and served in Sternberg Hospital, Chickamauga Park. On the 5th day of April, 1904, after examination, he was licensed to prac-

[43] Affirmed, *Dr. J. L. Stephens Co.* v. *United States,* p. 471, *post.*

tice medicine in the State of Ohio, and since that time he has been engaged in the practice of his profession at Lebanon, Ohio. For years he has made a specialty of treating patients addicted to drug and liquor habit.

The defendant company has no proprietary medicines, nor does it put up or offer any medicines to the general public. Its medicines, nor its prescriptions for medicines, are not for sale at any drug store or other place whatsoever. They are not put up or kept for sale by the defendant company, or delivered to any other party or parties for administering to patients generally, who are afflicted with the drug habit, nor can any person afflicted or claiming to be afflicted with the drug habit send to the company, or to anyone connected with the company, and buy a stock remedy or proprietary medicine for the cure of the drug habit.

In every case where the patient applies for treatment, either at the sanitarium or at the patient's home, a history of the patient's case is first obtained from the patient, from which a diagnosis is made and a prescription written by the medical director as the examining physician, to meet the needs of the particular case then under consideration, which prescription is then filled by the medical director, or under his immediate direction. Persons addicted to the drug habit have frequently made application to the defendant company for medicines, asking that the same be sent them without first submitting the facts and necessary data concerning the patient's habit, condition of general health, previous history, etc., from which an intelligent diagnosis of their case could be made, and from which the physician in charge could prescribe for their particular case, and the defendant company has always refused to prescribe for such persons or furnish any medicines until the patient could furnish the necessary facts from which the examining physician could intelligently prescribe for their individual cases. The defendant company has frequently been applied to by persons claiming to be afflicted with the drug habit to furnish them with sample, or trial packages of their remedies, but have always refused, as their treatment was that of a regular practicing physician, and sent out only on prescription for each individual case.

The package of medicine referred to in first count of the information, was shipped by the defendant company under the following conditions and circumstances:

On November 30, 1908, a person signing himself A. Stengel, and giving his address as 1415 Chapin Street, Washington, D.C., sent a communication to the defendant company, inquiring about its treatment of the morphine habit, expense of same, etc. This communication was answered on December 5, 1908, and other correspondence followed. The said A. Stengel endeavored to get the defendant company to forward him medicines for curing the morphine habit without submitting to its medical director and physician in charge a full statement of his physical condition, health, symptoms, effects of the habit upon him, etc. The defendant company refused to prescribe for him or to receive him as a patient without such complete statement. The result of the correspondence was that the said A. Stengel furnished the required information and, after a diagnosis of his case, a prescription was made and entered upon the prescription ledger of

the company, the medicine put up in accordance with said prescription by the medical director of the defendant company, and the same was sent to him by express, December 15, 1908.

The package of medicine referred to in the second count of the information was shipped by the defendant company under the following conditions and circumstances:

On November 5, 1908, the defendant company received a communication from a person signing himself L. F. Kay, and giving his address as Washington, D.C. Said communication was in fact from Dr. L. F. Kebler, Chief of the Division of Drugs, Bureau of Chemistry, United States Department of Agriculture, the name of "L. F. Kay," having been assumed by him for the purpose of obtaining evidence. The first communication being an inquiry concerning the defendant company's treatment of the drug habit. Several communications passed between the date of the said L. F. Kay's first inquiry, and October 20, 1909, when the defendant company accepted him as a patient and sent him medicine for a course of treatment for the morphine habit. This medicine was prepared and sent by the medical director and physician in charge of the defendant company, after he had diagnosed the case of the patient, the prescription having been made and entered upon the prescription ledger of the defendant company prior to the preparation and shipment of the medicine as aforesaid.

At the time of the Spanish-American War, when the Government imposed a tax upon all proprietary medicines, an official of the Government examined the sanitarium, the books of the defendant company, and its methods of doing business, and decided that the medicines prescribed and put up for its patients were not amenable to the revenue tax, and no revenue tax has ever been paid by said defendant company on its preparations.

It is a recognized fact by the medical profession generally that in the treatment of diseases, especially the drug habit, it is an important and in most cases a vital factor, that the patient should not know the composition of the medicines given in such treatment.

In the treatment of the morphine habit and of other drug habits of a similar character, and which constitute the main business of the defendant company, it is generally accepted and recognized and followed by the medical profession as the proper medical treatment to diminish the amount of the drug taken, without the knowledge of the patient, at the same time correcting nervous, digestive, or other effects of the habit by proper proportion of medicines generally combined with the drug against which the treatment is directed.

These prescriptions attached to "Exhibits A and B" herein, when filled, constitute a course of treatment for the morphine habit, based on the gradual reduction plan; they also embody combination of drugs calculated to overcome the effects of the morphine used, and while regularly diminishing the amount used, tend to correct the disordered conditions and restore normal health.

The alcohol contained in the compound is not for any therapeutic use whatever; on the contrary, it is used only in very small amount, as the analysis shows, to prevent fermentation and to insure against freezing.

SATER, *District Judge* (directing verdict for the Government). This case is submitted upon an agreed statement of facts. Each party asks for a directed verdict.

The defendant's first contention is that the information is defective and insufficient, because it alleges that each of the bottles shipped to the vendee was misbranded; whereas, it should have been alleged that the larger package, of which each bottle was a part, was misbranded.

A number of bottles of the article in question were shipped together as a single shipment. They went forward through the channels of interstate commerce as a single bundle or package, surrounded by some sort of a cover. The information charges that each individual bottle was mislabeled and misbranded, and not that the enclosing cover of all of the bottles was mislabeled or misbranded.

The first sentence of the second section of the Pure Food and Drugs Act provides:

> That the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this act, is hereby prohibited.

The paragraph then recites that "Any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this act" shall be punished as is thereinafter set forth. For the purposes of this case, the other portions of the section need not be noticed.

This section prohibits the introduction into interstate commerce of any article of food or drugs which is adulterated or misbranded within the meaning of the act. It also penalizes the shipment or delivery for shipment from any State or Territory or the District of Columbia, of any such article so adulterated or misbranded within the meaning of the act.

The verbs "ship" and "deliver" are both transitive and call for an object. The object is found in the words, "any such article so adulterated or misbranded within the meaning of this act." The antecedent of "such" and "so" is found in the first sentence of the section, in the words, "any article of food or drugs which is adulterated or misbranded within the meaning of this act." If I should be wrong in this, and if the object of the transitive verbs "ship" and "deliver" should be found further along in the section, in the words, "any such adulterated or misbranded food or drugs," the meaning would not be changed. I do not think, however, that I am mistaken as to the grammatical construction.

The section also imposes a penalty on the vendee or consignee who, having received, delivers in original unbroken packages for pay or otherwise, or offers to deliver to any other person, any article adulterated or misbranded within the meaning of the act. The law

contemplates the punishment of two classes of persons. This construction accords with that put upon the section by the Supreme Court in *Hipolite Egg Co.* v. *United States*, decided March 13, 1911.[46] In that case an adulterated article was involved. The court said:

> Section 2 of the Food and Drugs Act prohibits the introduction into any State or Territory from any other State or Territory of any article of food or drugs which is adulterated, and makes it a misdemeanor for any person to ship or deliver for shipment such adulterated article, or who shall receive such shipment, or, having received it, shall deliver it in original unbroken packages for pay or otherwise.

It was also said in that case:

> The object of the law is to keep adulterated articles out of the channels of interstate commerce, or, if they enter such commerce, to condemn them while being transported, or when they have reached their destination, provided they remain unloaded, unsold or in original unbroken packages. These situations are clearly separate, and we can not unite or qualify them by the purpose of the owner to be a sale.

It will furthermore be noted that the statute declares that it is one "—for preventing * * * the transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein."

The words, "package" and "original unbroken package", are both used in the act. The word "package" is not used in the same sense as "original unbroken package." The framers of the act manifestly had in mind the definition heretofore given by the courts to the term "original package", and in the second, third, and tenth sections have used that expression, or its equivalent. It is used in those sections with reference to the situations which arise where the article transmitted has reached the vendee or consignee, but has not yet become a part of the general property of the State in which the vendee or consignee lives. The package still being unbroken, and not having become a part of the property of the State, remains subject to Federal control. The article, if thus found, is subject to seizure and may thereby be prevented from reaching the ultimate consumer.

The word "package" is repeatedly used in this act without any modifying adjective or other qualifying term. It is in such instances to be taken in its broad sense. The word "package" as thus used means the package made up by the manufacturer for sale to the ultimate consumer, which goes into the possession of the person who will use the article of food or drugs.

In the portion of section 7, which deals with drugs, the statute recites in the proviso:

> That no drug defined in the United States Pharmacopœia or National Formulary shall be deemed to be adulterated under this provision if the standard of strength, quality, or purity be plainly stated upon the bottle, box or other container thereof although the standard may differ from that determined by the test laid down in the United States Pharmacopœia or National Formulary.

What does that language import, if it does not mean the particular receptacle of drugs which the person intending to use the drug buys along with the drug, as its container?

It means the bottle, or box, or other container, whatever it may be.

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[46] See p. 223, *ante*.

How can a person who wishes to buy a drug determine what the actual composition or character of the drug is, unless there be upon the bottle, or box, or paper, pasteboard, or other container, i. e., on the package, of whatever material it may be, the information which the law says he shall have?

The bottle, box, container, or package, in whatever form it may be, may have reached the druggist encased in a great wooden box, for instance, along with a great number of other bottles, boxes, containers, or packages. The ultimate consumer may never see, and in fact rarely does see, the large box encasing the individual packages. The label or inscription put upon the large box—the box enclosing the bottles, boxes, or containers sold by the retailer—will afford no protection to the purchaser. He must look to the bottle, or box, or container that he buys for the thing that he buys.

The same section provides that food shall be considered adulterated:

> If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health: *Provided*, That when in the preparation of food products for shipment they are preserved by any external application applied in such manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the covering or the package, the provisions of this act shall be construed as applying only when said products are ready for consumption.

This language recognizes that a food may, for its preservation in shipment, be packed in a preservative which may be removed so as to leave no deleterious or poisonous effects behind.

If the shipper puts upon the covering or the package directions for the removal of the preservative, which enable the person who receives the article for use to bring it to a wholesome condition, the shipper does not become amenable to the law. The lawmakers, in the use of this language, had in mind the ultimate consumer, rather than the person who prepares the food for use for him.

The eighth section relates to misbranding. It recites:

> That the term "misbranded," as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substance contained therein which shall be false or misleading in any particular, etc.

It is common knowledge that there are many articles of food and drugs found in the hands of grocers or druggists which the individual buys for use by himself or his family. It is from the package he buys, from the label upon such package, that he learns what the article is. If the label or brand upon it is misleading, an offense is committed. The package may have been shipped along with many other packages of the same kind in a large enclosing box or case. It is not such enclosing box or case to which the consumer looks, or about which he inquires for information.

The same section, in referring to drugs, provides that they shall be deemed to be misbranded:

> If the contents of the package as originally put up shall have been removed, in whole or in part, and other contents shall have been placed in such package, or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, * * * or any derivative or preparation of any such substances contained therein.

To what package does the statute allude? Manifestly, the package that the consumer buys, the package which goes into his possession, the package originally put up for sale and use.

Under the provisions relating to the misbranding of foods, the same section (section 8) recites that an article of food shall be deemed to be misbranded:

> If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foregin product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if it fail to bear a statement on the label of the quantity or proportion of any morphine, opium, * * * contained therein.

The words "purchaser", will be noted, is used without limitation or qualifying terms. The language quoted does not say the wholesale, retail, or individual purchasers. It does not say the purchaser who buys in order to utilize the article in some process of further manufacture or to sell to retailers. If it be broad enough—and I do not say that it is not so—to include wholesale and retail purchasers, it is also broad enough to include the ultimate consumer as a purchaser, and the labeling or branding of the particular package, box, bottle, or other container enclosing the article which he buys must be such as not to deceive or mislead him.

It will not do to say that this law was framed to protect wholesalers and retailers and not the common people. Its primary purpose is the protection of the ultimate consumer. The same section further provides that an article of food shall be deemed misbranded:

> Third. If in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package.
>
> Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein. which statement, design, or device shall be false or misleading in any particular: *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:
>
> First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of, or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.
>
> Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word "compound", "imitation", or "blend", as the case may be, is plainly stated on the package in which it is offered for sale: *Provided*, etc.

The law does not mean that when a number of bottles or boxes are put into the channels of commerce as a single shipment, encased together in a wooden box, for instance, that the aggregate weight of all the enclosed bottles or boxes, or of each individual enclosed bottle or box, shall be placed upon the enclosing wooden box and need not be placed on the individual enclosed bottles or boxes.

In whose favor does the prohibition run against any false or misleading statement, design, or device on the package or its label, regarding the ingredients or the substances contained therein? For whose benefit is the provision for labeling, branding, or tagging of articles so as to indicate that they are compounds, imitations, or blends made?

The answer to these questions, to my mind, is clear. It is the purchasing public, the ultimate consumer, whom the provisions of the statute are primarily intended to protect.

Without enlarging further, I am convinced that the word "package", as used in it, means the package which passes into the possession of the public, of the real consumer; and that the words "original unbroken package", relate, as heretofore stated, to the package in the form in which it is received by the vendee or consignee.

The objection to the information thus far considered is not well taken.

The remaining question is this: Is a reputable, regularly licensed, practicing physician, residing in Ohio, who prescribes for a person beyond the limits of the State and transmits to such person through the channels of interstate commerce the medicine prescribed subject to the penalties of the law, if the medicine so prescribed and so passing through the channels of interstate commerce contains morphine—the bottle, box, container, or package enclosing the medicine so prescribed and to be taken by the patient not being so labeled as to show the presence of that drug.

The defendant is engaged in the business of treating persons enslaved by the morphine, cocaine, and other drug habits.

In the course of the argument reference was made to the debates in the House of Representatives when the Pure Food and Drugs Act was under consideration and when amendments were offered and voted down, to exempt from the provisions of the act the prescriptions of regularly licensed and practicing physicians. The statute, like a written instrument, is to be construed by its express terms, from its four corners, as it is frequently said. It is said in 26 Am. & Eng. Ency. of Law, 638–639, that the opinions of individual legislators as to the object and effect of a statute are of little or no weight on questions of construction, and are generally inadmissible; and that while it is unquestionably a general rule that what may be called the legislative history of an act is not admissible to explain its meaning, yet in cases of doubt and ambiguity the journals of the legislature may be examined for the intent of the lawmakers to ascertain facts of which such journals are evidence. In view of the principle announced in *United States* v. *Delaware & Hudson Co.*, 213 U.S. 366, 414, the fact that Congress refused to incorporate in the Pure Food and Drugs Act a provision permitting regularly licensed and practicing physicians to send their medicines containing morphine, cocaine, and like drugs through the channels of interstate commerce without so labeling them as to show the presence of such drugs, is practically conclusive that it was the intention of Congress that physicians should not enjoy such a privilege.

The act under consideration, however, is not so obscure as not to be susceptible of interpretation without recourse to the journals of Congress.

It makes no exemption in favor of regularly licensed practicing physicians. The purpose of the law is to prevent deceit and false pretenses in the sale of food and drugs, and to protect the public. It is aimed at imitations, shams, frauds, and pretenses of every character as regards articles of food and drugs. Its purpose is to apprise

people who buy and use drugs as to what they buy and use, and to check the use of drugs which lead to destructive habits.

In the case at bar the prescription was given to correct the morphine habit. The agreed statement of facts recites that the best way to cure such a habit is by administering, without the knowledge of the patient, morphine in steadily diminishing quantities until finally none at all is given. It is urged that if a physician may not thus prescribe, he may be thwarted in his treatment of his patient, and that thus the law will operate to the detriment of the morphine victim. The court is therefore asked to so temper the law, to so construe it, as to permit a physician of the character aboye and in the agreed statement of facts named, to transmit medicine, to prescribe for his patients and transmit to them medicine through the instrumentalities of interstate commerce, without apprising the patients of their use of morphine, cocaine, and other drugs named in the act.

This, however, is asking the court to read into the law a provision not therein contained. If the requested construction be placed upon it, then in every case the question will arise: Is the physician who prescribes regularly licensed, practicing, and reputable?

The effect of the construction asked would be so to open the door as to permit disreputable physicians, "quacks", and the manufacturers and vendors of proprietary medicines, to place their prescriptions in the possession of the people and thus to continue the growth of the very drug habits which the law is designed to check. In the absence of any provision which exempts a regularly licensed, practicing, and reputable physician from sending his medicine or prescriptions through the channels of interstate commerce to his patients without labeling or branding them so as to show precisely what their contents are, I am of the opinion that such physicians are not exempt from the provisions of the act, and that a failure on the part of the defendant to so label its medicines or prescriptions as to show that one of the ingredients is morphine constitutes an offense.

If the law as it stands operates injuriously, relief should be sought from Congress and not from the courts.

One of the reasons for requiring the labeling or branding to show the presence of morphine, cocaine, and articles of like nature is that people may not become addicted to the use of such drugs without knowingly acquiring the habit of using them. Medicines or prescriptions might otherwise be taken by them without knowledge of their real contents and ultimately the users have fixed upon them a habit which destroys both health and life. The law is far-reaching, but it was intended to be so.

Another question presented is, whether the Pure Food and Drugs Act deals with articles other than those which are the subject of bargain and sale. It is urged that the medicine or prescription is a mere incident of the services rendered, and that it is not therefore to be treated as an article of commerce.

There are some sections of the act, as the third, which use the words "sale, or offered for sale." If a master employs a servant, he buys the servant's labor and the servant sells it. If a client employs a lawyer, he buys the lawyer's services. The lawyer sells his services, his learning, his skill. The client buys what the lawyer offers to sell.

A physician holds himself out as ready to serve others for a consideration. In a sense he sells his services to his patient. It is common knowledge that a physician rendering services to a patient also furnishes a considerable part, and sometimes all, of the medicine taken by the patient. The medicine is furnished along with, under, and as part of the contract of employment. In cities, the physician may write a prescription to be filled at a drug store, and yet it is within the knowledge of all that physicians in calling upon patients ordinarily carry with them some medicine at least for administration. There are instances, especially in cities, in which there is a separation of the drugs furnished from the employment. The patient then pays for the drugs in addition to the services rendered by the physician. But I do not understand from the agreed statement of facts that such a situation is presented in this case. The employment which a physician accepts is contractual in its nature and is sufficiently of the nature of bargain and sale to avoid the argument which is made. Moreover, the statute (sec. 2) prohibits the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipments to any foreign country, of any article of food or drugs which is adulterated or misbranded within the meaning of the act.

As was said in the *Hipolite Egg Company case*, the object of the law is to keep adulterated and misbranded articles out of the channels of interstate commerce, and it is immaterial whether the medicine or prescription which was furnished by the defendant company was the mere incident of the employment or its primary object. It is enough to know that the medicine or prescription was sent through the channels of interstate commerce, and misbranded, within the terms of the act. The information is sufficient.

On the fact submitted, the defendant violated the law, and it is therefore my duty, gentlemen of the jury, to direct you to return a verdict in favor of the Government.

After the defendant's motions for a new trial and in arrest of judgment had been denied by the court, the defendant sued out a petition for a writ of error to the Circuit Court of Appeals for the Sixth Circuit, upon the following assignments of error:

ASSIGNMENT OF ERROR NO. 1

The court erred at the conclusion of the agreed statement of facts in overruling defendant's motion that the court instruct the jury to return a verdict in favor of the defendant, to which ruling of the court counsel for the defendant at the time excepted, for the full reason to-wit:

First. That the information herein is defective and insufficient in that it failed to charge the defendant with any offense under the statutes of United States of America.

Second. The information did not charge the defendant with unlawfully shipping and causing to be shipped and delivered for shipment, certain articles of drugs "in original unbroken packages"; but did charge that the said certain articles of drugs were unlawfully shipped and caused to be shipped and delivered for shipment "in unbroken packages."

Third. The evidence adduced as set out in the submitted statement of facts does not disclose that the defendant unlawfully shipped and caused to be shipped and delivered for shipment, certain articles of drugs "in original unbroken packages and bottles"; containing alcohol and morphine sulphate which were misbranded within the meaning of the Food and Drugs Act of June 30, 1906.

Fourth. That the aforesaid Food and Drugs Act does not apply to a reputable, regularly licensed, practising physician who prescribes for patients beyond the limits of the State wherein he is licensed and is practicing, and who transmits to his patients through the channels of interstate commerce the medicine prescribed, if the medicine prescribed and so transmitted contains morphine and not being so labeled as to show the presence of the drug.

Fifth. That the aforesaid Food and Drugs Act applies to the giving of a prescription and the filling thereof by a reputable, regularly licensed, practising physician.

ASSIGNMENT OF ERROR NO. 2

The court erred, at the conclusion of the reading of the agreed statement of facts in granting the motion of the plaintiff to direct a verdict in favor of the plaintiff, to which ruling of the court counsel for the defendant at the time excepted, for the reasons assigned under the first assignment of error herein.

ASSIGNMENT OF ERROR NO. 3

The court erred, in holding that the terms "original unbroken packages" in section 2 of the Food and Drugs Act aforesaid, applied only to the vendee and consignee, and not also to the person who shall ship, cause to be shipped, or deliver for shipment any article of food or drugs which is adulterated or misbranded within the meaning of said act, to which holding of the court counsel for the defendant at the time excepted.

ASSIGNMENT OF ERROR NO. 4

The court erred, in holding that the aforesaid Food and Drugs Act in relation to the adulteration or misbranding within the meaning of said act applies to other than, "original unbroken packages," to which holding of the court counsel for the defendant at the time excepted.

ASSIGNMENT OF ERROR NO. 5

The court erred, in holding that the word "package" as used in the aforesaid Food and Drugs Act, applied to drugs meant other than "original unbroken packages," to which holding of the court counsel for the defendant at the time excepted.

ASSIGNMENT OF ERROR NO. 6

The court erred, in holding that the aforesaid Food and Drugs Act applied to a reputable, regularly licensed, practising physician who prescribes for a patient beyond the limits of the State wherein he is licensed and is practising and who transmits to his patient through the channels of interstate commerce the medicine prescribed, if the medicine so prescribed and transmitted contains morphine and not being so labeled as to show the presence of the drug, to which holding of the court counsel for the defendant at the time excepted.

ASSIGNMENT OF ERROR NO. 7

The court erred, in holding that the aforesaid Food and Drugs Act applies to the giving of a prescription by a reputable, regularly licensed, practising physician and the filling of the same, to which holding of the court counsel for the defendant at the time excepted.

ASSIGNMENT OF ERROR NO. 8

The court erred, in holding that the giving of a prescription by a reputable, regularly licensed, practising physician and the filling of the same is the subject of bargain and sale, to which holding of the court counsel for the defendant at the time excepted.

ASSIGNMENT OF ERROR NO. 9

The court erred, in rendering judgment against the defendant upon information No. 777, to which counsel for the defendant at the time excepted.

UNITED STATES v. MOHN WINE CO.

(District Court, W.D. Michigan, Oct. 11, 1911)

N.J. No. 1895

Information charging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of not guilty by direction of the court.

DENISON, *Circuit Judge.* In this case I have been requested by counsel for the defendant to direct you to render a verdict of not guilty, and for reasons which I do not need to state at large, at this time, I am constrained to hold that it is my duty to so instruct you.

The ground or basis of such instruction is, in a way, technical; in another way, there has been an invasion of a substantial right on the part of this defendant—a right given to him by the act of Congress under which this prosecution is had.

It appears by the undisputed evidence in this case that this defendant did introduce into interstate commerce a certain number of bottles of grape juice manufactured by it in this State and shipped by it, by the Michigan Central Railroad, to Chicago, Ill. That would constitute interstate commerce. It also appears by the undisputed evidence in the case that the bottles containing the grape juice were labeled "Grape Juice. Pure, unfermented, thrice sterilized." It also appears by the proofs in the case that there had been added to the grape juice a foreign substance, consisting of granulated cane sugar; that the purpose of adding cane sugar to the grape juice was to make it of a uniform degree of sweetness. It does not appear that the addition of cane sugar to grape juice made an injurious or deleterious product.

The act of Congress provides that any person who shall introduce into interstate commerce any food product that is misbranded or adulterated will be guilty of a misdemeanor, and if convicted shall be punished. The act also provides what shall constitute adulteration of a food product and what shall constitute a misbranding. It is a misbranding of a food product to put a label upon a case or bottle which in any way misleads or will mislead the purchaser; and the test is, would the ordinary layman, the purchaser, be misled by the label upon the package from a casual observation of the same? If he would, that is a misbranding. If he would not, it is not a misbranding. The act has been passed for the protection of consumers and purchasers.

It is not necessary, to constitute a misbranding, that the substance which is defined in the label should be injurious to health, or in any way. It is sufficient if there is something contained in the product which the label misleads. In other words, in this case this grape juice was labeled "Pure unfermented grape juice." That label was misleading, because under the undisputed evidence in this case it was not pure grape juice. It had added to it a foreign ingredient, something not derived from the grape, something not contained in the juice of the grape. There had been added to it cane sugar, which is not derived from the grape; and the purpose of the act is that the purchaser may know what he is buying; then he can pur-

chase it or not, as he sees fit, but he is entitled to know and he is entitled not to be misled or deceived as to what he is buying.

So that I have not any question but what the act of this defendant in introducing into interstate commerce this grape juice, the bottles containing which were labeled in the manner shown by the evidence, constituted a violation of this act.

It is also the claim of the Government in this case that the grape juice which was shipped from this State to the State of Illinois by the defendant was not unfermented. It is the contention of the Government that at the time of the shipment this grape juice was partially fermented. If that were true, it was a violation of this act—it was a misbranding. If the case were to be submitted to you that would be a question of fact for you to determine from the evidence in the case, as to whether or not at the time of the shipment the grape juice in question was fermented.

But upon another branch of the question I am constrained to take the case away from your consideration. This same act of Congress, in another section, affords the defendant in a case of this kind a substantial right. It is provided that the officers of the Department of Agriculture shall make an examination of specimens of food which it is claimed have been either adulterated or misbranded, and after such examination shall have been made, and after an analysis shall have been made, it shall then be the duty of the Department of Agriculture, through it proper officers, to give notice to the alleged violator of the law and afford him an opportunity to be heard. In other words, there shall be a hearing, and the defendant shall be given an opportunity to show that he is not a violator of the law and to demonstrate that a prosecution ought not to be instituted, and that is required to be done prior to the institution of a criminal proceeding. In other words, it is a condition precedent to the institution of such a proceeding as has been instituted in this case. It does not appear in the proofs that any such examination was made, and it does not appear that any hearing was had prior to the institution of this proceeding. It is not alleged in the information in this case, and it is necessary that it should be alleged in the information, and also that it shall be proven in the case. There is no proof of that kind; there is no allegation in this information, and for that reason I am constrained to hold that this is not a case for your consideration. The failure, if there was a failure, to give this defendant an opportunity to be heard and make such explanation as he desired before he should be prosecuted criminally, was a substantial right which ought to have been accorded him, and the Government had no right to institute a proceeding until that hearing had been given. That only applies in a case where the prosecution is instituted at the instigation of the officers of the Department of Agriculture. Had this case been prosecuted in the ordinary way upon an indictment found by a grand jury, and upon an investigation made by the district attorney, or other officers of the Government, except the officers belonging to the Department of Agriculture, such a hearing would not have been necessary, any more than it would be necessary in any other criminal case. But it is shown by the files in this case, and it is conceded by the district attorney, that this prosecution was instigated by the

officers of the Department of Agriculture. Under those circumstances it was necessary that they should give this defendant an opportunity to be heard prior to the institution of these proceedings.

For these reasons, your verdict in this case will have to be "Not guilty."

Mr. Clerk, you will take the verdict.

UNITED STATES v. RINCHINI

(United States District Court, Third Judicial District, Territory of Arizona, Oct. 21, 1911)

N.J. No. 1450

Indictment charging violation of section 1 of the Food and Drugs Act. Demurrer to indictment overruled. Jury trial. Verdict of not guilty, by direction of the court.

By the COURT (directing verdict for the defendant). A motion has been made in this case to the court to direct the jury to return a verdict for the defendant on the ground that the offense that the defendant is charged with has not been made out by the testimony. The defendant is charged with manufacturing an adulterated article of food, the claim being that a valuable constituent of the article has been in whole or in part abstracted. Now, of course, in the manufacture of ice cream, in the use of milk, as is done, together with some cream, the milk being an article from which the cream has been abstracted, the use of milk in the manufacture of ice cream is the use of an article from which a valuable constituent has been in part abstracted. The question, therefore, to determine in this case is whether or not this defendant in making this ice cream which has been testified to be only 7.09 percent butter fat, is manufacturing an article from which a valuable constituent has been in part abstracted. Now, the Government, neither by the act of Congress nor by the rules of the Secretary of Agriculture, has established any standard with respect to ice cream: there is no standard established below which a product may not be deemed ice cream and sold as such, and above which it may. There is no fixed standard, as there is in some States, in this act of Congress or in any regulation or rule adopted by the Secretary of Agriculture. Therefore, the question now comes up whether or not the court may, as a matter of law on the evidence now before me, say to you that a certain percent is proper in the manufacture below which they may not manufacture, the contention of the Government being that the evidence here is such that the court ought to fix on 14 percent as the amount of butter fat necessary in ice cream, and that any article manufactured below that is not ice cream, and if, manufactured as such, as the evidence is the defendant has done, he is within the province of the law. Now, I do not feel that the evidence of the custom or use of the trade before me is such that I can fix upon, as a matter of law, any standard, as is requested by the Government. I am not confident that, under the law, the court would have power to fix a standard in any event, but if the court has power and should fix a standard for the jury then to say

whether this falls above or below, I, nevertheless, do not think that the evidence in this case is sufficient to warrant my fixing upon any standard. The evidence is that the general custom of the merchants here of standing, like Mr. Donofrio and Mr. Sanichas, is that any cream below 14 percent is not proper cream to be called ice cream: there is evidence that in Chicago a large concern there who manufactures ice cream for the best trade, considers that anything below 12 percent is not ice cream, and is labeled "frozen milk", I believe. There is other testimony in the case that makes it impossible for the court to fix a standard, for, if I fix a standard in this case, we may have someone up at the next term of court indicted for selling ice cream with 12 percent butter fat if I fixed the standard at 14 percent, and under that standard the jury would be obliged to convict. I am not sure that 14 percent is the right amount. It should not be left, it seems to me, for the decision of the court, but it should be determined by Congress or by authorization of the Secretary of Agriculture so that the trade may know—so that any man manufacturing it will not be at the mercy of what his brother merchants in a town fix upon as being the right proportions. Therefore, in this case I do not think the evidence before me is sufficient for the standard to be fixed either by the court or the jury below which this defendant may be said to have fallen. I grant the motion to direct a verdict for the defendant. One of you may sign it as foreman.

UNITED STATES v. PISO CO.

(District Court, W.D. Pennsylvania, Oct. 26, 1911)

N.J. No. 1912

Information charging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty. Motion to set aside the verdict, in arrest of judgment, and for a new trial granted. Nolle prosequi entered on motion of United States attorney.

ORR, *District Judge* (charge to the jury). The defendant, the Piso Company, stands indicted charged with a violation of what is commonly called the "Pure Food and Drugs Act" of the United States, and it is proper that we should call your attention to some of the provisions of that act. It is very long and we will give you but a brief summary of it.

It provides that it shall be unlawful for any person to ship in original packages in interstate commerce, from one State to another or into a Territory, and it is charged the defendant shipped the product it made into the territory of the District of Columbia—any articles of food or drugs which are adulterated or misbranded within the provisions of this act, and shall be punished for it.

The act provides "That the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this act", and we will come to one of the rules of the Secretary of Agriculture in a few minutes.

The act also provides, among other things, that for the purpose of the act an article shall be deemed to be adulterated, in the case of drugs, "if its strength or purity fall below the professed standard or quality under which it is sold."

The indictment charges the defendant with shipping goods that were adulterated—drugs adulterated. The term "drugs" includes all medicine, and any "substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease."

The indictment further charges that the shipment of drugs was misbranded. Section 8 of the act provides that the term "misbranded" shall "apply to all drugs, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular." And for the purpose of this act drugs shall be deemed to be misbranded, "If the contents of the package as originally put up shall be removed, in whole or in part, and other contents shall have been placed in such package; or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin," etc., including chloroform, "or any derivative or preparation of any such substance contained therein."

The Government charges, as we have stated, that in the month of October, 1909, the Piso Company, the defendant, shipped into the District of Columbia certain bottles of medicine which came within the meaning of the word "drugs" as used in this act, and which were adulterated and were misbranded.

There is no evidence in this case from which we should submit to you the question of whether this medicine was adulterated, but there is some evidence to which we shall call your attention as bearing directly upon the question of whether or not it was misbranded.

This act of Congress was passed for the protection of the people. That is plain. It intended that through the instrumentality of the act foods and drugs that should pass in interstate commerce should be as represented, and should be unadulterated and should be branded truthfully.

As we have said, there is nothing in this case with respect to adulteration to be submitted to the jury; but there is a question as to whether or not there has been misbranding. It is eminently proper that when one buys a patent medicine he should know whether it contains injurious substances, whether or not there is anything in it that might hurt or injure him, and it is proper when one buys a drug or a mixture, a patent medicine, or anything which is ordinarily handled with great care, that there should be a statement on the bottle to the effect that that particular article is in the mixture.

This act was originally passed so as to prevent people from taking cocaine when they did not know there was cocaine in the mixture, or chloroform when they did not know there was chloroform in it, or some of the other deleterious substances mentioned in the act.

The act was not limited to that alone. It is broad enough to cover the case where the substance mentioned in the act required to be stated appears in a less quantity than is stated on the bottle. We think this is a fair interpretation of the act; but we want to call your attention to this: That it seems as if it were more important that the

maximum amount of an injurious substance should appear on the label than that the minimum amount should be there. That is the construction placed on it by the Secretary of Agriculture and others who adopted the rules in pursuance of the act. We refer to the rules adopted not as controlling this court by way of construing the act but as being a reasonable construction which the court might adopt if it sees proper, and perhaps as being the construction that is being placed by the rules which are provided for in the act itself.

Regulation 28, paragraph c, provides that "a drug or food product, except in respect to alcohol, is misbranded in case it fails to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin", etc., including chloroform, "or any derivative or preparation of any such substances contained therein."

Paragraph d, of the same rule, provides that a statement of the maximum quantity or proportion of any such substance will meet the requirements provided the maximum statement does not vary materially from the average quantity or proportion. It seems as if it were a matter of materiality that the maximum amount should be stated and that if there is a variation from the maximum in the matter of these deleterious drugs, or articles, or substances appearing in the previous section of the rule, it is perhaps of less consequence.

Now take the evidence in this case. Each of these bottles contains on its surface a label. We wish to say to you now that there is nothing in this case for the jury with respect to the matter of whether or not there is a misbranding than the statement on it that it contains 5 minims of chloroform. We have nothing to do with any ideas that it might be wrong to sell a patent medicine to people without disclosing its contents generally; we have nothing to do with any question of fraud or deception except as to the question of misbranding in the one particular I have mentioned.

The defendant company stands in this court like any other citizen and is entitled to the fairest and best consideration that the jury can give it in the consideration of the evidence before it. Now, the defendant is presumed to be innocent and the presumption of innocence continues with it until overcome on the part of the Government by evidence beyond a reasonable doubt which satisfies you there was a misbranding in this case. You have to determine whether or not there is evidence on the part of the Government which satisfied you beyond a reasonable doubt that there is a misbranding in the statement that each fluid ounce of this mixture contains 5 minims of chloroform, or a sufficient amount to approach the maximum which is required by the rules of the Secretary of Agriculture. Does this evidence satisfy you? You must take into consideration—we would be neglecting our duty if we did not call to your mind the fact, as it appears in the evidence—that chloroform is exceedingly volatile and escapes when exposed to the air, and it is for you to say whether or not there is sufficient evidence on the part of the Government, in view of the character of the substance searched for by the chemists, and the analyses they made and the methods detailed to you, to satisfy you beyond a reasonable doubt of the defendant's guilt.

Now, comment has been made that there was no chemist employed by the defendant. Gentlemen, it does not take a chemist to make a mixture. It might take a chemist to make a proper compound, but we think any one with a formula can mix the ingredients in a mixture unless there are to be peculiar things done to the different parts before they go into the mixture. It does not require a chemist to make a mixture.

The whole thing resolves itself into this, whether or not there is a false and misleading statement within the meaning of the act of Congress with respect to each fluid ounce in the bottle containing 5 minims of chloroform. It is immaterial in our view of the law whether the defendant did intend a false or misleading statement. We think this is a police regulation, and the person who makes a statement is bound to know whether it is true or not in sending it out to the public; but if they make such a statement on the bottle and that statement is false and the Government has satisfied you it is false and misleading, beyond a reasonable doubt, then you might find the defendant guilty.

If on the other hand you find that the statement was not misleading and false, or if you find the chloroform in the mixture approached the maximum as stated on the bottle—we say to you that the act does not require the exact amount to be stated—then you should find the defendant not guilty.

UNITED STATES v. 58 SACKS AND 70 SACKS CORN MEAL

(District Court, D. South Carolina, Oct. 26, 1911)

N.J. No. 1342

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict in favor of the United States.

SMITH, *District Judge* (charge to the jury). These are two proceedings brought for the condemnation of certain sacks of meal seized as being misbranded, under the act of Congress. That act of Congress is an act passed in 1906, and is what we call a remedial act. It is an act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein. Under that act it is prohibited in the case of food to label or brand it so as to deceive or mislead the purchaser in any particular as to the food product which is contained in the package. If the package containing it was labeled with a particular statement, design, or device regarding the ingredients or the substance therein, which statement, design, or device shall be false or misleading in any particular, in that case, under the terms of this act, it is misbranded. Now, in the present case the point for you to decide is as to whether or not the device or design or statement contained upon the packages of meal was false or calculated to mislead. In such case they were misbranded, and on that point I charge you as matter of law: First, the question is not as to the quality or the character of the substance contained, or the meal contained in these packages, but

it is as to the truthfulness, or the tendency to mislead of the statement printed on it.

As matter of law I charge you that a man when he purchases an article, has a right to buy whatever he pays his money for; it may be a pure fancy on his part, and it may be the veriest whim on his part, but if he stipulates in the contract that he is to buy certain specified articles, or an article prepared in a certain specified way, and that is the contract and the agreement, and he pays for it, then he is entitled to have it, although the result may be that he chooses to buy an inferior article at a higher price, he has the right to have what he pays for. Therefore in this case the question is not as to the character of the substance in here, not any question of moral turpitude, that defendant only furnished an inferior article, that does not come in; the question is as to whether these sacks of meal contained the article that they were stated to contain, or is the statement on them calculated to mislead and deceive the person, i. e. the consumer, in buying the article that he intends to buy. Now, the evidence is that, in the first place, these sacks of meal were labeled "water ground", and I charge you that it is a matter of fact for the jury to determine from the testimony whether these sacks, the meal in them, was water ground or not, and that depends upon the meaning of "water ground", and that is for the jury to find.

The evidence here is that this meal was not ground by a mill as the old water mills were worked, by what is known as the direct application of water power, that is to say by the weight of water either by gravity, or velocity and gravity combined, acting directly upon the operative parts of the mill; that is what is meant by the direct application of water. The testimony is that it was by what is called the converted application of water, that is to say the power of water was first used in the application to a dynamo to generate electricity. When that electricity was generated that was transmitted from the point of generation to the different points of the location of the motors, thereby using those motors to apply power to these mills. The question is for the jury to say whether that was direct application, or whether it was converted or transmitted application of water power, just as you gentlemen may consider whether steam is a direct application of water power because it is water converted by the application of heat. So when you get steam from water power it is conversely nothing but the result of the vapor of water carried up by the heat of the sun, or the dryness of the atmosphere, recondensed and carried back to the earth in streams; therefore, it is for you to say whether or not this mill was run by the direct application of water from a stream or mill pond, or whether it was run by water in an indirect way. Now, those are matters for the jury; it is for you to say whether this meal was water ground, and in that is involved the question of what is water ground. What is water ground? Is it meal ground by the direct application of water in the recognized method of the application of water power, both by gravity and velocity to a water wheel, or does it include the application of electric power generated originally by water, but used not by direct application of water, but by conversion to a different form of power?

I charge you as a matter of law, as to the meaning of water ground, that it is not a question whether or not the product or the meal might

be exactly the same, if the power was applied by steam and electricity to burr stones, moving with the same rate of revolution. Now, it may be that the product of that grinding may be exactly the same. It may be that the product of meal ground between burr stones of the same size, of the same character, and moved at the same rate of revolution as if they were in an old water mill, although the power was secured from electricity, would produce exactly the same product, yet, I charge you as a matter of law that if you find that was not water ground, according to the accepted definition of that product, then it is not water ground. It may be a mere fancy or whim, yet, if a man says "I want my meal ground at a mill worked by the direct application of water", and the fellow who sells him that meal says "Well, I tell you this is stuff ground that way", although it might be the same article in effect, yet if it was ground by electricity, it is a misstatement, so it is for the jury to determine whether in this case the term "water ground" meant meal ground according to the old method of direct application of water. If you find that it did mean so, then I charge you, if it meant that, that under this testimony, the testimony being that it was not ground in that way, that you will be authorized to find a verdict against these sacks of meal as misbranded.

Now, gentlemen, on the question of the second charge in this information, that they were misbranded because they had the term "Hazel Green Mills" on them, when it was not ground at the old mill called Hazel Green Mill, it is also for the jury to say whether that term is calculated to mislead. That is a matter for you to decide also. I charge you that if it was ground in any other manner than you find was water ground, and if you find that the putting the meal in sacks was calculated to mislead the individual, the purchaser, who was stipulating for water ground and it was not water ground, then it would be your duty, and you would be justified and authorized to find a verdict against them.

Now, as to the term "Hazel Green Mills"—that depends upon two different matters: Whether that was a brand, or whether it was a designation of the location of manufacture. I charge you that brands may consist of all sorts of fancy names, and that a person may acquire a brand from manufacturing at one spot and move his factory, and if he produces the same article he is entitled to carry his brand, although he no longer manufactures at that place; that if he manufactured fancy wheat at Greenville or any other point and branded it wheat flour, and originally branded it with some brand referring to the locality and thereafter moved his mill, he had the right to carry his brand, provided two things: That the actual manufacture was not dependent upon something in that locality, and that the name was not calculated to mislead the consumers with regard to that fact. Therefore, if the Asheville Ice and Milling Company purchased the Hazel Green Mills, and the Hazel Green Mills had a brand known as the Hazel Green Flour, and that denoted a particular article which could be reproduced in Asheville by the same method, with the same result, they had the right to remove their brand, and they would not be guilty under this charge for using Hazel Green brand if it simply denominated a brand which had

given currency to their flour, and was not misleading because of the character of the production in a certain designated locality; but if you find from the testimony that the name Hazel Green had an acceptation as referred to a method of production at Hazel Green which was not carried on in Asheville—that is to say, if the use of the words "Hazel Green" were calculated and intended to produce the impression that they were water ground at the old Hazel Green Mills, whereas in Asheville they were not ground by the direct application of water, but in another way, then I charge you it would be a misbranding.

It depends upon whether it is simply a brand designating the character or quality, or whether it is a brand which by the name misleads because it contains within it a statement that it must have been done in a particular locality because it would not be the same article if done elsewhere. If you find that that is the case, that the effect of calling it "Hazel Green" was a statement that it was done in a particular locality, and that the same article could not be produced elsewhere, so as to mislead the individual buyer who intended to buy an article produced in a certain way, under a statement that it was done there, then it would be misleading and would be misbranded. In these cases, gentlemen, your verdicts will be framed as follows:

"We find that the meal mentioned within was ____ water ground, and we find that the designation 'Hazel Green Mills, Asheville, N.C.' was ____ true." If you find in favor of the Government then read, "We find that the meal mentioned within was not water ground"; you will insert the word "not." If you find in favor of the claimant, that it was water ground, within the sense which I charge you, then you will not fill that; and you vary in the same way when you get to the other, because you say "and we find that the designation 'Hazel Green Mills, Asheville, N.C.' was true." Now, if you find in favor of the Government in that last you must put in the word "not"; if you find in favor of the claimant you leave it as it is; date it and sign your name, remembering that the word "not" is to be inserted in both cases if you find in favor of the Government; if you find in favor of the claimant on either one, then you will leave it as it is.

UNITED STATES v. HEIDE

(Circuit Court, S.D. New York, Nov. 3, 1911)

N.J. No. 1335

Information charging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of not guilty.

MARTIN, *District Judge* (charge to the jury). This case stands like any other criminal case—a man is charged with the violation of a statute, a statute of the United States. Now, in order to convict him, find a verdict of guilty, you must find that from evidence that satisfies you beyond a reasonable doubt. Or, in other words, in all

criminal cases, so sacred is our liberty and so well is it guarded under the law, that a man comes into court under the presumption of innocence, and that presumption obtains until it is overborne by evidence of guilt beyond a reasonable doubt.

Now this man is charged with having violated what is called and known as the Pure Food Act. And I simply repeat what I have already said in your hearing to counsel, that it shall be unlawful for any manufacturer to manufacture within any territory of the United States any article of food or drug which is adulterated, or misbranded, within the meaning of this act. And then the word adulterated is defined, as has been read to you by the assistant district attorney, and the charge in this case is that the article which this man shipped—and it is conceded that he did ship it and put it into interstate commerce, so as to bring it within the purview of the law—the charge is, that this article so shipped was adulterated, in that a certain substance other than almond paste, to wit, glucose, had been mixed with said article, so as to reduce and lower and injuriously affect its quality and strength, and had been substituted in part for said article.

Now you must be satisfied beyond a reasonable doubt, in order to convict, that this man did just what he is charged with doing in this complaint. So the question is one for you to determine under this evidence—that is, by the adding of this 5 percent, if that is what the amount is, of glucose, mixing it as is termed here, did so reduce the product as to lower and injuriously affect its quality and strength. That is the question for you to pass upon. It would not be adulterated unless it had that effect.

Now the cross-examination of the defendant, as to not naming glucose, can only be considered as bearing upon the intent because he is not charged with misbranding these goods. There is no claim here that he has falsely represented certain articles and things to be in this that are not there, but what they do say is, that the adding of this glucose has injuriously and materially reduced its value. Now how do you find that fact to be, on the evidence that has come into court here—what these people said about it—what the defendant himself has said about it. That is the question, gentlemen. That is a question, gentlemen, that you want to think of carefully.

It has been suggested that it won't drive this man out of business. Well, that may be so. But, a man having a business established, as the evidence shows that this man's business has been established, you should be careful before you pronounce him guilty. See to it that the evidence warrants you doing it, because by that decision you must of necessity affect his business. Take into consideration the whole history of this transaction; what was formerly used, and then withdrawn at the request and suggestion of the party having the Pure Food Act under administration, and the resorting to glucose, and whether glucose deteriorates, injures, is a matter for you to take into consideration, in view of the evidence that has come here upon the stand, and then say whether the adding of that glucose amounted to an adulteration, as charged in the complaint and defined in the statute.

Take the case, gentlemen.

STEINHARDT BROS. & CO. v. UNITED STATES

(Circuit Court of Appeals, Second Circuit, Nov. 13, 1911)

191 Fed. 798

Error to the Circuit Court for the Southern District of New York. Judgment affirmed.

Before LACOMBE, COX, and NOYES, Circuit Judges.

LACOMBE, *Circuit Judge.* There are three counts. The jury brought in a general verdict of guilty. The act complained of was a single one. The counts presented different phases of it. The sentence was for a single offense. Therefore if we find that conviction was properly had on any one count—the third, for instance—the sentence was proper and the judgment should be affirmed.

We do not understand that it is contended that the third count is in any way defective, either in form or substance. It charges the shipment of a certain food or drink contained in a bottle, the label of which bore a statement or design, regarding the ingredients or substances contained therein, which was false and misleading, in that said label contained the words "Damiana Royal Brand Celebrated Nerve Invigorator", which said words were false and misleading, in that damiana was not one of the ingredients contained in said bottle.

Error is assigned to the refusal of the court to require the prosecution to elect between the second and third counts; the second count charged misbranding of the article shipped, alleging it to be a "drug." Upon the proof the bottle manifestly contained a "food or drink", unless its contents were shown to be a "drug", as that word is defined in the act. There was conflicting evidence as to whether or not it came within that definition, and that question was left to the jury. There was no error in denying the motion to require an election. Misbranding the bottle which contained the liquid was an offense against the act, whether such liquid was a drink or a drug. Election under such circumstances might have defeated the ends of justice.

This misbranding charged under the third count consisted in labeling the bottle "Damiana—Invigorator", when damiana was not one of the ingredients contained in the bottle. It is contended that there was a failure of proof by the Government of the alleged absence of damiana. The Government chemist who analyzed the contents testified that he could not find any trace of damiana in the compound. A man who said he was the person who compounded the liquid testified that it contained a small amount of damiana leaves. The court left it to the jury to say whether in fact there was sufficient damiana in the preparation, so that the label on it, "Damiana", was a proper label, or whether it was not, and whether the label was misleading under the meaning of the act. This part of the charge was not excepted to, but, at defendant's request the court supplemented it with the further instruction that:

> The testimony of the experts is not binding upon the jury; that they may disregard such testimony if they choose, and find such conclusion of fact if (as ?) they choose.

Under these circumstances the verdict is conclusive as to the absence of damiana.

The statute contains a section which reads as follows:

Sec. 9. That no dealer shall be prosecuted under the provisions of this act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this act, designating it. Said guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines, or other penalties which would attach, in due course, to the dealer under the provision of this act.

Four days before the trial, more than 18 months after prosecution was initiated, defendant obtained the signature of such a guaranty by another corporation, known as Deimel Bros. & Co., doing a similar business in the same building as defendant. There was some testimony as to business relations between the two corporations, and as to the one holding a controlling interest in the other. The trial judge refused to admit the guaranty in evidence on the express ground that it was dated June 6, 1910; whereas the information was filed November 24, 1909; such refusal is assigned as error. In our opinion his ruling was correct. If Congress had intended that a dealer could avoid conviction by obtaining a guaranty from the manufacturer after his prosecution had begun, it would presumably have evidenced that intention by providing "no dealer shall be *convicted*", instead of providing that "no dealer shall be *prosecuted*." So too the section provides that he is to have the guaranty signed by the person "from whom he purchases the articles", language which seems to imply that guaranty and purchase are related transactions. Moreover, the guaranty is to be of such a sort and so given that the guarantor can be himself convicted of the offense. He surely could be if his guaranty had been signed before the shipment of a misbranded article; the shipment being the offense. It would seem that he could not be convicted of the offense of shipment when he did not sign guaranty until long after the offense had been committed. We think the statute should be construed according to its natural interpretation.

The judgment is affirmed.

UNITED STATES v. CERTAIN CANS OF SYRUP

(District Court, E.D. Pennsylvania, Nov. 17, 1911)

192 Fed. 79

Libel under section 10 of the Food and Drugs Act. Motion for issuance of process on libel denied.[44]

J. B. McPherson, *District Judge.* I defer to the decision in *United States* v. *20 Cases of Grape Juice* (C.C.A.), 189 Fed. 331, but it may

[44] The libel in the above case contained the following allegation: "Your libelant further represents that these proceedings are sought to be instituted as a result of a report to petitioner by the Secretary of Agriculture, under the provisions of section 4 of the act of Congress aforesaid, and that all the matters above set forth are true."

perhaps be not improper to add that I feel at liberty to reserve judgment upon the matter referred to in the dictum on page 334.

The Government's motion that process may issue upon this libel is therefore refused.

FRANK ET AL. v. UNITED STATES

(Circuit Court of Appeals, Sixth Circuit, Dec. 5, 1911)

192 Fed. 864; N.J. No. 2098

Error to the District Court for the Southern District of Ohio. Judgment affirmed.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, *Circuit Judge.* The appellants were informed against under the Food and Drugs Act of June 30, 1906 (34 Stat. 768), for shipping in interstate commerce an article of food labeled "Perfection Mills Compound White Pepper", alleged in separate counts to have been, respectively, misbranded and adulterated. The alleged adulteration consists in the fact that the article contains only about 65 percent of white pepper, the remaining 35 percent being a corn product, which is alleged to have been so mixed and packed with the pepper as to reduce and lower its quality and strength. As the corn product was of such a nature as not to constitute adulteration if properly branded, we may, with propriety, confine our attention to the charge of misbranding.

The information charged that the article was labeled and branded as follows: "Perfection Mills Compound White Pepper", in large and plain letters, and about one inch thereunder, the following words, to wit: "Composed of Ground White Pepper and Ground Cereals", in small and inconspicuous type, "so placed upon said label as not to be readily noticed by the purchaser." The information was demurred to as stating no offense under the act in question or under the laws of the United States. The demurrer was overruled. Thereupon a jury was waived by agreement of counsel.

A trial was had before the court upon an agreed state of facts (except in one particular hereafter mentioned), whereby the defendants, pleading not guilty to the charge in the information, admitted the fact of the alleged shipment in interstate commerce, also that the article contained 65 percent of ground white pepper, and about 35 percent of ground cereals, and that it was labeled, in large type "Perfection Mills Compound White Pepper", and in smaller type "Composed of Ground White Pepper and Ground Cereals"; also, in substance, the purchase of a sample can by an inspector of the Bureau of Chemistry of the United States Department of Agriculture, its analysis by an analyst of that Department, and its possession by the United States district attorney for use on the trial.

The Government admitted on the trial that the words "Composed of Ground White Pepper and Ground Cereals" are in type larger than the size required by regulation 17c of the rules and regulations passed in conformity with the Food and Drugs Act, and that the article of food contained no added ingredients poisonous or deleteri-

ous to health. The package was submitted to the court "so as to display the label thereon" and is returned with the bill of exceptions. The defendants then moved to dismiss the information, and for judgment in their favor, upon the grounds contained in the demurrer to the information. The motion was denied. The trial court held that the label was not in compliance with the law, found the defendants guilty, and imposed a fine of $50.

Upon the argument in this court, defendants urged that the information was improperly filed, and should be dismissed for that reason, upon the authority of *United States* v. *20 Cases of Grape Juice* (C.C.A. 2), 189 Fed. 331, where it was held that in case the district attorney acts solely in pursuance of the report of the Secretary of Agriculture, under sections 4 and 5 of the Food and Drugs Act, the notice and hearing provided by section 4 are conditions precedent to the filing of the information; such notice and hearing not appearing in this case. It would be enough to say that this proposition is not properly before us from the fact that no motion to dismiss for this reason was presented below, nor is the question raised by any pleading or presented by assignment of error. We do not, however, construe the information as showing that it was filed without investigation by the district attorney, or solely by authority of sections 4 and 5 of the act.

The fact that the case was finally heard by the court without a jury raises the question of the effect of the judgment when presented for review. By R. S. sec. 566, the trial of issues of fact in the district court is (with certain exceptions not material here) required to be by jury; and section 649 (page 25), which provides for a waiver of jury in the circuit court, has no application to the district court. The result is that if the offense for which the defendants were tried amounts to a crime, as distinguished from a "petty offense", it could, under section 2 of article 3 of the Constitution of the United States, be tried only by a jury; and, if not so tried, the judgment would be a nullity and require reversal. On the other hand, if the offense is merely a "petty offense", the trial under waiver of jury would amount to an arbitration as to the questions of fact involved; and it would result that the court's conclusions of fact could not be reviewed here, and we would have no power to inquire into the sufficiency of the evidence to support the conviction, nor any question of law arising out of or upon the evidence. *United States* v. *L. & N. R.R. Co.* (C.C.A. 6), 167 Fed. 306, 93 C.C.A. 58; *Low* v. *United States* (C.C.A. 6), 169 Fed. 86–88, 94 C.C.A. 1; *Rogers* v. *United States*, 141 U.S. 548, 12 Sup. Ct. 91, 35 L.Ed. 853.

However, if the submission is upon an agreed state of facts, leaving for determination only a question of law arising thereon, the determination upon that question of law is reviewable. *Henderson's Distilled Spirits*, 14 Wall. 44, 20 L.Ed. 815. Counsel agree that the offense here charged is merely a "petty offense." Construing, as we do, section 2 of the Food and Drugs Act, as providing for no imprisonment for the first offense, but merely for a fine not exceeding $200, we agree with counsel. *Callan* v. *Wilson*, 127 U.S. 540, 8 Sup. Ct. 1301, 32 L.Ed. 223; *Schick* v. *United States*, 195 U.S. 65, 24 Sup. Ct. 826, 49 L.Ed. 99.

Was the case finally heard solely upon an agreed state of facts so as to involve only a question of law? We think not. It is true that

the case was heard in part upon an "agreed statement of facts", the substance of which has been before set out. But this statement contained no reference to the allegations made in the information that the words "composed of ground white pepper and ground cereals" were "in small and inconspicuous type so placed upon said label as not to be readily noticed by the purchaser", as well as the statement "that the label and branding as above set forth was calculated and intended to deceive and mislead the purchaser thereof." On the other hand, the package containing the pepper was submitted to the court upon the trial, "so as to display the label thereon"; and we are unable to determine from the record that the court did not, in finding the defendants guilty take into account the relative size and prominence of the type of the letters following the first part of the label, in connection with the allegations in the information relating thereto, and draw inferences of fact therefrom. For this reason, we think the final judgment embraced the determination of a question of fact, which is not reviewable here. But the ruling upon demurrer to the information is still open to review, and its consideration seems to sufficiently present the meritorious question in the case.

Regulation 17e adopted for the enforcement of the Food and Drugs Act, provides that "an article containing more than one food product or active medicinal agent is misbranded if named after a single constituent." Defendants challenge both the validity of this regulation and its application to this case. In the view we take of the case, we have not found it necessary to consider either of these questions.

By section 8 of the act an article of food is declared to be misbranded, "Second. If it be labeled or branded so as to deceive or mislead the purchaser", with the proviso attached to the fourth subdivision of the section that an article not containing any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded, and "Second. In the case of articles labeled, branded, or tagged, so as to plainly indicate that they are compounds, imitations or blends, and the word 'compound', 'imitation' or 'blend', as the case may be, is plainly stated on the package in which it is offered for sale." We assume, for the purposes of this opinion, that if the statement of the ingredients of the "compound" were printed in type as large and prominent as that used in the primary label, and in such position as to be substantially part of one continuous label or brand, there would be no misbranding. But the information alleges the contrary of this, and that the branding "was calculated and intended to deceive and mislead the purchaser." Unless, therefore, the term "compound" on the label naturally implies that the article is a "compound" of white pepper and some ingredient or ingredients other than pepper, it seems clear that there is misbranding. Defendants contend that the term "compound" does naturally so imply; the argument being that as the second subdivision of the fourth paragraph of section 8 of the act provides "that the term 'blend' as used herein shall be construed to mean a mixture of like substances, * * *" and regulation 27a, made under the authority of the act, provides that "the terms 'mixtures' and 'compounds' are interchangeable, and indicate the result of putting together two or more food products", the term "compound" must be held to be a mixture of unlike substances, and that the statute is satisfied in

the case of a compound, if the word "compound" is plainly stated on the package. We are disposed to the view that the result of the statute and the regulations thereunder is that a blend is a compound, but a compound may or may not be a blend; in other words, that the term "compound" does not necessarily denote a mixture of unlike substances. The statute does not declare that the mere use of the word "compound", whether as an adjective or as a substantive, sufficiently indicates that the article is a compound within the statute. The provision is that articles containing no poisonous or deleterious ingredients shall not be deemed to be misbranded "in the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds * * * and the word 'compound' * * * is plainly stated on the package."

A primary label "White Pepper Compound" would doubtless fairly indicate that the article is a compound of white pepper and some other ingredient, whether another kind of pepper or an unlike substance, it is not now necessary to decide. But the term "Compound White Pepper" does not, in our opinion, necessarily import the same idea as "White Pepper Compound." The adjective "compound," we think, is sometimes used colloquially, as meaning "having added strength," as a "compound extract." However this may be, it seems clear that the term "Compound White Pepper" does not so naturally imply, to the average purchaser, a mixture of white pepper with an ingredient other than pepper as to make it a proper branding, as against the fact (as alleged) that the statement of the ingredients is so placed and in such type as not to be readily noticed by the purchaser, and as to be calculated and intended to deceive and mislead the latter. While we have found no controlling authority in specific support of this view, we have found nothing persuasive to the contrary. The decisions principally relied on by the defendants (*In re Wilson* [C.C.], 168 Fed. 566; *United States* v. *68 Cases of Syrup* [D.C.], 172 Fed. 781; *United States* v. *Boeckmann* [C.C.], 176 Fed. 382; *United States* v. *779 Cases of Molasses* [C.C.A. 8], 174 Fed. 325, 98, C.C.A. 197), as well as the departmental rulings (one of the most prominent of which is F.I.D. 63), are all distinguishable from the case before us. In our opinion, the demurrer to the information was properly overruled.

The motion for new trial was addressed to the discretion of the court, and its denial is not subject to review.

It results from these views that the judgment of the district court should be affirmed.

UNITED STATES v. 75 BARRELS OF VINEGAR

(District Court, N.D. Iowa, E.D., Dec. 11, 1911)

192 Fed. 350; N.J. No. 1441

Libel under section 10 of the Food and Drugs Act. Exceptions to claimants' answer allowed.

REED, *District Judge* (on exceptions to libel). In this case the United States have filed a libel of information against 75 barrels of vinegar, which it is alleged were shipped from the State of Illinois

into the State of Iowa, and held in the latter named State within the jurisdiction of this court by the John T. Hancock Company at Dubuque, Iowa, and were being offered for sale for food consumption by that company in violation of the Food and Drugs Act of Congress approved June 30, 1906, 34 Stat. 768.

Spielmann Brothers Company, a corporation of Illinois, has intervened in said proceedings, and claims to be the owner of said vinegar; admits that it was shipped from Illinois to Dubuque in the State of Iowa, and was being held at Dubuque by said John T. Hancock Company, a corporation; but denies that the same was shipped, or is being held or offered for sale in violation of said act of Congress.

It further alleges that a sample of said vinegar was obtained by the Bureau of Chemistry of the Department of Agriculture, and was analyzed by said bureau, or under its directions, and found, in the opinion of said bureau, or the analyst of said sample, to be adulterated and misbranded within the meaning of said act of Congress, and a report and certificate to that effect made by the Secretary of Agriculture and forwarded by him to the United States attorney for this district, who, upon such report and certificate alone, instituted this suit under section 10 of said act, as directed by section 5 thereof, for the condemnation and forfeiture of said vinegar.

It is then alleged, in article 6 of its substituted answer or claim as a defense to the proceedings, that the Secretary of Agriculture failed to give notice to the person from whom the sample of said vinegar was procured, or to this claimant, or to any other person, that such sample of vinegar had been analyzed by the Bureau of Chemistry, or under its direction, and found to be adulterated or misbranded, and an opportunity given to them to be heard upon the question of adulteration or misbranding of said vinegar, before this proceeding was commenced, and prays that the suit be dismissed and said property restored to the claimant.

To so much of the allegations of the claimant corporation, as allege the failure of the Secretary of Agriculture to give the notice required by section 4 of said act, and afford to it, or to the person from whom said sample was obtained, an opportunity to be heard before the Department of Agriculture prior to the commencement of this proceeding, the Government excepts for the reason that the same constitutes no defense to this proceeding.

It is contended in behalf of the claimant company that, when a proceeding of this character is instituted by the United States attorney, solely upon the report and certificate of the Secretary of Agriculture to him of a violation of said act, and not upon his own initiative, or upon information furnished to him by the local authorities, such proceedings cannot be sustained unless the Secretary of Agriculture has prior to the commencement of such proceedings, in fact given the notice and afforded to the person from whom the sample was obtained an opportunity to be heard, as provided in section 4 of said act; and the case of the *United States* v. *20 Cases of Grape Juice, Flickinger & Co., Claimants*, 189 Fed. 331, decided May 8, 1911, by the Circuit Court of Appeals of the Second Circuit, is cited in support of such contention. That case supports the contention of the claimant, upon the ground, as it would seem, that it is the practice of the Government to make an investigation through the proper execu-

tive department of alleged violations of the laws of the United States, before commencing criminal proceedings against the alleged offender, or proceedings for the forfeiture of property shipped, or offered for sale in violation of law. Admitting that such is the practice of the Government, it cannot be that it is the right of an alleged offender to have such investigation made before he can be indicted for an alleged offense, or proceedings commenced against him, or the property which has been shipped or offered for sale in violation of law, for its condemnation and forfeiture, or that he can plead the failure to make such investigation as a defense to an indictment, or other proceedings for the condemnation of the property so illegally used.

Section 4 of the Food and Drugs Act reads in this way:

> That the examinations of specimens of foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of such bureau, for the purpose of determining from such examinations whether such articles are adulterated or misbranded within the meaning of this act; and if it shall appear from any such examination that any of such specimens is adulterated or misbranded within the meaning of this act, the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such sample was obtained. Any party so notified shall be given an opportunity to be heard under such rules and regulations as may be prescribed as aforesaid, and if it appears that any of the provisions of this act have been violated by such party, then the Secretary of Agriculture shall at once certify the facts to the proper United States district attorney, with a copy of the result of the analysis or the examination of such articles duly authenticated by the analyst or officer making such examination, under the authority of such officer. After judgment of the court, notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid.

Section 5 is as follows:

> That it shall be the duty of each district attorney to whom the Secretary of Agriculture shall report any violation of this act, or to whom any health or food or drug officer or agent of any State, Territory, or the District of Columbia shall present satisfactory evidence of any such violation, to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States, without delay, for the enforcement of the penalties as in such case herein provided.

This proceeding is under section 10 of the act, which need not be set out. In the case above cited it is conceded that the failure of the Secretary of Agriculture to give the notice and afford the opportunity to be heard, as required by section 4 of the act, does not limit the authority of the United States attorney to commence proceedings upon his own initiative and prosecute the same to final determination; but it is held that said section imposes upon the Secretary of Agriculture the duty of making an investigation of the facts before he may rightly make a report and certificate to the United States attorney for the proper district, of a violation of the act, and before proceedings instituted without such notice and opportunity to be heard can be sustained. It seems to me that section 5 of the act imposes upon the United States attorney of the proper district, the duty of instituting the appropriate proceedings whenever he is informed by the local authorities, or by the report and certificate of the Secretary of Agriculture, that the law has been violated, to commence without delay the appropriate proceedings for the alleged violation of this act. And whenever such information or report is made to him he has no discretion but to proceed as directed by that section;

and he is not required to investigate and determine whether or not the Secretary of Agriculture has performed his duty under the law.

Just what may be the purpose of the requirements of section 4, that the Secretary of Agriculture shall give the notice and opportunity to be heard, may not be entirely clear. It will be observed that this section only requires the notice to be given to the person from whom the sample is obtained, who may be only the bailee of the property of which it is a sample, and knows nothing of its ingredients, and afford him an opportunity to be heard. This may be for the purpose of ascertaining who is the real violator of the law, if the analysis shows such violation, with a view of affording him an opportunity to discontinue its violation and proceed lawfully in the conduct of his business under the act and the requirements of the Department of Agriculture. However this may be, it does not seem to me that the giving of, or the failure to give, such notice and opportunity to be heard can relieve any violator of the law of the penalties which he may have incurred by reason of its violation, or that the Government is barred from prosecuting him by indictment or commencing proper proceedings for the condemnation and forfeiture of the property illegally manufactured and shipped, or offered for sale. This is the view taken by several of the district courts, viz, Judge Morris in *United States* v. *50 Barrels of Whisky*, 165 Fed. 966; Judge Dayton in *United States* v. *65 Casks of Liquid Extracts*, 170 Fed. 449, 454; Judge McPherson in *United States* v. *Nine Barrels of Olives*, 179 Fed. 983; and Judge Willard in *United States* v. *100 Barrels of Vinegar*, 188 Fed. 471. With the utmost respect for the opinions of the Court of Appeals of the Second Circuit, I am unable to agree with its conclusion in the case cited.

The notice that is required to be given of the seizure of the property and of the proceedings for its condemnation affords ample opportunity to its owner to appear and defend against such proceedings; and if upon the final hearing it is condemned and declared forfeited, he is not deprived of his property without due process of law.

The exceptions of the Government to that part of the answer of the claimant above referred to are allowed and an order will be entered accordingly.

UNITED STATES v. MORGAN ET AL.

(Supreme Court of the United States, Dec. 11, 1911)

222 U.S. 274; N.J. No. 1692

Error to Circuit Court for the Southern District of New York. Judgment reversed.[45]

The defendants maintained an establishment in New York where, after filtering Croton water drawn from the city pipes, adding mineral salts and charging it with carbonic acid, the water was bottled and sold as "Imperial Spring Water." In October 1908, a

[45] Reversing *United States* v. *Morgan et al.*, p. 146, *ante*.

food and drug inspector applied to a druggist in Newark, New Jersey, for several bottles of this water. The druggist, not having them in stock, ordered them from the defendants, who shipped them from New York to the druggist in Newark. He delivered them to the inspector, who paid therefor.

The judge, in his opinion, treats the prosecution as having been instituted by the inspector, though this does not affirmatively appear in the record, and the defendants were not indicted until April 1910, when they were found guilty of shipping misbranded goods in interstate commerce. They moved in arrest of judgment on the ground that it was not alleged that they had been given notice and a preliminary hearing by the Department of Agriculture, contending this was a condition precedent to the return of a valid indictment. The judge held that such hearing must be granted in all cases where the prosecution was instituted by the Department of Agriculture or its agent (181 Fed. 587), and from a later order sustaining the motion in arrest the Government brought the case here under the criminal appeals act.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court.

The Federal courts have not agreed as to the effect of the provision for notice and hearing found in section 4 of the Pure Food and Drug Act of June 30, 1906, ch. 3915, 34 Stat. 768. *United States* v. *Nine Barrels Olives*, 179 Fed. 983. *United States* v. *20 Cases of Grape Juice*, 189 Fed. 331. Whether it confers a right upon the defendant, or results in imposing a duty upon the district attorney, can be determined by a brief examination of a few of the provisions of the act.

Under the Pure Food Law, not only a manufacturer but any dealer shipping adulterated or misbranded goods in interstate commerce is guilty of a misdemeanor. In aid of enforcement of the statute it is made the duty of the Department of Agriculture to collect specimens of such articles so shipped, and the Bureau of Chemistry is required to analyze them. But, even if the specimen, on analysis, is found to be adulterated, there is no requirement that the case should be turned over at once to the district attorney, for the reason that the "party from whom the sample was obtained" might be a dealer holding a guaranty from his vendor that the articles were not adulterated. In such case the dealer is not liable to prosecution, but the guarantor (sec. 9) is made "amenable to the prosecutions, fines, and other penalties."

The act, therefore, declares (sec. 4) that when, on such examination by the Board of Chemistry, the article is found to be adulterated, "notice shall be given to the party from whom the sample was obtained. Any party so notified shall be given an opportunity to be heard." If it then appears that he has violated the statute, the Secretary of Agriculture is required to certify that fact, together with a copy of the analysis, to the proper district attorney, who (sec. 5), *without delay*, must "institute appropriate proceedings", by indictment, or libel for condemnation, or both, as the facts may warrant.

But the act also contemplates (sec. 5) that complaints may be made to the district attorney by State health officials. In that class of cases, no doubt because the State agents investigate without giving

a hearing, the district attorney is not obliged to prosecute unless such State officers "shall present satisfactory evidence of such violation." But the very fact that he must do so in that event recognizes that he may begin proceedings against a defendant who has not been given a notice and an opportunity to be heard.

In providing for notice in one case, and permitting prosecutions without it in another, the statute clearly shows that there was no intent to make notice jurisdictional. This view is strengthened by the fact that it contains no reference to giving notice to anyone except "to the party from whom the sample was obtained." And if, on the hearing given him, it appears that he is a dealer holding a guaranty, the act in providing for proceedings against such guarantor contains no suggestion that a new notice shall be given him before an indictment can be submitted to the grand jury.

In cases like the present, or where foreign goods are labeled as of domestic manufacture and vice versa, no scientific examination may be necessary. But usually a chemical analysis will be required to determine whether an article is adulterated. The Bureau of Chemistry is equipped to do that work, so that in practice most prosecutions will be based on reports made by the Department of Agriculture after notice. But the hearing is not judicial. There is no provision for compelling the presence of the party from whom the sample was received; if he voluntarily attends he is not in jeopardy; an adverse finding is not binding against him; and a decision in his favor is not an acquittal which prevents a subsequent hearing before the department, or a trial in court.

The provision as to the hearing is administrative, creating a condition where the district attorney is compelled to prosecute without delay. When he receives the Secretary's report, he is not to make another and independent examination, but is bound to accept the finding of the department that the goods are adulterated or misbranded, and that the party from whom they had been obtained held no guaranty. But the fact that the statute compels him to act in one case, does not deprive him of the power voluntarily to proceed in that and every other case under his general powers. If, for any reason, the executive department failed to report violations of this law its neglect would leave untouched the duty of the district attorney to prosecute "all delinquents for crimes and offenses cognizable under the authority of the United States" (Rev. Stat. secs. 771, 1022). So, an improper finding by the department would no more stay the grand jury than an order of discharge by a committing magistrate after an ordinary preliminary trial. For the statute contains no expression indicating an intention to withdraw offenses under this act from the general powers of the grand jury, who are diligently to inquire and true presentment make of all matters called to their attention by the court, or that may come to their knowledge during the then present service.

Repeals by implication are not favored, and there is certainly no presumption that a law passed in the interest of the public health was to hamper district attorneys, curtail the powers of grand juries or make them, with evidence in hand, halt in their investigation and await the action of the department. To graft such an exception

upon the criminal law would require a clear and unambiguous expression of the legislative will.

It was argued that the privilege of a preliminary hearing was granted so as to prevent malicious prosecutions. But, had such been its intention, the statute would have required that a hearing should be given to all persons charged with a violation of the act, and not merely to those from whom the sample was received. A further answer is, that as to this and every other offense the Fourth Amendment furnishes the citizen the nearest practicable safeguard against malicious accusations. He cannot be tried on an information unless it is supported by the oath of someone having knowledge of facts showing the existence of probable cause. Nor can an indictment be found until after an examination of witnesses, under oath, by grand jurors—the chosen instruments of the law to protect the citizen against unfounded prosecutions, whether they be instituted by the Government or prompted by private malice. There is nothing in the nature of the offense under the pure food law, or in the language of the statute, which indicates that Congress intended to grant violators of this act a conditional immunity from prosecution, or to confer upon them a privilege not given every other person charged with a crime.

The judgment is reversed.

VON BREMEN ET AL. v. UNITED STATES

(Circuit Court of Appeals, Second Circuit, Jan. 8, 1912)

192 Fed. 904; N.J. No. 1949

Error to the Circuit Court for the Southern District of New York. Judgment reversed.[46]

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, *Circuit Judge.* This is an information under the Food and Drugs Act of June 30, 1906, against the defendants, who compose the firm of Von Bremen, MacMonnies & Company, containing two counts. The first count charges them with delivering for shipment from New York to Galveston a can bearing the label, "Imported Salad Oil Morel Brand", which was a misbrand because it was false and misleading, in that it indicated that the contents of the can was olive oil, whereas it was sesame oil. The second count charges that the same can was misbranded, in that it was labeled or branded so as to deceive and mislead the purchaser into believing that it contained olive oil, whereas it contained sesame oil.

The first count falls within the first subdivision of section 8 of the act as to foods, viz, that the article "was offered for sale under the distinctive name of another article", namely, olive oil. The second count falls within the second subdivision, viz, that the article was "labeled or branded so as to deceive and mislead the purchaser", namely, by making him think he was getting olive oil, whereas he was getting sesame oil.

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[46] Reversing *United States* v. *Von Bremen et al.*, p. 193, *ante*.

The trial judge, taking judicial notice that standard lexicographers define the words "salad oil" as "olive oil", denied the defendants' motion to quash the information on the ground that it alleged no offense, and afterwards, it being stipulated that the can contained sesame oil and not olive oil, he denied the defendants' motion to direct a verdict in their favor. These rulings were within our decision in the *Brina case*, 179 Fed. 373, 105 C.C.A. 558. The Government thereupon rested, and the defendants showed by a large number of witnesses that for some forty years a perfectly healthy oil for edible purposes had been made from cottonseed and sold in enormous quantities in this country as "salad oil", and that other edible oils were made from the seed of sesame, a kind of grass, and from peanuts and from corn and sold as salad oil. The oil in question is sesame oil imported by the defendants. The defendants also showed that olive oil is always, except perhaps in the case of one brand, labeled and sold as olive oil; that it is four times as expensive as the oils sold as salad oils, and that these other oils are sold in vastly greater quantities, the American Cotton Seed Oil Company selling from 175,000 to 200,000 barrels, the Union Cotton Seed Oil Company 40,000 barrels a year of salad oil made from cotton seed.

In reply to this the Government called two purchasers of oil, Edward Nougaret, steward of the Cafe Martin (in this country a month), who testified that nothing but olive oil was used there. Francis J. Englefield, purchasing agent of the Hotel Knickerbocker, testified that nothing but olive oil is used there, and that "salad" means the very best kind of olive oil. It also called three sellers of olive oil; John W. Eginton, an employee of James P. Smith & Co., who sell nothing but olive oil, testified that in his opinion "salad oil" means olive oil; Benito Maspero, an importer of Italian olive oil, who said that in his line of business "salad oil" is generally claimed to be olive oil; Henry L. Marks, chief clerk of an importer of olive oil, testified that in the trade they supply "salad oil" means olive oil. They all said their oil was labeled olive oil.

The act does not make the intention of the defendants material; but, as the case was a criminal one, the jury was bound to be convinced beyond a reasonable doubt that the article in question was misbranded before they could find the defendants guilty. We think that the proof did not justify such a conclusion, and that the defendants' motion for the direction of a verdict in their favor should have been granted.

Assuming, however, that there was enough to send the case to the jury, other errors were committed. We think it was error upon the state of facts set forth above to refuse to let the dealers in salad oil not made of olives say whether they had ever heard any complaints from purchasers to the effect that they had been misled or deceived. Such testimony would be directly relevant to the charge in the second count that the article was branded so as to deceive or mislead purchasers.

It was also error to refuse to let large dealers in this salad oil say what the understanding of the trade was as to the meaning of the words "salad oil." It would certainly be relevant to the inquiry under the first count that the article was branded under the distinctive name of olive oil to show what the trade which buys and sells

thousands of barrels of this "salad oil" a year understands by those words, and it was also relevant to the inquiry under the second count because it is a fair inference that the trade does not sell salad oil to the consumer as anything else than what it really is.

So we think it was error to permit the Government to cross-examine the defendants' witnesses as to whether they thought the words "salad oil" would be less misleading if the words "pressed from cotton seed" on some of the labels were in larger type or if the cans had been labeled simply "cotton seed oil." The question to be decided was whether purchasers supposed they were getting olive oil when they purchased "salad oil", and it throws no light on this to inquire whether they could have been in any doubt if the words "cotton seed oil" alone were used or if the words "cotton seed oil" were printed in large type on the label. We think the case was tried throughout a little too strictly against the defendants. The judgment is reversed.

LACOMBE, *Circuit Judge.* I concur in the conclusion to reverse, because I think some testimony was excluded which defendant was entitled to have in the case. But I am of the opinion that there was a question for the jury to pass upon and that that question was whether the article was labeled so as to deceive or mislead "the purchaser", who, in the case of a sale at retail, would be one of the general public not necessarily informed as to the trade meaning of words.

UNITED STATES v. 75 BOXES OF ALLEGED PEPPER

(District Court, D. New Jersey, Jan. 25, 1912)

198 Fed. 934; N.J. No. 1568

Libel under section 10 of the Food and Drugs Act. Trial before the court. Decree in favor of the United States.

CROSS, *District Judge.* No jury having been demanded, the above-entitled cause came to hearing before the court. On or about June 28, 1911, B. Fischer & Company, the claimants herein, of the City of New York, shipped in interstate commerce from that city to Jersey City, in the State of New Jersey, seventy-five boxes containing the alleged pepper which the Government seeks to condemn as having been misbranded and adulterated within the meaning of the act commonly known as the Pure Food and Drugs Act of June 30, 1906 (34 Stat. 768). The Government claims that the article contained in the boxes consisted of a combination of ground *Piper nigrum* (or black pepper), and ground *Piper longum* (or long pepper). The product was labeled by the claimants "Pure Pepper", and bore its guaranty number 6657 at the time of its shipment.

At the close of the proofs the case was reserved, and counsel requested to submit briefs upon the following points deemed to be involved in the disposition of the case:

First. Was a notice and hearing as provided for by section 4 of the act, a condition precedent to the bringing of this suit?

Second. Shall the words " pure pepper ", as affixed to and used as a label upon the boxes in question, be given their ordinary and customary meaning or a technical meaning?

Third. Are the words " pure pepper ", as so used, in any wise false or misleading under the evidence in the case?

It is probable that the first question would have been the most difficult of solution, owing to the conflicting decisions of subordinate courts, but for the fact that since the hearing and on December 11, 1911, the Supreme Court, in the case of the *United States* v. *John Morgan and Alfred Y. Morgan*, 222 U.S. 274, 32 Sup. Ct. 81, 56 L.Ed. 198, held that the notice and hearing referred to in the first point were not a condition precedent to the bringing of a suit of this character.

The second point reserved must be answered in the affirmative. It is difficult to perceive how otherwise justice could be done in any given case, or what practical efficiency the statute would have or what protection it would afford if the public were required to have scientific and technical knowledge as to the derivation and nomenclature of the various food and drug products. The ordinary purchaser, unless he could rely upon the common and generally understood signification of a label, could never be certain of what he was buying. A label should be reliable to the extent that it will not in any wise, or to any extent, mislead such a purchaser. In the case of *Brina* v. *United States*, 179 Fed. 373, 105 C.C.A. 558, the Circuit Court of Appeals of the Second Circuit, speaking by Judge Lacombe, said:

> The section declared on (sec. 2) imposes a penalty on any person who shall ship or deliver for shipment from any State, to any other State, any article of food or drug so misbranded. It was proved that the words " Olio per Insalata " mean " oil of salad " or " salad oil ", and the trial judge held and so charged the jury, that " as a notorious fact salad oil prima facie means olive oil ", but allowed the defendant to show if he could that " it means something else because of recent events which have perhaps rendered olive oil more difficult to obtain, or that other food elements have come to be known as salad oil." No such proof was introduced, and the ruling is assigned as error. The Century Dictionary, Worcester's, Stormont's Imperial, and the Encyclopedia all define " salad oil " as " olive oil." Webster's does not give any definition. We are satisfied that the trial judge quite properly charged, in the absence of any testimony of the sort suggested, that " salad oil " prima facie imports olive oil; that is what the world has been accustomed to regard salad oil.

So also in *Worden* v. *California Fig Syrup Co.*, 187 U.S. 516, 536, 23 Sup. Ct. 161, 167 (47 L.Ed. 282), which was a trade-mark case, the court speaking of a label containing the words " Syrup of Figs ", and what should be understood from those words as used, said:

> The argument for complainant is that, because fig juice or syrup has no laxative property, everybody ought to understand that, when the term is used to designate a laxative medicine it must have only a fanciful meaning. But the fact is admitted that the public believe that fig juice or syrup has laxative medicinal properties. It is to them that the complainant seeks to sell its preparations, and it is with respect to their knowledge and impression that the character, whether description or fanciful, of the term used, is to be determined.

The extract given from the case last cited was quoted from an opinion by Judge Taft in *California Fig. & Syrup Co.* v. *Frederick Stearns & Co.*, 73 Fed. 812, 817, 20 C.C.A. 22, 33 L.R.A. 56 (C.C.A.

Sixth Circuit). Counsel for the Government has also cited several cases which have arisen from time to time in different district courts of the United States, and has furnished extracts thereof from circulars issued by the Department of Agriculture; but, as such extracts were parts of charges to juries and the cases do not appear to have been reported, no further mention will be made of them, except to say that they all follow the above doctrine.

The third question reserved requires an examination of the facts of the case. It has already been stated, and it is not disputed, that the article in question was labeled by the claimants "pure pepper", and that it was composed of *Piper nigrum* and *Piper longum*, or black pepper and long pepper, ground and mixed. The evidence also shows that the mixture contained a larger proportion of long pepper than it did of black pepper, or, to be more definite, that it contained between 50 and 75 percent of long pepper, worth at the time of the shipment in question several cents a pound less than black pepper, and that such differences in price usually, but not invariably, existed. The two kinds of pepper, black and long, belong to the same genus, but differ in strength, quality, and characteristics. The testimony shows that black pepper or *Piper nigrum* is known in the market as "ordinary pepper", "common pepper" and is what people usually term "black pepper", and that "pure pepper" means in the trade *Piper nigrum*, and nothing else. The weight of the testimony upon these points and particularly upon the point that "pure pepper" means in the trade nothing else than *Piper nigrum*, is overwhelming; while of the evidence in general it may fairly be said that it is but slightly conflicting. The defendants have introduced evidence to show that there are four kinds of pepper in common use, "black pepper", "white pepper", "long pepper", and "red pepper", the first three of which are grouped in one family, known as the capsicum family. It appears, however, that white pepper is *Piper nigrum* whitened by means of a process, and as red pepper is in no wise under consideration, it is only requisite to consider black pepper and long pepper. The defendants claim that because these two varieties of pepper belong to the pepper family and are so classified in some, but not in all, scientific books, they were justified in labeling a mixture of them "pure pepper" and that such labeling was neither false or misleading in any particular. But, as above stated, the evidence is clear that "pure pepper" is known to the trade and in the market as black pepper and nothing else. It also appears that the two kinds of pepper, black and long, have different qualities, characteristics, and uses. If the defendant's contentions were upheld, they could with impunity sell an article composed entirely of the cheaper and inferior long pepper for "pure pepper" or black pepper, although the purchaser would pay the price of, and be justified in believing that he was buying, black pepper. Speaking generally, "flour" is a generic name. Suppose, however, that wheat flour was generally known in the trade as "pure flour", would a manufacturer be justified under the act in so labeling it, if as a matter of fact it were composed of a mixture of 50 percent of wheat flour and 50 percent of rye or buckwheat flour? Numerous illustrations of a like character are instantly suggested.

But the defendants, furthermore, attempt to justify their conduct in the premises because of its alleged conformity with a pamphlet published and circulated by the United States Department of Agriculture, called "Standards of Purity for Food Products", as established and prescribed by that Department. But I can find in those standards no warrant for such justification. Substantially all they do is to classify under the title "pepper" *Piper nigrum*, *Piper longum*, and white pepper, and describe them. Notwithstanding such classification, it would seem that both the public and the Department might reasonably assume that, if black pepper and long pepper were mixed or blended, in equal parts, the product would be marked or branded as required by the act in question.

The more pertinent parts of that act are as follows:

SEC. 8. That the term "misbranded" as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device, regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

That for the purposes of this act an article shall also be deemed to be misbranded:

In the case of food:

* * * Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredient shall not be deemed to be adulterated or misbranded in the following cases:

First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word "compound", "imitation", or "blend", as the case may be, is plainly stated on the package in which it is offered for sale: *Provided*, That the term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only: *And provided further*, That nothing in this act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredients to disclose their trade formulas, except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding.

It seems to me that the fourth subdivision of section 8, in connection with the second paragraph of such subdivision, covers this case as completely as if specially enacted therefor, and that a mixture of black pepper and long pepper constituted a compound "blend" within the meaning of the act, and should have been so marked. In view of this conclusion, it is unnecessary to consider whether the article in question was also adulterated as claimed by the libelant.

Upon consideration of all evidence in the case, it is concluded that the "seventy-five boxes of alleged pepper" bore a false and misleading label, and were consequently misbranded within the meaning of the Pure Food and Drug Act.

Judgment of forfeiture will accordingly be entered in favor of the United States, with costs.

HUDSON MANUFACTURING CO. v. UNITED STATES

(Circuit Court of Appeals, Fifth Crcuit, Feb. 6, 1912)

192 Fed. 920; N.J. No. 1451

Error to the District Court for the Eastern District of Louisiana.

This was a libel proceeding instituted by the United States under section 10 of the Food and Drugs Act, for the condemnation and forfeiture of a food product labeled "Hudson's Extract, made by the Hudson Manufacturing Co., Chicago, Ill", which was alleged to be adulterated and misbranded. Adulteration was alleged in that there had been mixed and packed with it, so as to reduce, lower, and injuriously affect its quality and strength, commercial vanillin and coumarin; and in that said commercial vanillin and coumarin had been substituted in whole or in part for the genuine vanilla extract; and in that said extract had been mixed and colored in a manner whereby damage and inferiority were concealed. Misbranding was alleged in that said article was offered for sale as vanilla extract, whereas in truth and in fact it was not genuine vanilla extract but was an imitation thereof and was offered for sale under the distinctive name of another article, to wit, vanilla extract. The Hudson Manufacturing Co. intervened as claimants and filed exceptions and demurrer to the libel, which exceptions and demurrer were overruled by the court. To the claimant's answer the libelant filed exceptions, which exceptions were sustained by the court, and the claimant filed an amended answer. The case was tried to a jury, which returned a verdict for the libelant. Whereupon the claimant moved for a new trial. This motion was denied.

The claimant excepted to the order of the court refusing its motion for a new trial, filed its bill of exceptions, and sued out a writ of error.

Before PARDEE and MCCORMICK, Circuit Judges, and MAXEY, District Judge.

By the COURT:

Where there is no proof that the words "Hudson's Extract" have a well-known trade meaning, an imitation of vanilla marked "Hudson's Extract", without giving an indication of what the article is composed, shows a clear case of misbranding under the Pure Food Law.

The judgment of the district court is affirmed.

WILLIAM HENNING & CO. v. UNITED STATES

(Circuit Court of Appeals, Fifth Circuit, Feb. 6, 1912)

193 Fed. 52; N.J. No. 1529

Error to the District Court for the Eastern District of Louisiana.

Libel proceedings under section 10 of the Food and Drugs Act for the condemnation and forfeiture of a quantity of adulterated

tomato catsup, William Henning and Company, claimants. From a judgment of condemnation claimants bring error. Affirmed.

PARDEE and MCCORMICK, Circuit Judges, and MAXEY, District Judge:

By the COURT:

Conceding in this case that the addition of pumpkin to tomato catsup as a filler results in an article that may be described as a compound, still the Food and Drugs Act requires that such article must be labeled, branded, or tagged so as to plainly indicate the substances composing the compound, and it is not a compliance with the act to merely mark the word "Compound" on the package.

The judgment of the district court is affirmed.

UNITED STATES v. 443 CANS OF FROZEN EGG PRODUCT

(Circuit Court of Appeals, Third Circuit, Feb. 20, 1912)

193 Fed. 589; N.J. No. 1576

Appeal from District Court for the District of New Jersey. Decree reversed.[47]

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

BUFFINGTON, *Circuit Judge.* In the court below, the United States, proceeding under the act of Congress of June 30, 1906, filed a libel for the condemnation of 443 cans of frozen egg product. So far as now pertinent, the libel charged that such product was intended for food, was decomposed, and that it was adulterated, in the statutory definition of adulteration. After seizure, the product was claimed by the company that made it and the proceeding defended. The claimant's answer admitted interstate shipment of the product and other jurisdictional facts as to 342 cans, that 10 percent of the product was superadded sugar, but denied it was decomposed or adulterated. The case turns on two questions: First, that of fact, whether the product was decomposed; and second, that of law, whether the product is adulterated as adulteration is defined by the Federal food law above referred to.

This product came from a company in Kansas which markets eggs in the shell and also in this frozen form. It was consigned to a baking company in New York City and was seized in New Jersey. The product was prepared under a patent, referred to below, and for convenience we refer to it hereafter as frozen eggs, the seized cans bearing the label: "* * * Eggs for Cooking. Slow Thawing Gives Best Results." Without entering into details, we may say the company selected from the current supply which came from stores and dealers, the highest grade of eggs, which it marketed in the shell. The remainder, termed "discards", were sorted by candling into

[47] Reversing *United States* v. *443 Cans of Frozen Egg Product,* p. 197, *ante.* Judgment of Circuit Court of Appeals reversed by Supreme Court, *443 Cans of Frozen Egg Product* v. *United States,* p. 416, *post.*

three grades, namely, "seconds", "checks", and "spots", or, to quote from complainant's testimony:

> A current use egg is an egg that is full firm; it may be clean and some slightly soiled shell eggs. No. 2 is a dirty shelled egg, a small egg, though it may be dirty shelled or clean shelled, and the check egg is an egg that is cracked in course of transportation.

Of the discards, the seconds and checks are used for food purposes in the frozen product here in question, while the spots, or third class, which consist of leakers, or eggs with broken shells, blood ringers, and embryo chicks is used in liquid form for tanning purposes. "Candling" consists of examining the egg as it is held before an artificial light in a darkened room. As this sorting by candling is done with great rapidity—an expert girl sorting and breaking from seven to eleven thousand eggs in a day—there is a likelihood of bad eggs going into the mixture, for as the claimant's president, speaking of bad eggs, admits, "there is likely an egg (bad) that goes in once in a while through the candling process." In addition to the spoiled eggs, there is danger from musty eggs, the deleterious effects of which are such that, as stated by one of claimant's witnesses, "one musty egg would spoil anywhere from 250 to 350 eggs." And a musty egg cannot be detected by candling, and must be opened slowly to emit smell, the proof of claimant being, "the only way you can detect a musty egg is by smelling it; if a person opens a musty egg quick, it is very hard to detect it. You must open them slowly. You can smell them if you are not too quick opening them. If you take your time in opening the egg, you can smell if it is musty or fresh." It is clear, therefore, that the danger from contamination, both from bad and musty eggs, is very considerable in the rapid sorting at claimant's factory. After the eggs were thus sorted and broken, they were run through a colander to break the yolks, chilled, thoroughly mixed by churning, passed through a fine meshed sieve, and finally mixed with sugar and frozen solid. This sugar, to the extent of ten percent, was added in pursuance of the patented process "to prevent the permanent thickening of the egg mixture containing the yolk of the egg when subjected to low temperatures, so that the physical characteristics of fresh eggs will be preserved and a deterioration of the egg both as to flavor and otherwise be preserved." But, in this connection, it will be noticed, as hereafter stated, that, when the frozen product is melted, the sugar tends to hasten decomposition. The patent covered both a process and a new article of manufacture, viz: "As a new article of manufacture egg containing added sugar and frozen below the temperature of decomposition", etc.

The voluminous testimony consisted of two kinds, fact and expert, and has all had our full consideration. As to the facts, when the testimony is carefully analyzed, there is little dispute, but the scientific deductions from such facts are as far apart as is usually the case where experts testify. After the seizure in Jersey City of the cans containing the product, samples were taken by the scientific representatives of both sides. The Government experts made analyses and tests of their samples. Whether the claimant's experts made corresponding analyses and tests of theirs does not appear in the proofs. They did, however, make certain tests in the court below. Turning to the cooking and smelling tests to which the Government samples

were submitted, the proofs disclose the following facts: Benjamin R. Jacobs, qualified as a chemist, a graduate of scientific schools, of experience in testing bakers' products for manufacturing companies, and is now, and for four years has been, employed as a chemist in the Government Bureau of Chemistry, where he carried on cooking experiments for that bureau. He used three different samples of the frozen eggs, which he received from Dr. Bacon, whose custody and prior treatment of which we will refer to later. At the same time he took fresh eggs, and used them and the frozen eggs in cake making in the same manner. After describing his mixtures and preliminary work, the witness, to reduce the questions and answers to narrative form, in substance said: This dough was placed into small gem cups—so-called cake cups—and baked for 25 minutes. The finished product of this blank or fresh eggs was taken as a standard to judge the odor, both hot and cold, the color and appearance of all the eggs. The fresh eggs had the normal odor of a fresh egg, and the sample no. 11158C, while it was being beaten, had a very strong odor of rotten eggs, sample 11167C had rather a strong odor of rotten eggs, and sample 11173 had a very strong odor of rotten eggs while being beaten. The odor permeated his and the adjoining rooms, and people in the next one called attention to it. All the samples had a strong odor of rotten eggs while hot, and a normal odor when cold. When the cakes baked from these samples were cold, there was nothing in their color or smell different from the cakes he baked from fresh eggs at the same time. The odor was only detected when the cakes came from the oven and were broken. Dr. Bacon, also a chemist of the Bureau, who has had a very considerable experience in the chemistry and decomposition of foods, testified to observing Dr. Jacobs' cooking experiments; that he handled the frozen eggs and they were odorless; but when Jacobs baked the cakes, they had, when broken open hot, the foul odor of decomposed albuminous matter. He further says he distilled both fresh and frozen eggs at the same time by the same process. In the distillate of the former he simply found the ordinary odor of fresh-boiled eggs, while in the latter his distillate was very foul, had a fishy odor, very pronounced, the odor of decomposing fish. This odor not only permeated the witnesses' room but got out into the hall to such an extent that occupants of other rooms came and complained. Dr. Rosenberger, who received several of these samples for analysis, among them 11158C, 11167C, and 11173, is professor of hygiene and bacteriology of the Jefferson Medical College, Philadelphia, and for three years has examined eggs and egg products for the Pennsylvania State Food Department. Speaking of No. 1158C, he says it smelled like stale fish, a stale fishy odor, and from his observation and experience with such matters he would say it was decomposed. Dr. Stiles, who is in charge of the bacteriological work of the Bureau of Chemistry, made bacteriological tests of the frozen eggs. He said that when the claimant's eggs were frozen, they had no appreciable odor, but as melting went on the odor came. He then said:

> By taking one of the Mason jars and vigorously shaking it, and then removing the cover—I did that after removing our bacteriological samples—I could detect, plainly detect, an odor. This odor increased as the product stood, and in our sample I observed during the day that it was kept at approximately a temperature of 22° C., at the end of 2 hours there was a distinct odor, which increased on the standing of the egg. It was a sweetish, rancid, fishy odor.

Unless in some way counteracted, this testimony would seem conclusive of the fact that this product was decomposed. This it is sought to do on several grounds: First, that other samples taken from the same cans were tasted, smelled, and cooked by the claimant's witnesses, without any odors or other evidence of the decomposition being discovered. But this testimony, while it is persuasive as to the particular samples used by claimant's witnesses, is at best but negative and does not disprove the positive and affirmative evidence as to the foulness of the samples used by the Government witnesses. Moreover, it is to be borne in mind that no analysis was made by the claimant of the samples taken by its experts at the same time and from the same packages the Government's samples were taken. To us it is clear that testimony of the limited, negative character referred to above cannot avail to counteract and discredit the strong, positive proofs of decomposition found in the testimony of those who testified thereto. And in weighing testimony founded on the senses, and this is particularly true of the sense of smell, it is a fact that there is a wide difference in individuals in the sensitiveness of the olfactory nerves. Two men may truthfully testify as to the acute presence or the absence of odor, but with such testimony before it, that of the man who detected the odor should have the greater weight. One is positive, the other negative. It is also contended that the samples of the Government were not subjected to proper treatment, and by reason of delay in treatment they were unfairly allowed to deteriorate before the tests were made. It must be borne in mind that the question we have before us is whether this product, when subjected to the conditions ordinarily incident to its use as a food product, was decomposed. The test is not whether decomposition existed and was going on while the product was frozen solid, but when it was melted and used as a liquefied food product. The nature of that change we have from the directions to the user placed on the can by the maker, viz, "Slow thawing gives best results," and the description of the process in the patent, viz:

> The mixture is then frozen solid, and held below the point where decomposition may occur, as by subjecting it to a temperature of zero Fahrenheit, and is maintained frozen until desired for use. When thawed, the egg substance resembles that of the natural egg in its useful physical characteristics and is of much greater commercial value than ordinary frozen egg.

It is, then, apparent that, if the frozen product is of the proper character, it can be slowly thawed out and used without resultant decomposition, and by thawing is meant not a careful, close scientific maintenance of exact thermal conditions, but the gradual reduction of the frozen product to a liquid state in the ordinary way a cook would allow a solid to liquefy in the place where the cooking was going on. Under such directions, a baker would naturally allow the product to gradually melt in the atmosphere of the room where he was working, or the cook in her kitchen. And not only is this the case but if this frozen product is so near decomposition that exact chemical and thermal precautions are necessary to prevent decomposition, then the product is, as an article of food, so close to the danger line as to excite suspicion and not only warrant but demand the closest judicial scrutiny before it is allowed to become an article of food consumption. In this case we find no proof that the treatment

of these samples by the Government chemists was unfair or subjected the product to conditions producing more rapid decomposition than if it had been used for baking. As will be seen by the proofs, on February 10, 1911, the Government samples were set apart on ice, and on February 14th were shipped to Washington. When received there the next day they were still frozen solid. They were then delivered to Doctors Bacon and Anderson, Government chemists, and on March 7th some of them were packed in ice and sent to Dr. Rosenberger at Philadelphia from the cold storage where they had meanwhile been kept at 10° F. From the samples which he received, Dr. Bacon melted two samples "very slowly, according to the direction on the can." They were placed in Mason jars closed with a screw top and rubber bands and allowed to stand at room temperature for ten hours. They were given to Jacobs within an hour after melting and were used by him in the cooking operation. We find no evidence of unfair or improper treatment of the product in this evidence, and the suggestion that the odor of the eggs, which Dr. Bacon testified was noticeable as soon as the product melted, came from the sterilizing of Mason jars or from the rubber sealing bands is a mere suggestion not based on facts, and that such jars were improper as receptacles for samples is negatived by the very fact that the claimant's chemists used such jars in part for taking their samples, and there is no proof that in any subsequent use of such samples they detected any odor from the rubber bands at all resembling bad eggs. We are therefore of the opinion the liquefied samples of the Government, when tested by the experts for bacteriological results and used for cooking, were in a condition fully as favorable to the product as would be its liquefied condition when used by bakers and other consumers. And the condition of a product in the hands of a consumer is the place and time to test its fitness for food. Turning from this proof of practical facts to the theories of the expert witness, we find a wide difference of conclusions. As we stated above, the Government witnesses subjected the samples to well-known scientific tests, and in the absence of any opposing tests made by the claimant, we are justified in accepting these tests as correct. Without entering into details, we may summarize such tests as proving in this liquefied product recognized products of decomposition; that the product when hypodermically injected into guinea pigs and other animals used in laboratory experiments produced sickness and death when the like administering of fresh egg product had no harmful effect. The tests showed the presence of such bacteria as produce disease, blood poisoning, and death, and are found in animal excreta. From these facts, which are not controverted, the Government experts infer that the product was decomposed, while the claimant's experts testify they do not prove decomposition. Indeed, as we understand the contention of the claimant's experts, it is contended, to use the language of Professor Folin, of the Harvard Medical School:

> The number of bacteria in an unknown product is no index to the degree or extent of the decomposition in that product. I mean that in a bacterial decomposed product there are other factors involved than the mere number of bacteria found in that product at any particular time.

Viewing the problem, then, from the standpoint of decomposed, in the technical meaning of that word, and not from the word as meaning spoiled (for, as he himself said, "On terms in common use, such as 'spoiled', an expert does not really known any more than the person who asks him. It is spoiled to that person"), Professor Folin examined one of Dr. Bacon's samples for the presence of ammonia, which he says is an indication of technical decomposition. Finding none, he concluded there was no decomposition. But such value as this test and the inference drawn from it might ordinarily have, it appears to us the time of such test is as open to the criticism of having been made too soon as Dr. Bacon's was of being made too late. We have already shown that the latter was made under conditions similar to those to which the product was subjected in culinary working conditions. But such we do not find to be the case in Professor Folin's test for ammonia, where he took the product from cold storage and put "the vessel containing the egg in cold water, allowing it to stand; but in all cases, for the first determination, I startled the ammonia [test?] within two hours after I took the sample out of cold storage." Now, in view of the fact he stated that it is not possible to determine the ammonia in the product while frozen, that this frozen product stood in cold water, and that for only two hours, we are not convinced that this testimony throws any helpful light on the question before us, for it is not shown that his sample had liquefied to the extent incident to ordinary baking use. It may well be that, in view of the frozen condition of the product initially, its test within two hours, and that meanwhile it was kept standing in cold water, the product was proof against the ammonia test. But, as we have said, this may prove nothing as to this product considered from a food standpoint. Professor Folin admits he purposely omitted to make the tests Bacon had made, and that he did this "because I knew that, in the presence of so much sugar, the subsequent decomposition which would take place was largely the fermentation of the sugar which results in the formation of carbonic acid and which would figure as an acid, and therefore, it did not indicate anything in the decomposition of the egg substance." From this it is evident that his test was not to discover whether decomposition of the product as a whole, superinduced, it may be, by sugar, had begun, but whether it was found in the egg product alone. It is therefore clear that bearing in mind the time, method, and limited object of such tests, and his tests may be taken as fairly illustrative of the viewpoint of claimant's experts, they throw no helpful light on the question before us of whether this product when subjected to conditions incident to ordinary culinary use was decomposed.

Finding, therefore, that this food product was decomposed, and the act providing that for the purposes of the act an article shall be deemed adulterated "if it consists in whole or in part of a filthy, decomposed, or putrid animal substance", it follows that this product falls within the statutory definition on the ground of decomposition, and it therefore becomes unnecessary for the purposes of this case to pass on the question whether the product, by reason of the addition of sugar, was also to be deemed adulterated. The decree of the court below is therefore reversed, with directions to enter a decree in condemnation in favor of the Government.

UNITED STATES v. 350 SACKS OF "PRINCESS FLOUR" AND 50 SACKS OF "FANCY MELBA" FLOUR

(Supreme Court, District of Columbia, Mar. 1, 1912)

N.J. No. 1768

Libel under section 10 of the Food and Drugs Act. Trial before the court. Decree in favor of the United States.[48]

BARNARD, *Judge.* The libelant in this case seeks to condemn the flour described in the libel, because the same consists in part of a filthy, decomposed, and putrid animal and vegetable substance.

The answer of the claimants denies that the said flour is filthy, and denies that it is subject to seizure under act approved June 30, 1906 (34 Stat. 768), known as the Pure Food Law.

The libel was filed September 17, 1909, and at the same time, an order was made permitting the libelant and the claimants to each take two sacks of flour, one from each of said two lots described, for the purposes of examination and analysis. An answer was filed by the claimants, November 23, 1909, and on the 18th of February 1910, another order was made, permitting the libelant to take two other sacks, one from each of the said lots described, and also for the claimants to take two other sacks, one from each of said lots, for the purpose of analysis for use at the trial.

December 20, 1911, an amendment was made to the libel, by striking out paragraph three, and inserting the following paragraph in lieu thereof:

> Your libelant further represents that the said sacks of flour, and each and every one thereof, are adulterated within the meaning and intent, and in violation of, the said act of Congress, approved June 30th, A.D., 1906, in that the said flour consists in part of a filthy, decomposed, and putrid animal and vegetable substance.

The answer was a denial of this paragraph, and the issue so made was set down for hearing before the court without a jury. Testimony was taken in open court, which showed the result of the analysis of the four sacks of flour taken by the libelant, under the permission of the orders of the court aforesaid.

It did not appear that the claimants took any samples, or had any analysis made. The result of the examination of the four sacks taken by the Government as samples, was that one of them contained worms, insects, and beetles, aggregating 3,525, and the other three, worms, insects, and beetles, aggregating 1,207, 1,448, and 1,959, respectively.

Experiments were made by the Department of Chemistry, showing that the said flour contained a large number of bacteria that were supposed to be injurious to the human body; and, in addition, to the worms, insects, and beetles, that had been sifted out of the flour, the evidence showed that there remained in the same, cases or husks made by the worms, as well as the excreta from them, all of which,

[48] Affirmed, *Wm. M. Galt & Co.* v. *United States,* p. 422, *post.*

it was claimed, rendered the said flour filthy within the meaning of said act.

There were a great many weevils discovered, and they were defined as the grain weevil, or wingless insects, which required a period of some six weeks, in warm weather, for a full growth and development, during which time they passed through four distinct stages of existence, first in the form of the egg, then the form of the larva, then in the pupa form, and finally reaching the adult form; and that after maturing, these insects might live for several months, and possibly for a year. In cold weather a longer time was necessary for their growth.

That the beetle known as "flour beetle", comes from a larva, or worm, about half an inch long, and it breeds in flour and grain. Several of these beetles, in the larva state, or in the adult state, appeared to be in said samples.

The evidence was that the flour was injuriously affected by the presence of such worms, insects, and beetles, by reason of their feeding on the gluten, and thereby destroying the strength and value of the flour, and rendering it unfit for making bread, or other domestic use, even if the foreign, filthy matter could be bolted or sifted out of it.

The sixth paragraph of section 7, of said act of Congress, authorizes condemnation of food offered for sale, if it consists in whole or in part of a filthy substance, and it is under this section of the law that the libel was filed.

No proof was offered by the libelant, or by the claimants, as to the condition of the other sacks of flour that were seized, except such as might be inferred from the condition of the four sacks analyzed by the Government; and counsel for the claimants contends that the court is without power to guess at their condition, as the four sacks taken may have been all that were so affected.

It appears that the four sacks taken were from different locations in the several piles of sacks, and it is argued on behalf of the Government, that all the sacks seized were in a position to become affected by the dirt and filth from a stable nearby, and that it is fair to presume that all the sacks of flour of the same brand, and being in the same general neighborhood, were all similarly affected by the presence of these worms, insects, and beetles.

No authorities directly in point have been called to the Court's attention, which would seem to control a decision under the facts in this case.

In *Shawnee Milling Company* v. *Temple*, 179 Fed. 517, the Court considers section 7 of the said statute, and in respect thereto the act is upheld, notwithstanding no standard for pure food is fixed, or can be fixed, as is done with reference to drugs.

The Court says, page 524:

> It is a fact most obvious that no standard could be fixed other than was done by Congress. The one provision as to food is that it shall not be mixed so as to reduce or lower or injuriously affect its quality or strength. Another provision is that some substance shall not be substituted, wholly or in part, for the article. Another provision is that no valuable constituent of the article shall be abstracted. Another provision is that it shall not be mixed, colored, powdered, coated, or stained, in a manner whereby damage or inferiority is concealed. Another provision is that poisonous or other deleterious ingredients shall not be added. Still another provision is that filthy, decomposed, or putrid substances shall not be added.

From the testimony it is not clear that weevils and beetles may not come into flour while in storage, without any fault of the owner, and the argument is made that if they are liable to so infest or inhabit sacks or barrels containing flour, that their appearance is a thing that it was not contemplated by the said act of Congress to prevent. That it is not a false branding, or an adulteration made by the manufacturer or seller, but a natural result liable to happen with the best of care, and that its effect is not to wholly destroy the value or nutritive qualities of the flour, but only to cheapen it, provided the flour is again properly sifted or bolted.

The court is unable to accept this argument in behalf of the claimants, because it seems to the court that the purpose of the act was to prevent the sale of deleterious foodstuffs, no matter how they became such; and that if a merchant should have in his stock flour, or other food product, and be offering the same for sale, under names which the public might anticipate guaranteed a good quality, and the said foodstuffs had become filthy and deleterious by reason of long standing in exposed situations, and had become inhabited by worms, insects, and beetles, such as shown by the testimony in this case as to the four sacks which were examined, the law would apply, and such foodstuffs would be subject to condemnation under section 10 of the said act.

Considering the testimony as presented, and the absence of testimony on behalf of the claimants, the court is forced to the conclusion that if other samples had been taken and analyzed their examination would have shown similar conditions to those in the four sacks actually examined.

That if they had shown to the contrary it might be assumed that the claimants would have put in evidence to that effect, rather than leave the matter to the presumption necessarily arising from the examination of the samples taken.

Finding as matter of fact from the evidence that the said several sacks of flour are in a filthy condition, under the provisions of said act, by reason of the presence of the said worms, insects, and beetles, in such quantities as shown, and from the condition which they have produced in the said flour, the court is of the opinion that the said several sacks of flour, now in the warehouse of the claimants, should be condemned and destroyed, unless the claimants shall give bond to dispose of the same in some manner not contrary to the provisions of the said act of Congress.

UNITED STATES v. 307 CASES CONFECTIONERY

(District Court, D. Massachusetts, Mar. 6, 1912)

N.J. No. 1642

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict for claimants.[49]

DODGE, *District Judge* (charge to the jury). The printed forms of verdicts which will go out with you when you go out to consider this

[49] Reversed, *United States* v. *R. C. Boecket & Co. et al.*, p. 637, post.

case are a little different from those you have used before. A specimen will be enough: "The jury find that the candy eggs contained in 131 boxes are"—then there is a blank—"adulterated." That verdict you will complete either by omitting or by inserting, according as you shall find, the word "not" in that blank. The foreman will sign that verdict when it is agreed upon, in the usual way. There will be one verdict to be rendered in each of these three cases, and you have a form applying to each one. The only difference between the three cases, the only respect in which one differs from another, is that in case No. 395 the United States proceeds against 96 boxes of candy peaches and pears. Now for the present purposes you may treat this case as if it were a proceeding against the candy pears only. The Government admits that it has nothing to object to in the peaches, and you may disregard them. You may treat this case as if it related to the pears and nothing else, and when your verdict is rendered we will see what to do with the peaches.

This, as you have heard, gentlemen, is a prosecution under the Pure Food Law, so-called; and we shall all agree that of all the laws ever passed by Congress it is probable that that is one of the most useful, and one which has benefited the people of this country, probably, as much as any other. There is no question that such a law should be properly enforced, just as any other law of Congress should be properly enforced. It is, nevertheless, true that that law, like all the other laws which Congress passes, is a law passed for practical purposes, to be considered by practical people, and not to be given an unduly theoretical construction.

The law says, as you have heard several times while this case has been on trial, that all goods in interstate commerce which are adulterated are liable to be forfeited to the United States—all goods within the act, goods which come within the Pure Food Law. The law also says in so many words that candy is adulterated within the meaning of the law if it contains talc. There is no dispute about that. Those are the words of the law.

The Government in seeking to have these goods declared forfeited rests upon the mere words of the law. The Government says: "This candy had talc in it; never mind anything more, it has talc in it; therefore it is adulterated under that law."

Well, gentlemen, the Government does not try to show you in this case that the goods are injurious to anybody. You have no such question as that before you. You are not to inquire, for any purpose in this case, whether the talc would hurt anybody or whether it would not. So far I agree with the contention of the Government counsel. The Government does not try, and there is no question for you to consider, as to whether talc is injurious, or whether talc in the quantities which these Government experts have described is injurious. There is no such question before you here.

It seems to me that to say that the goods are necessarily adulterated under the law as it stands, if only any talc, no matter how little, may be found in them, is not the proper construction of the law. Such a claim might be good, undoubtedly is good, in strict logic; but does it follow that for the purposes for which this law was intended it is good? I do not think it follows that any such thing was necessarily the intent of the law when it was passed. We must sup-

pose that the law was passed by reasonable and practical men for use among reasonable and practical men. I take on that question a little different view from that taken by the Government. It is the duty of the court to instruct the jury in matters of law. Questions of fact it is the duty of the court to submit entirely to the jury. The court should not undertake to interfere with any question of fact, but questions of law are for the court, and if the court makes any mistake in ruling upon them the party against whom he rules has a perfect remedy by appeal.

Now, I shall instruct you, gentlemen, that the Government in order to prove these goods adulterated, and to be entitled to a verdict from you that they are adulterated, has the burden of satisfying you by a fair preponderance of the evidence, in the first place, that there was talc in these candies; and, in the second place, that there was something beyond a mere chemical trace of talc, that is to say, a quantity sufficient to enable you, as reasonable and practical men, to say that it was significant or important for some possible practical purpose.

Let us take first the question, Was there any talc in this candy? The Government has the burden to satisfy you of that, in the first place, by a fair preponderance of the evidence. If it has failed to do that, you should find for the defendant, without going any further. On the one side you have the evidence of the experts introduced by the Government. They tell you they found talc, as a result of their examination. They undertake to tell you or to estimate for you how much talc they found. Now it is for you to say how far you will believe them. You have heard them cross-examined. They have been made to detail before you the manner in which they treated these candies in their analyses, and the reasons which they have for believing that what they found in the candy was talc. All that evidence you are to consider, and consider fairly. You are to say how far you will believe it. If there is any evidence the other way, you are to consider that in the same manner. You are to say, then, which way to your minds the preponderance, the fair preponderance, of the evidence has been.

The witnesses for the Government, as I understand them, have told you that they found in these candies, as a result of their analyses, mineral matter. They have not undertaken to claim to you that all of it was talc, at least not all of them have made that claim. There was mineral matter. Talc is mineral matter, but not all mineral matter is talc. What the Government has to prove to you is, in the first place, that there was talc in these candies, and you must say whether that has been proved by a fair preponderance of the evidence or not.

If you are so satisfied by a fair preponderance of the evidence that the candy did contain talc, I shall instruct you that it is still necessary to consider to some extent the amount of talc that there was there.

We have been told in the course of this case that there are no substances which are chemically pure. We have been told in the course of this case that there is mineral matter, to a greater or less quantity, contained in every ingredient of this candy. Gelatine enters into it, and gelatine, they tell us, contains mineral matter, a

trace, a small quantity, however much it may be. Chocolate enters into it; in that we are told there is mineral matter. Sugar enters into it; in that we are told there is also mineral matter.

In considering the quantity of a substance like this, not claimed to be poisonous, it seems to me that of a quantity so small as not to be appreciable for any practical purpose whatever, the law does not take account. Things which are entirely trifling, insignificant, unsubstantial, of no consequence for any practical purpose, as a general rule the law does not take account of. Of course, gentlemen, we are to give to this law a fair and honest construction, for the purpose of enabling it to be carried out to accomplish that which it was intended to accomplish. It is important that the law should be strictly enforced. But it does not follow from that that we are required to give the law a construction or an effect purely theoretical, as opposed to a practical construction.

If you have been satisfied by a fair preponderance of the evidence that there is talc in these candies, I instruct you that you should also be satisfied, in order to find for the Government, by a fair preponderance of the evidence, that there is in the candies a quantity of talc sufficiently appreciable to enable you, as reasonable men, to regard it as significant or important for some practical purpose. I shall instruct you, gentlemen, that it is not merely a quantity so small that all the difference it could possibly make for any purpose whatever would be only imaginary or theoretical. That is not enough to enable you to find these eggs adulterated within the meaning of this law. A mere mechanical trace, only to be detected by a skillful chemist, would not, as I shall instruct you, be sufficient.

There must be such a quantity, at least, as you would say, supposing that were the question, you could possibly regard as enough to show on the manufacturer's part some purpose of deception. If it were so insignificant and small that you could not say, if the question of deception on the manufacturer's part were raised here, that he could possibly have been supposed to have any purpose of deception, if he used only so small a quantity as that, then I shall instruct you that there was not enough talc in this candy to justify your finding it adulterated within the meaning of the act.

I think that the law means that there should be at least so much of the forbidden substance in this candy as you would say, if that were the question, might possibly be considered by you as enough to show a want of that extreme care expected of the manufacturer of candies, in guarding the purity of his product; and if you find that the quantity of talc was so small that, no matter what extreme care the manufacturer had to use, yet he would not be guilty of any failure whatever in that extreme care if only so much talc as that got in, then that would not be a sufficient quantity of talc to warrant you in finding the candies adulterated within the meaning of the law.

Now, gentlemen, it is not necessary that you should find that there was enough talc to injure or hurt any consumer of those candies, for the purpose of this case. That is not the question here. Undoubtedly it may be true that a quantity so small that it could not possibly hurt any consumer would be within the meaning of the law, and would require you to find the candies adulterated. All that I mean to say is that, in my opinion, and I shall so instruct you, there

should be at least some quantity beyond a mere chemical trace, something which you can regard as going beyond what is merely imaginary or merely theoretical.

Counsel can remind me of anything they desire me to say further.

Mr. FURBER. Your Honor suggested that if it were only such a quantity as would be detected by a skillful chemist. I suggest, of course, that a layman could never detect it; it would always have to be a skillful chemist who could ever detect it.

COURT. I understand you desire to except to that part of my charge?

Mr. FURBER. Yes.

COURT. Very good. Anything else?

Mr. FURBER. Yes.

COURT. You may save your exceptions with the stenographer. My inquiry now is whether I have omitted to say anything I indicated to counsel I would say?

Mr. FURBER. Does Your Honor mean to charge that if a layman could not detect this, it would not be adulterated?

COURT. That is not a question which I feel called upon to answer, Mr. Furber. You may except to what I have said.

Mr. FURBER. I am merely trying to get some basis for my determination as a lawyer. May I have an opportunity to except to portions of Your Honor's charge after it is written out, in order that I may make the exceptions definite, or does Your Honor insist that I should do it now?

COURT. What you have to do now is to indicate the parts of the charge to which you except. That is all it is necessary to do at present.

Mr. FURBER. I except to what I have just suggested. I except to the portion of the charge which relates—I except to all of Your Honor's charge that goes beyond saying that merely the presence of talc is sufficient. Perhaps that is the easiest way of stating it, if Your Honor will allow me all my rights under that?

COURT. Certainly; I think a brief indication is all that is necessary—enough to give the other side notice. Have the defendants any exceptions?

Mr. BEAL. We have none.

UNITED STATES v. AUERBACH & SONS

(Circuit Court, S.D. New York, Apr. 4, 1912)

N.J. No. 1803

Information charging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of not guilty.

HOLT, *District Judge* (charge to the jury). The charge in the information in this case is that the defendant shipped in interstate commerce on the 25th day of February, 1911, from the city of New York to the city of Colorado Springs, consigned to the J. T. Clough Mercantile Company, a certain article, being and purporting to be an article of food and an article used for food by

man, to wit, milk chocolate, in a package containing the label "Auerbach Red Band Brand Sweet Milk Chocolate, Warranted to be a pure and delicious confection", which said article shipped as aforesaid was adulterated in that a certain substance, to wit, wheat starch, has been substituted wholly or in part for the article. And it is further alleged that the article was adulterated, in that the aforesaid substance, wheat starch, has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

Now the section of the Pure Food Act, under which this information is brought, provides that, for the purposes of the act, an article shall be deemed to be adulterated, first, in the case of drugs:

Then follows a description of what is adulteration in the case of drugs.

Then in the case of confectionery:

If it contains terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound or narcotic drug.

If any confectionery contains any of those articles, it is adulterated, and the act does not provide that the introduction of anything else shall constitute the adulteration of confectionery.

Now the defendant claims that this is a confectionery, and it is so described on the outside of the package. It is also described as a food. Now, it is for you to say, gentlemen, in the first place, whether it is a food or a confection, or both. I do not understand that there is any claim that there is any evidence in this case that they violated the provisions of the Pure Food Law in relation to confectionery.

Confectionery, of course, often contains a great many complicated combinations of different substances, and Congress has not undertaken to say that it shall not consist of combinations, but it says that it shall not contain any of these things mentioned in the act. This milk chocolate does not contain any of such things. Therefore if this is a confection, in your opinion, I charge you that you should acquit the defendant, unless you also hold that it is a food, and violates some food provision of the act.

Now, the act says in the case of food:

First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

It is urged in this case that wheat starch had been packed with it so as to reduce its strength and injuriously affect its quality or strength.

Second. If any substance has been substituted wholly or in part for the article.

The Government alleges that wheat starch has been substituted for the article.

Now, the act in the case of food generally applies—or some part of it at least applies—to a single substance of food such as flour or meat, or some original, simple article, but there are a great many things which constitute food, which are compounds, and the act makes provisions in regard to that, and it says, "An article of food which does not contain any added poisonous or other added deleterious ingredients"—and that is conceded in this case of milk chocolate—shall not be deemed to be adulterated in the following cases:

First, in the case of mixtures or compounds which may be now or from time to time hereafter may be known as articles of food under their own distinctive name which shall not be an imitation of or offered for sale under the distinctive name of another article, and the act provides that the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

Now, this article contains a statement that it is manufactured by Auerbach & Company of New York City, which complies with that provision.

Now this article is sold as milk chocolate, which indicates upon its face that it is a compound or mixture. There is no such thing as milk chocolate as a natural single substance. There is chocolate and there is milk, and there is combined in this, therefore, something that makes milk chocolate. And, if in your opinion, this article comes within this provision relating to mixtures or compounds and is to be regarded as an article of food, and is an article which does not contain any added poisonous or deleterious ingredients, and is known under its own distinctive name, and is not an imitation of or offered for sale under the distinctive name of another article, and the name and the place of manufacture is on the brand, why, then you should acquit the defendant.

So that the question comes down to this: Whether milk chocolate commercially means something which does not contain any wheat starch. It is admitted that the insertion of starch does not make it unwholesome. The defendant claims that he put in the wheat starch at a time before there was any action by the Government objecting to it; that it was authorized by formulas for the manufacture of milk chocolate before the Pure Food Law was adopted, and that the reason why he put it in was so as to give it greater consistency, so it would be a better commercial article, particularly for warm climates.

Now this, as I say, is a compound. There is milk in it and there is cocoa—a buttery chocolate material. There is powdered sugar—300 pounds of powdered sugar in the formula used—more sugar than all the other materials put together. But the Government does not complain that they do not put outside the package that there is sugar in it. The complaint is that they do not put outside the package that there is wheat starch in it. Now, if milk chocolate in the ordinary commercial sense includes all those things, that is a term which may be used, but if it does not include, then, if, to the ordinary person, milk chocolate can not be properly made and is not properly made with wheat starch inserted in it, why then the act of the defendant is not protected by this provision of the act with regard to compounds. Now, that is a question for you gentlemen. In the first place, was it a confection? If it is, and it is not a food, why, you should acquit.

In the second place, is it a food? And, if it is a food, has a substance been mixed with it so as to reduce or lower or injuriously affect its quality or strength, or has a substance been substituted wholly or in part for the article. Now, it is for you to say, in the first place, whether that provision of the act applies to such a compound as this. If they were simply selling a pure original article, like chocolate, or like sugar, and then there was mixed with it wheat flour, why, the act would undoubtedly apply.

But it seems to me that this article we are dealing with is a compound called milk chocolate, and the only question in the case is whether this is a milk chocolate; whether it is permissible in the ordinary meaning of the trade term to make milk chocolate, by putting in such a proportion of wheat flour as may in the opinion of the manufacturer improve it as an article of commerce without essentially affecting or injuring it as milk chocolate.

Gentlemen, I leave the case with you.

UNITED STATES v. GIDDEN

(Circuit Court, S.D. New York, May 3, 1912)

N.J. No. 1693

Information charging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

MAYER, *Judge* (charge to the jury). The information in this case charges the defendant, Herman M. Gidden, with unlawfully shipping and delivering for shipment from the city of New York, State of New York, and Southern District of New York, to Philadelphia, Pennsylvania, consigned to Kurtz Brothers, a certain article used for food by man, to wit, tomato paste, in fifty cases, packages, and containers, all labeled with the Italian name that you heard spoken of and translated, and then the information says that this tomato paste or sauce or substance shipped as charged was adulterated, contrary to law, in that it consisted in whole or in part of a filthy, putrid, or decomposed vegetable substance.

The case has been tried by counsel for the Government and counsel for the defendant fairly and courteously and in a way to assist you in arriving at a speedy determination one way or the other. The statute under which this information is brought is the one known as the "Food and Drugs Act", and the one you have doubtless all heard of, and perhaps sat on juries and read about, popularly called the Pure Food Law. It is provided in that statute, under section 7 thereof and subdivision sixth, as follows:

"That for the purposes of this act an article shall be deemed to be adulterated if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter", and a person becomes subject to inquiry and prosecution if that sort of substance comes under this provision. The introduction into any State from any other State of any article of food which is adulterated is prohibited, and the person who ships such article of food from one State to another shall be guilty of a misdemeanor.

It is stipulated in this case that the subject matter of the controversy was a subject of interstate commerce, so that there is nothing left in the case for you to determine except whether this food was adulterated, and whether it was adulterated is for you to determine within the definition that I have just read to you.

The act in question is a beneficent law intended to safeguard the people in their daily lives, and to the end that their health may be conserved. The defendant is entitled to every safeguard upon his part that the law throws around him, and no matter what the facts may be, the defendant is always entitled to have the Government prove its case beyond a reasonable doubt. You have sat on juries no doubt earlier in the month, and you know that a reasonable doubt, as you have probably been told, is a doubt with some reason to it; it is not a mere guess or caprice or surmise but a question of some reason, and if the Government does not prove its case beyond a reasonable doubt the defendant is entitled to an acquittal, but if it does, then the defendant must be convicted.

The fact that the defendant says that he did not intend to violate the law is not the question in the case. The question is: Was the law violated? Now, I think it is hardly necessary to attempt any very fine or close or scientific definition of the various words of the statute. In plain English, that you and I use every day, these words mean the substance was rotten, that it was unfit for food for man, and therefore, of course, it was a danger to those to whom this would come. Manifestly, the Government is rarely in the position of proving by actual physical facts that it saw a food product made, and therefore the Government is of necessity compelled to resort to the introduction of expert testimony, and to that end, through its Department of Agriculture, it has examinations made, and it is for you to say in this case whether the exhibits here presented, which were concededly taken from this shipment, were kept step by step in such a careful condition as to warrant you to say that the examination made by the Government experts was fair and just and had no purpose in it other than to discover the truth. You are entirely competent to determine that from the evidence before you. It has been shown to you that the inspector who originally took this part of the shipment turned it over to the Department of Agriculture, and each one of these experts got one or the other samples in due course and made the examinations they described. It is for you to say whether their examinations as testified to, together with their testimony as to the effects and results of that examination, show that this substance was, as the statute says, in whole or in part a filthy, decomposed, or putrid vegetable substance.

There remains, as I recall it, only one other question to which your attention should be directed. It has been suggested by the defense that between the time the tomato is ready for canning and the time that it is actually put into the cans, the process of nature may be such as to produce a decomposed or putrid condition. The learned counsel for the Government says that such a contention does not go to the right of the case, and I charge you that his view of the matter in that regard is right. What happened between the time the tomato was found in the factory and what happened after it had stayed there for a while and before it was canned is entirely immaterial under this statute. The question is whether the substance which is the subject matter here referred to at the time that it became the object of interstate shipment was in such a condition. So as to be entirely fair to the defendant, you may take into consideration, under the rules

which I have laid down, the testimony of the Government expert who went around to some canning factories here and told you it took a considerable length of time before a healthy tomato could become decomposed or putrid; and also the testimony of Dr. Dunbar as to the practical experiment made in respect of keeping healthy tomatoes.

This is a case that is comparatively simple of solution one way or the other. You must give the defendant every reasonable doubt to which he is entitled, and, under the rules laid down, find your verdict.

UNITED STATES v. AMERICAN CHICLE CO.

(District Court, D. Oregon, May 10, 1912)

N.J. No. 1939

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

BEAN, *District Judge* (charge to the jury). This is a prosecution under what is known as the Food and Drug Act, passed by Congress in June, 1906, and which makes it an offense, a crime, or a misdemeanor to introduce into any State or Territory any article of food or drug which is adulterated or misbranded. The charge here is that the defendant, in July 1910, shipped from this State into the State of Washington certain packages of chewing gum, and that this chewing gum was misbranded. The indictment contains two counts, or in other words, the facts upon which the Government relies for a conviction are charged in two separate counts in the indictment, but the only difference between the two is that in one it is charged that chewing gum is a food and in the other that it is a drug. It is alleged that these packages contained labels reading—

Beeman's Pepsin Chewing Gum Trade Mark Registered U.S. Patent Office. A delicious remedy for all forms of indigestion. Originated by the Beeman Chemical Company. Manufactured by American Chicle Company, Successor, Incorporated. Cleveland, Ohio, U.S.A. Price 5 cents. Each of the enclosed tablets contains sufficient Beeman's Pure Pepsin to digest 2,000 grains of food. Guaranteed by American Chicle Company under the Food & Drugs Act June 30, 1906. Serial No. 1557.

It is alleged in each count of the information that this label was false and misleading and that the package was therefore misbranded in that each of the tablets enclosed in the package contained no pepsin which would be and was effectual to accomplish the purpose for which pepsin is ordinarily used, and that the statement "Beeman's Pepsin Chewing Gum" upon the package and label was calculated to and did convey to intending purchasers the idea that a substantial amount of pepsin was present therein and sufficient to aid the digestion of persons using such drug. Then it is also charged that the statement on the label that such package contained pepsin sufficient to digest 2,000 grains of food was false and misleading for the reason that it required not less than 40 milligrams of pure pepsin to digest 2,000 grains of food, whereas in truth and in fact there was no pepsin in these packages at all.

The defendant has entered a plea of not guilty and that plea puts in issue the material allegations of the information. It is admitted by the defendant, however, that it manufactured the gum and that it shipped it to the State of Washington, so there is no issue upon that question. But it denies that the gum was in fact misbranded, and that is the question for you to determine from the testimony.

The particular charge of misbranding and the one to which your attention is especially directed is the statement on the label to the effect that each of the enclosed tablets contains sufficient Beeman's pure pepsin to digest 2,000 grains of food. The Pure Food Law says that the term "misbranding" shall "apply to all drugs or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular" and as applied to food if it shall be labeled or branded so as to deceive or mislead the purchaser. So that there are two questions in the case, first whether the brand upon that label was calculated to mislead the purchaser; in other words, whether the statement on the label that it contained pepsin was, if false, such a statement as would be calculated to mislead one who desired to purchase the article and if that statement is false and was so calculated to milead the purchaser then it was a misbranding within the meaning of the statute. Again, it was perhaps not necessary for the defendant company to state on the label the quantity of pepsin contained in the gum, but when it assumed to do so the law imposes upon it the duty of stating the truth in reference to the matter, and if it made a false statement it was misbranding within the meaning of this statute and therefore if you believe from the testimony that the statement on the label that each of the tablets contained sufficient pure pepsin to digest 2,000 grains of food is false, it was misbranding within the meaning of this statute, and the defendant would be guilty of a violation of the law.

Now, in that connection it is proper to allude to the manner in which this gum was manufactured and to the results of the manufacturing process. The law applies to an article as it is put upon the market, so when these people state on its label that each package contains pure pepsin sufficient to digest 2,000 grains of food, it was a false statement unless the article as put on the market contained that amount of pepsin. The law requires the statement on the label to be a true statement of the contents of the package in this regard, and if it is false the defendant is guilty of a violation of the statute. There is evidence tending to show that the defendant company has filed in a public office a trade-mark. I believe the trade-mark as it appears from the certified copy of the filing is "Beeman's Chewing Gum." The filing of that trade-mark would not give the defendant the right to put a false statement upon the label of their manufactured article. It would probably give them the right to use the name of Beeman's Chewing Gum, or Beeman's Pepsin Chewing Gum—whatever the trade-mark is—and protect them in that right and prevent an infringement or use of it by any other manufacturing company, but it would be no defense or excuse for misbranding the goods. Again the statute provides that goods that are mixtures or compounds used

for food and sold under a distinctive name, which do not contain any added poisonous or deleterious ingredients, shall not be deemed to be misbranded. For instance, if there is a food product which is composed of divers and sundry ingredients and is sold in the market under a distinctive trade name, the mere fact that it is sold under that name is not a misbranding, but if put on the market under a distinctive trade name and in addition to that the manufacturer undertakes to state the contents and states those falsely he does violate the statute. To illustrate, it was said in argument here that a product known as Coca-Cola was sold on the market under the name of Coca-Cola, and that it had been held by some court that that was not a misbranding within the meaning of the statute. If that doctrine has been announced, and of that I have no knowledge, and it is not necessary at this time for the court to indicate any views upon that subject, it would only be an illustration of what I am intending to convey by the term "distinctive name", so that if the product was branded and sold on the market as Coca-Cola, although that might not be a misbranding within the meaning of the statute, yet any manufacturer who, in addition to that, put on the label a statement to the effect that that article contains certain ingredients and that statement was false, it would be a misbranding. So in this case. Again it is said where an article is sold like, for instance, Beeman's Pepsin Chewing Gum under that name alone, it would not be a misbranding if it contained no pepsin. Now, I am not prepared to say whether that is the law or not, nor is it necessary in this case, because here the defendant has gone beyond that and not only branded the article "Beeman's Pepsin Chewing Gum", but it has undertaken to state, and has stated, that it contains pepsin in sufficient quantity to digest 2,000 grains of food and that the Government charges to be false, and that is one of the issues and the important issue in the case.

The burden is on the Government to sustain the charge made in the information. In other words, it must prove that this label was either misleading and calculated to deceive the public or that it is false. In other words, that fact that it was false would prove that it was misleading as far as this case is concerned. The statement on the package is that it contained pepsin sufficient to digest a certain quantity of food. That statement is either true or false. If false, it is a misbranding; if true, it is not misbranding.

The label contains, as you will remember, another statement, and that is that "this package is a delicious remedy for all forms of indigestion." There is no charge in the information that the defendant violated the statute by this statement on the label and indeed the courts have held that that is not misbranding within the meaning of the Pure Food Law. The mere statement on a package of this kind that it contains a delicious remedy for all forms of indigestion would not be misbranding and there is no charge in this case that it is.

Now during this trial there has been a great deal of expert testimony—men and women skilled, or professing to be skilled, in the art of chemistry have been called and testified as witnesses before the jury, and they have given the results of their analyses of this product and their conclusions from such analyses. This testimony has been admitted to advise the jury, but you are not bound to follow the testimony of any of these experts or all of them unless you are satis-

fied—unless it meets with your approval. You are to find the facts in this case from the testimony—all the testimony as you understand it, and in weighing this testimony, you will not of course overlook the fact that the man who actually manufactured this product testified before you in reference to its ingredients and the amount of pepsin, if any, put in, and the manner in which it was manufactured, and with that testimony together with the expert testimony that has been given here it is for you to determine from his record whether or not the label was false or misleading and that you must determine from the evidence—from the testimony as you understand it and according to your own conclusion, and not the conclusions of anyone else.

Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which a witness testifies, his appearance on the witness stand, evidence affecting his credibility, or his interest in the controversy as it may be manifested at the trial, or may appear during the trial.

Mr. MAGUIRE. Just one thing. I would like to have the instruction given in accordance with the law laid down in *United States* v. *443 Cans of Frozen Egg Products*, and that the condition of the product in the hands of the consumer is the place and time to test its fitness.

COURT. I have already said to the jury that the question here is whether this label was true or false as applied to the product after it was manufactured and at the time it was shipped and put on the market.

Mr. COLE. Just simply to follow out, I want to save the same points I have been trying to save all the way through this case; for that reason I want to save exceptions to the court's refusal to give the instructions requested by the defendants, Nos. 1, 2, 3, 4—I think you gave 5, didn't you?

COURT. Yes; I gave 5.

Mr. COLE. Nos. 6, 7, 8, 9, 10, 11, 12, 13, 14, 15. And also save an exception to that part of the court's instruction in reference to the 2,000 grains of food. I don't remember just the wording.

COURT. That will be sufficient for the record. That calls my attention to a matter that I overlooked.

As I said to you, gentlemen, this information contains two counts. In other words, it is charged that the alleged misbranded article was a food, and it is also charged that it is a drug. I suppose the district attorney, in drawing the indictment, was in doubt about that, so he charged it both ways; but you can only find the defendant guilty on one or the other of these counts, if you find him guilty at all, for it must be either a drug or a food. If it is a food and misbranded, it is a violation of the statute. If it is a drug and misbranded, it is a violation of the statute. Now, these terms are defined in the statute: "The term 'drug' as used in this act shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals. The term 'food' as used herein shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether sim-

ple, mixed, or compound"; and I think it must be a question of fact for you to determine from this testimony whether this is a food or a drug.

UNITED STATES v. J. L. HOPKINS & CO.

(Circuit Court, S.D. New York, May 31, 1912)

N.J. No. 1881

Information in four counts alleging violation of section 2 of the Food and Drugs Act. First and second counts dismissed. Jury trial. Directed verdict for defendant on third count. Verdict of not guilty on fourth count.

In May, 1910, the United States attorney filed an information, and on September 23, 1911, another information in four counts, against J. L. Hopkins & Co., a corporation, New York, N.Y., charging shipment by said company, in violation of the Food and Drugs Act—

(1) On or about September 1, 1909, from the State of New York into the State of Virginia, of a quantity of gum tragacanth which was adulterated and misbranded. The product was labeled "5 lbs., No. 1 Tragacanth Gum U.S.P. (astragalus gummifer) powd. J. L. Hopkins & Co., New York." Adulteration was alleged for the reason that the product was sold under and by a name recognized in the United States Pharmacopœia, to wit, gum tragacanth, and differed from the standard of strength, quality, and purity as determined by the test laid down therein at the time of shipment and investigation, in that it was not gum tragacanth and was not a gummy exudation from *Astragalus gummifer* Labillardiere or from other species of astragalus, but was a powdered Indian gum, and also in that it failed to conform to the test laid down in said Pharmacopœia, among others the tests by sodium hydroxide and iodine and alcohol, and the standard of strength, quality, or purity was not stated on the package except the false statement that the product conformed to the standard prescribed in the United States Pharmacopœia and its strength and quality fell below the professed standard and quality under which it was sold, in that it was sold as gum tragacanth of the standard of the United States Pharmacopœia, and was not such, but was of the character hereinbefore described. Misbranding was alleged for the reason that the product was labeled as set forth above, so as to deceive the purchaser or purchasers, in that the package and label of the article bore statements regarding it and the ingredients and substances contained therein which were false and misleading in that they stated that the article was gum tragacanth of the standard prescribed in the United States Pharmacopœia, whereas it was not gum tragacanth but was Indian gum, and was not of the standard prescribed by the United States Pharmacopœia.

(2) On or about February 24, 1910, from the State of New York into the State of California, of a quantity of senna leaves which were alleged to have been adulterated and misbranded. The product

was labeled: "412 Alex. Senna Broken U.S.P., From J. L. Hopkins & Co., under the Food and Drug Act June 30, 1906, Serial 3236." Adulteration of this product was alleged for the reason that it was sold under and by a name recognized in the United States Pharmacopœia, to wit, senna leaves, and differed from the standard of strength, quality, and purity as determined by the test laid down therein at the times of shipment and investigation, in that it contained stalks, stones, seeds, pebbles, and other substances foreign to senna leaves, and the standard of strength, quality, or purity was not stated upon the package excepting the false statement that the article was of the standard prescribed in the United States Pharmacopœia and certain substances, to wit, stalks, seeds, pebbles, and other foreign substances, had been substituted in part for the article, which were not declared, and its strength and purity fell below the professed standard and quality under which it was sold; that is to say, it was sold as Alexandria senna leaves, whereas it was not such but was as above described. Misbranding was alleged for the reason that the product was labeled as set forth above, so as to mislead the purchaser or purchasers thereof, in that the package and label of the product bore statements regarding it and the ingredients and substances contained therein which were false and misleading in that they bore statements to the effect that the article consisted entirely of senna leaves of the standard prescribed by the United States Pharmacopœia, whereas it did not, but consisted of a mixture of senna leaves, with stalks, seeds, pebbles, and other foreign substances.

On April 25, 1911, the case covering the shipment of the gum tragacanth having come on for trial, counsel for defendants moved to dismiss the information filed in May 1910 on several grounds, the chief of which were that the information did not contain allegations showing that notice had been given to the defendant by the Department of Agriculture or that a hearing had been had, and the court sustained the motion, and on September 23 the new information in four counts was filed covering the shipments of gum tragacanth and senna leaves. On October 2, 1911, defendants filed their plea and answer, and on February 13, 1912, the court rendered the following opinion striking out two of the pleas by defendant.

HOUGH, *District Judge.* Having been called upon to plead, defendant offers a written document entitled "Plea and Answer", whereupon the prosecution moves to quash (i.e., strike out) as irrelevant or improper most of said written instrument.

An examination of the "Plea and Answer" shows it to consist of four parts:

First. A declaration that defendant is not guilty;

Second. That prosecution is barred by the statute of limitations;

Third. That defendant was formerly acquitted of the same misdemeanors as are charged in the present information;

Fourth. A statement which may be summarized as follows, viz: Long before the passage of the Pure Food Act, gum tragacanth was a well-known article of commerce. It is a vegetable gum, exuding from many varieties of plants, which plants exist for the most part

in Asia, but all such vegetable gums having the same properties were known as tragacanth. The United States Pharmacopœia (8th ed., Sept. 1909) is a publication which (for the purposes of the Pure Food Law) fixes the standard by which the quality of drugs shall be determined. The edition of the Pharmacopœia above referred to declares in its preface that "the standards of purity and strength (described in the book) are intended to apply to substances used solely for medicinal purposes and when professionally bought, sold and dispensed as such."

Said book contains a complete list of drugs, of which "a medicine dose" is prescribed, and neither tragacanth nor senna is on that list.

In May 1909, defendant imported "33 bags Gum Indian Tragacanth." One of these bags was inspected by the cutoms authorities and an examiner of the Department of Agriculture, and passed as a "crude drug". Thereafter said gum was ground by defendant, and after such grinding a skilled chemist made an analysis thereof and reported that said ground tragacanth complied with the said Pharmacopœia's requirements. Thereafter defendant received a pretended order from a firm in Norfolk, Virginia, asking among other things for 5 pounds tragacanth gum and 10 pounds senna leaves—this order was really given by an employee of the Department of Agriculture. Defendant sent, inter alia, both the tragacanth gum and senna leaves, filling the order for tragacanth with its second quality described as "tragacanth gum No. 1 U.S.P. Powder." That at or just before the time of this sale certain employees of the Department of Agriculture had publicly claimed in writing that gum tragacanth from India was not real tragacanth, but of this fact no public notice had been given, nor was defendant aware of it at the time of shipment.

Defendant had long sold and catalogued several varieties of senna, described as "Whole leaf U.S.P.", "Half leaf", and "Broken." Defendant received an order from a firm of San Francisco, California, for one bale of senna "U.S.P. Broken Powder", and for two bales "Senna Alex. U.S.P. Broken." Defendant filled this order partially, by shipping two bales of senna, broken, which had been passed by the customs and agricultural authorities of the United States. Said order so received from California was not a genuine order, but one given at the instigation of the United States Department of Agriculture. Senna in the leaf is not used for medical purposes, but by soaking and filtration is made into extract, so that the broken leaf is as effective as the whole leaf.

The information consists of four counts:

(1) Shipping in interstate commerce adulterated gum tragacanth, in that it differs from the standard of strength, quality, and purity laid down in the United States Pharmacopœia;

(2) Shipping in interstate commerce misbranded gum tragacanth, in that the article was labeled with the false and misleading statement that it was tragacanth of the standard prescribed by said Pharmacopœia, whereas it was not gum tragacanth, but Indian gum, and not of the standard prescribed as aforesaid;

(3) Shipping in interstate commerce adulterated senna, not of the strength, quality, and purity prescribed by the United States Phar-

macopœia, in that it contained stalks, stones, seeds, pebbles, and other substances foreign to senna leaves;

(4) Shipping in interstate commerce misbranded senna, in that its label represented the article to consist entirely of senna leaves of the standard prescribed by said Pharmacopœia, whereas it in fact consisted of a mixture of said leaves with stalks, seeds, etc., etc.

MEMORANDUM

It is suggested that so extraordinary are the prosecutions or proceedings brought under the Pure Food Law, that some new procedure should be brought out in respect to them—apparently for the purpose of preventing a trial occurring on the criminal side of the court until after the facts have been looked into by the court itself.

This is a startling innovation, and so far as I am concerned might be disposed of by expressing my unwillingness to attempt such new procedure, and my belief that juries are far more apt to be extremely tender of defendants and their rights, real or pretended, than any judge could be.

But it is perhaps advisable to indicate, even at some length, the view that no such method of judging facts is permitted by the criminal law.

It is the invariable practice in this district to prosecute under the pure food law by criminal information—that is, the Government alleges a misdemeanor.

It is not open to doubt that Congress has created several possible misdemeanors by the passage of the act in question. Procedure by criminal information is common law practice, and being a matter of practice it needs no statute to support it. Originally it was a concurrent remedy with indictments for all misdemeanors except misprison of treason. In practice, even before the independence of the United States, leave to file information was seldom sought by the Attorney General except at the instance of a high officer of Government.

Informations under the Pure Food Law are perfect representatives of this ancient practice being brought by the district attorney under leave of court at the instance of the Department of Agriculture.

In the United States the function of an information is limited, however, by the constitutional provision that no one shall be held to answer for a "capital or otherwise infamous crime", except on presentment by the grand jury. (On this subject generally see 2 Hawk, P.C., cap. 26, sec. 3, p. 326 et seq.; *United States* v. *Waller*, 1 Sawyer 701; *Ex parte Wilson*, 114 U.S., at 425; *United States* v. *De Walt*, 128 U.S. 393.)

An information, therefore, being no novelty, it does not become one by being applied to a new misdemeanor. The course of trial is and must remain that of an indictment. It is therefore necessary to inquire what pleas are possible either to an indictment or information, there being no such thing known as an answer in criminal law in the sense in which that word is used on the civil side. All possible pleas on the criminal side of this court must be either in abatement, in bar, or the general issue.

A motion to quash is not a pleading and therefore is not included, and jurisdictional pleas, which are sometimes given as a separate

class, are really either in abatement or bar according to whether the objection is to a particular court or to courts in general. Tested by these rules this defendant has—

First. Pleaded the general issue, which is of course proper and sufficient;

Second. The statute of limitations is raised by special plea, which is permissible but not necessary; *United States* v. *Brown*, 2 Lowell 267;

Third. A plea is tendered of *autre fois acquit*, concerning which plea the record is in the same condition as found by me in *United States* v. *Robinson*, memorandum filed January 18, 1910; and finally,

Fourth. The evidential matter as above digested is put into a pleading.

It may first be noted that the plea of *autre fois acquit* or *convict* should not be tendered simultaneously with the general issue. It is the rule in criminal law as it was at common law on the civil side, that defenses, both dilatory and peremptory, if they did not go to the merits of the controversy, should be pleaded first, in order that judgment (if against defendant) might be *respondeat ouster*. This practice arose after the severity which directed final judgment against defendant on overruling a plea in bar (*Rex* v. *Taylor*, 3 B & C 502) had been modified.

This, however, being a matter of detail only, I have examined the record as if the prosecution had filed a replication to the plea of *autre fois acquit* and find by the record that the previous information failed for what the court considered defects apparent on the face thereof. Therefore it was no information, and the defendant was never in jeopardy.

Notwithstanding the informality of the fourth plea, what is sought to be raised is I think plain enough, unless this defendant shipped a "drug" it is not guilty under this information. "Drug" is defined by the sixth section of the act, and the standard of drugs is to be ascertained from the United States Pharmacopœia by the seventh section thereof. What the Pharmacopœia says, therefore, the defendant asserts the court may take judicial cognizance of, and having done this it is found that neither leaf senna nor gum tragacanth is a drug in the sense in which the Pharmacopœia uses that word, i.e., "Substance used solely for medicinal purposes and when professionally bought, sold, and dispensed as such."

If such a plea as this (plainly in bar if it is anything) can be tried, it must be tried either by the court or the jury; and no matter which course of trial is adopted, it is a sure test of a good plea that the trying power can give judgment or verdict either way.

If it be regarded as a plea triable by the court only, judgment against the defendant would be *respondeat ouster*, but such judgment would be based necessarily upon the insufficiency of the facts alleged, admitting them to be true. This reduces the whole matter to an absurdity, for if the facts alleged (as I understand them) be true, the defendant is not guilty and the court has no more power to pronounce a judgment of not guilty than it has to enter one of guilty.

I think this analysis shows that the alleged plea amounts to no more than a statement of evidence intended to support the plea of not guilty; therefore it is not a plea at all.

It is ordered: That the pleas of not guilty and statute of limitations stand; that the plea of *autre fois acquit* be overruled after an inspection of the records of this court, and that the remainder and balance of the document filed and entitled "Plea and Answer" be stricken from the files as unauthorized by law.

On May 30, 1912, the case came on for trial before the court and jury. The trial was upon the third and fourth counts of the information. The first and second counts charging shipment of adulterated and misbranded gum tragacanth were nolled on the grounds that the shipment of that article was not made from the Southern District of New York, but from the Eastern District of New York. At the end of the Government's case, upon the trial of the third and fourth counts of the information charging shipment of adulterated and misbranded Alexandria senna leaves, counsel for defendant moved to dismiss the information. The motion was granted as to the third count covering the charge of adulteration of senna leaves, as more fully appears in the following opinion:

HAND, *District Judge.* This is a case under the title of June 30, 1906, an information charging the defendant with shipping in interstate commerce a bale of senna labeled "412, Alex. senna, Broken, U.S.P." The prosecution has proved the shipment of the bale and also its contents.

Now, it appears that in the shipment of senna to the United States there are several grades, first beginning with what is known as whole leaf senna, the second, the three quarter leaf, third, the one half leaf, fourth, broken leaf, fifth, senna siftings, and sixth, senna dust. All of these products are prepared by a process of sifting from the gross products; it is pulled from the senna plant by Arabian natives of the African desert.

There is evidence in the case sufficient to go to the jury that the product in question was not broken senna but senna siftings. On that question of fact it would not be my province to determine if the case were to go to the jury, but the law requires me to assume upon this motion that the product was senna siftings, and that, therefore, it did not comply with the label which described it as broken senna. That, however, is not sufficient to make a case with the Food and Drugs Act.

Both sides concede that the only provision applicable to the case is the first subdivision of section 7 of that act, which reads as follows:

> If when a product is sold under or by a name recognized in the United States Pharmacopœia or the National Formulary, it differs from the standard of strength, quality, or purity, as determined by the test laid down in the United States Pharmacopœia or National Formulary official at the time of the investigation.

If the defendant has violated the act it is in that it has shipped something which differs from the standard of strength or purity from that laid down in the United States Pharmacopœia.

Now, I think that the shipment in this case was sold under a name recognized in the U.S. Pharmacopœia because when that Pharmacopœia used the word senna it certainly included more than the whole leaf, three quarter leaf, or one half leaf, but also included broken senna; nor could the defendant in this case escape consequences of a

violation of the act by describing senna as broken senna, especially as he uses the word U.S.P. But the statute only forbids the shipment of the article which differs in the standard of its strength or purity from what is laid down in the United States Pharmacopœia.

Turning to page 392 of that publication I find that there is no standard laid down except that senna consists of the dried leaflet of the plant and that it should be free from stalks. The only relevant clause in the Pharmacopœia is the phrase which I have just stated—senna should be free of stalks.

Now, the Government contends that the word stalks includes not only the stalk proper of the plant but the stem on which the leaflets grow which is commonly known as the rachis, and for the purposes of this prosecution I will admit that the position of the Government is correct in that respect and that the term stalk includes the rachis. Very well, that being the fact, was there any senna ever brought into the United States which was free from stalk? The proof shows contradiction. Therefore, in considering this clause of the Pharmacopœia it is quite clear that you cannot construe it literally or absolutely; indeed, the Government with some hesitation, I may say at least, makes no very strong argument to the contrary, and I must say that any such argument it seems to me, is hardly worthy of serious consideration because the Pharmacopœia is a book put in the hands of druggists all over the country, men of no great learning, for practical use, and this surely must be intended to bear upon the commercial usages of the country and to have some reference to the raw materials which the chemists actually use, else it is a merely delusive, arbitrary, and scholastic publication which it certainly is not. Therefore, you can not consider the word as meaning it should be wholly free from stalks. What then is the standard of strength or purity which the Pharmacopœia establishes? The senna which passes commercially by the name of broken senna contains less of the stalks than that which passes under the name of senna siftings. If the Pharmacopœia had described both broken senna and senna siftings, I think I might say that that was the standard; that is, by those terms it would have reference to the commercial usage of the terms, and that if a person sold broken senna siftings for broken senna he would be not conforming to the standard prescribed by the Pharmacopœia. The question, therefore, simply resolves itself into this: Am I free to interpret this Pharmacopœia as meaning—to accept the meaning of the Pharmacopœia to be—that when you sell broken senna it should be free from the amount of stalk common to such senna as passes by that name in the market, and when you sell senna siftings, it must be free from more stalks than is present in that senna which passes as senna siftings. Now, I don't think in a criminal statute that I am free to expand that question in the way it is suggested. The Pharmacopœia could have made the standard of that commercial use. I don't think it has; I don't think that any one reading it could fairly be charged criminally with failure to recognize that the phrase related to commercial usage in the different grades as they are accustomed to. On that account it does not seem to me that I can say, or let the jury say, in this case, that they have been different from the standard of purity which the Pharmacopœia has established. That being true, gentlemen, I take the case from you, and direct a verdict for the defendant.

A motion by defendant to dismiss as to the fourth count, covering the charge of misbranding, was denied, whereupon the defendant introduced evidence, and thereafter the court charged the jury and the jury on May 31, 1912, returned a verdict of not guilty on the fourth count. The charge to the jury was as follows:

HAND, *District Judge.* In this case, as you perhaps already understood, there were two separate charges against this corporation; the first was for the adulteration of its drugs and the second is for their misbranding. The first charge I have withdrawn from your consideration and so you need not regard it when you come to deliberate. The only thing that remains for you is the charge that they misbranded their goods.

Now, the Congress of the United States in the exercise of its power to regulate interstate commerce has provided—has prescribed—certain things which you shall not do, among others that you shall not misbrand drugs that pass from one State to another. The actual words are, no person—I do not mean literally, but the actual significance of the words is, no person shall deliver for shipment from any State to another State any misbranded products. Then afterwards in the statute having made that prohibition, in order to enlighten us as to what the term "misbranded" means, it says that misbranded products are those whose package or label bears any statement regarding the article contained therein which shall be false or misleading in any particular, and that is all that the statute says. In this case, therefore, you will have to determine that the corporation delivered for shipment from one State to another State certain drugs; second, that those drugs were misbranded, and in determining whether they were misbranded you will have to consider whether the package or label bore any statement which was false or misleading.

As to the first it is not disputed the defendant concedes that they sent this bale of senna in a package of burlap and matting from the State of New York to the State of California; they do say that the Government has not proved that the drugs were misbranded. How are you to determine that question? In the first place, did the package bear the statement about the senna? That is not in dispute. The package was labeled, as you will remember, "412, Alex."—meaning Alexandria—"Senna, broken, U.S.P." and then said where it came from, so that this package did bear a label or a statement about the contents. Now, then, there remains the question, was that statement false or misleading in any particular? That is the issue in the case, and the issue about which all of this testimony has been taken, or at least, a large part of it—some of it was taken before I withdrew the question of adulteration.

Now, gentlemen, the question of whether the statement on the label was false in any particular is to be determined by whether the meaning which it conveyed to the ordinary man when he read it was not a truthful statement of what the facts were. The fact was that this had come over under the name of senna siftings, and that it was one of the grades of the article which contained, I think, 20 percent of stalk and rachis, together with a certain number of pebbles, and so on; you have heard the testimony and you remember what the actual character of the article was. There is no dispute about what the character was; there is no dispute but that it was legal to import

it into the United States and that it was an article which could pass in commerce; there is nothing illegal or contraband about it. Now, then, did the label which the defendant used correctly state those facts, and again, in the determination of that, did the label, or, rather, in amplification of that, did the label state to an ordinary man that it was senna of that kind? In determining that question you may consider the fact that it was going to people who were familiar with the trade, that the label was intended to be read and to be understood by men who were in the drug business, and so you must consider whether within commercial meaning, as you have heard the testimony in regard to it, that the character of senna siftings was known in the trade as broken senna. If it was not, if broken senna meant something which had never been senna siftings, then the defendant was guilty of misbranding the goods. The question is of the meaning—the trade meaning, of that label or package, whether it corresponds with that character of senna siftings. Now, the testimony upon that question I don't think I need go into at any great length. The Government testimony is that of Moore and Rusby. Mr. Moore said that senna means in the trade the whole leaflet and the three-quarter senna means the whole leaflet somewhat broken, so one-half senna, and that broken senna means pieces of the broken leaf of one sixteenth to one quarter or one half; that is, less than the half senna, but not with the added percentage of stalks and stems. Mr. Rusby says that he was for a long time I think the pharmacognosist, in any case employed to scrutinize the products which were purchased by a large drug house of this country, Parke, Davis & Company; that he had a large experience with the character of the different kinds of senna and the names applied to them, and he says that the classification was whole senna, three quarter, one half, broken, siftings, and dust, and that this came in the next to the last classification, siftings, and was not broken. The testimony of the defendant on the other hand, is that he coined, so far as he knows, he coined the word "broken," and that he applied it to a kind of sifting, the first of the three classes of siftings, and that he used it, and the inference may be made, you may make the inference if you see fit, that it had been the general knowledge in the trade, and so did not indicate any particular grade of the siftings. There you have the conflicting testimony, and in that conflict it is your province absolutely to determine. I will leave the facts to you as they are. I may say that the intention of the defendant in the case to mislead is not a material element, and you need not find it. In this particular case you may well come to the conclusion, if you determine that there was a misstatement, that the defendant knew he was making a misstatement, but it is of no consequence and it is not necessary that you should reach that conclusion that it is relevant. It is enough that the package bore the statement which was misleading in form in the sense which I have tried to determine. Nor is it of any consequence whether the consignee of the goods was in fact actually misled. The parties have introduced the testimony in both ways; upon that the Government says there is testimony that Mr. Herb was misled because he expected his elixir to be more potent, and he got less potency from it because of the impurities. The defendant says, on the other hand, the consignee

must have gotten what he wanted, or he would have returned it. But that whole question, whether in this specific instance the consignee was misled is immaterial and of no consequence. The question is whether the package bore a statement which to the ordinary man in the trade would have meant something different from what it actually contained. If you determine that you will bring in a verdict of guilty.

Now, so far as the degree of proof is concerned, you have already sat in a number of criminal cases and you know that all the facts in the case must be proved beyond a reasonable doubt in favor of the Government, and then you can bring in such a verdict. This is just like any other criminal case in that respect. Each statement of the case must be established against the defendant beyond a reasonable doubt, and I think I have told you that the best definition which I can give you of that degree of conviction is that it would be such a degree of assurance as would make you willing to entrust affairs of great consequence as you may have upon your conclusion. If you come to such a conclusion in this case, then you may bring in a verdict for the Government. If you find that you cannot reach such a degree of conviction, you must bring a verdict in of acquittal.

Mr. HITCHINGS. I beg to except to that portion of Your Honor's charge in which you say if senna was not known to the trade as broken senna, and I ask Your Honor to charge the jury that in this case if Scott & Gilbert knew the meaning of the word broken as you are advised, that then the prosecution must fail and the defendant be found not guilty. I except to Your Honor's charge that the intention of the defendant in putting this label on the package was immaterial. I except to that portion of Your Honor's charge that it is of no consequence that the consignee was not misled, and I except to that portion of Your Honor's charge that if the label would deceive an ordinary man that then the defendant was guilty of misbranding, and again I request Your Honor to state that the label must have deceived the consignee—must have been calculated to deceive the consignee or there cannot be a verdict for the plaintiff.

The COURT. Well, calculated to deceive the consignee; that is rather different. I will charge you, gentlemen, that the label must have been of such a character as would be calculated to deceive the consignee. That it should actually have deceived him? No.

Mr. HITCHINGS. I want Your Honor to charge this jury specifically that any ordinary man outside of the consignee has nothing whatever to do with it and the jury has nothing whatever to do with it.

The COURT. No; I won't charge that.

Mr. HITCHINGS. I take an exception. Will Your Honor call the attention of the jury, inasmuch as you have adverted in your charge to it, to the fact that he did not know anything about senna siftings. Mr. Moore, and also the fact that Ross testified that senna broken and senna siftings were the same thing?

The COURT. I have stated that.

A JUROR. Will you inform the jury what qualities of senna that word U.S.P. can be put after?

The COURT. I will charge you, gentlemen, that it could be put after the actual contents of this bale. You need not be concerned with

the U.S.P. There was no misbranding in that they put U.S.P. upon the contents of this bale.

Mr. HITCHINGS. I ask Your Honor to charge the jury as to that, that Scott & Gilbert were not misled in some evidence that the jury may consider that the label was not misleading.

The COURT. Yes; I will charge that, gentlemen, I really intended to do it in my charge: In considering the question as to whether the meaning in the trade—to the man in the trade—that the meaning of broken senna indicated the contents of this package, you may, I think, fairly consider the fact that Scott & Gilbert received it and whatever the testimony is in his deposition. You may take the deposition if you like. I won't charge you now, because I have forgotten what he said about that; it was read and counsel differed in their recollection, and I haven't any definite recollection of what he said, but if he said he regarded it as broken senna, that would be a piece of evidence you could consider.

SAVAGE v. JONES, STATE CHEMIST OF THE STATE OF INDIANA [50]

(Supreme Court of the United States, June 7, 1912)

225 U.S. 501

Appeal from a decree of the circuit court for the District of Indiana, sustaining a demurrer to a bill in equity to restrain the enforcement of the provisions of an act of the State of Indiana, as applied to complainant's product. Affirmed.

STATEMENT OF THE CASE

This is an appeal from a decree of the circuit court sustaining a demurrer to the bill for want of equity. The suit was brought by Marion W. Savage, a citizen of Minnesota, to restrain the defendant, the State chemist of Indiana, from taking proceedings to enforce an act of the general assembly of that State (Acts 1907, ch. 206) as applied to the sales of the complainant's product, a preparation for domestic animals known as "International Stock Food."

The bill alleges that the complainant has for many years been engaged in Minnesota in the manufacture of medicinal preparations, one of which is called "International Stock Food" and is sold in every State in the Union as well as in many foreign countries; that he has invested large amounts of money in building up a lucrative trade in Indiana among the retail druggists, many hundreds of whom were "buying, carrying in stock, and retailing to the public" the complainant's preparations; that the complainant's gross annual sales in Indiana amount to many thousands of dollars; that the "International Stock Food" possesses effective curative properties for various diseases of domestic animals and is composed of medicinal roots, herbs, seeds, and barks, combined by a secret formula of great value; and that the disclosure to his competitors of the proportion of the ingredients and the manner of combination would seriously

[50] Not arising under the Food and Drugs Act of June 30, 1906.

injure his business; that the commercial designation "International Stock Food" is not used by the complainant as descriptive of feed of any kind, and is not so understood by retail druggists and purchasers, but is well known to the public as a trade name of a medicine for domestic animals protected under trade-marks in the United States; that on investigations made by the United States Internal Revenue Department it was determined that the preparation was not feeding stuff nor a condimental stock food, but was a proprietary or patent medicine within the meaning of the revenue laws of 1863 and 1898; and that subsequent to the enactment by Congress of the Food and Drugs Act of 1906 (June 30, 1906, 34 Stat. 768, ch. 3915), the administrative officers of the United States Government duly determined that it was a medicine and not a food within the meaning of that act.

The bill then avers the passage of the act above mentioned by the Legislature of Indiana and sets forth the provisions of sections 1, 2, 8, 9, and 11. It is alleged that the defendant, the State chemist of Indiana, is asserting that the complainant's manufacture is one of the concentrated commercial feeding stuffs covered by the act, and that it is the duty of the complainant to comply with its provisions with reference to its sale in Indiana, "and has stated and declared to your orator, and now threatens that unless your orator has attached in a conspicuous place on the outside of each package of your orator's said medicinal preparation offered for sale within the State of Indiana, a printed statement, clear and truthful, certifying among other things the name of the manufacturer and shipper, the place of manufacture, the place of business and chemical analysis stating the percentage of crude protein, crude fat, and crude fiber contained in said preparation, and have all its constituents determined by the methods adopted by the session [association?] of official agricultural chemists, and shall also state upon said package the names of each ingredient of which said preparation is composed, he will cause the arrest and prosecution of every person dealing or trading in the medicinal preparation of your orator within the State of Indiana." That the defendant has sent, or caused to be sent, broadcast throughout the State of Indiana to dealers and others who are customers, directly or indirectly, of complainant many thousand circular letters warning them against the sale of said preparation and threatening that prosecution will be instituted against all persons engaged in the sale thereof, unless and until the complainant shall have complied with the provisions of said act.

It is also alleged that the sales made by the complainant "in the State of Indiana are made at the city of Minneapolis, State of Minnesota, to be delivered free on board of cars at Minneapolis, Minnesota, and delivered to purchasers and consumers within the State of Indiana in the original unbroken packages, freight being paid thereon by the consumers and purchasers." That unless restrained the defendant will continue to annoy and intimidate the numerous persons engaged in selling the preparation in Indiana, by threats of criminal prosecution, and will report to the various prosecuting attorneys of the State the sales that may come to his notice and instigate prosecutions of the sellers as violators of the statute, thereby obstructing the complainant in the conduct of his business in the State

of Indiana and interfering with his property rights to his irreparable injury, for which there is no adequate legal remedy. That many hundreds of persons engaged in selling the preparation have already discontinued their purchases and sales because of the fear of criminal prosecution induced by the defendant's threats, and that large numbers of those who are still handling it will be induced by such threats to discontinue its sale.

The bill further avers that the complainant's preparation is not in any sense either concentrated commercial feeding stuff, or condimental stock feed, or a patent proprietary stock feed within the proper construction of the act of Indiana, and is not advertised as possessing nutritive properties or used except as medicine; that the complainant does not "claim that said medicinal preparation contains any crude protein or crude fat"; that it does not contain, nor is it claimed on behalf of the defendant that it contains, any ingredient that is deleterious or injurious to animal life or health; that it is prescribed and administered in small doses as medicine, and "that the only nutritive substance or ingredients * * * are employed as diluents in so small an amount as to produce no feeding effect whatever, but for the sole purpose of rendering medicinal bitter roots, herbs, barks, and seeds more acceptable to the animal stomach"; that directions for use accompany each package and in every case there is a statement plainly showing that the preparation is to be used to cure disease and not in place of or as a substitute for any grain or feed. That nevertheless, the defendant, who in his official capacity is charged by law with the enforcement of the statute, has construed it to apply to complainant's product.

That under section 3 of the statute of Indiana the State chemist is to register the facts set forth in the certificate required by section 1 as a permanent record and to furnish stamps or labels, showing such registration, to manufacturers or agents desiring to sell the concentrated commercial feeding stuff so registered in amounts not less than the value of $5 or multiples of $5 for any one such product; that by section 5 the State chemist is to receive $1 for each 100 stamps, and that the proceeds thus derived are to be paid into the treasury of the Indiana Agricultural Experiment Station to be expended in carrying out the provisions of the statute and for any other expenses of such station as authorized by law.

That the statute, and particularly sections 1, 2, 7, 8, and 9, are repugnant to the Fourteenth Amendment of the Constitution of the United States in that they require manufacturers of proprietary stock feed and condimental feeds, arbitrarily, without compensation and without due process of law, whether such preparation contain any poisonous or deleterious element or ingredient, to disclose the formulæ by which they are compounded, and the ingredients and proportions thereof, which embody valuable trade secrets; and that if the act is enforced against the complainant he will be deprived of his property contrary to the said amendment.

That the statute also violates section 8 of article I of the Constitution of the United States as an unreasonable interference with interstate commerce in which the complainant is engaged.

That further, the statute is invalid under section 19 of article IV of the constitution of the State of Indiana in that the title does not

express the requirement that manufacturers or dealers shall disclose the formulæ by which their products are manufactured or the ingredients or proportions.

That for many years the complainant's preparation has been offered for sale in packages of different sizes, holding respectively 24 ounces, 3 pounds, 6 pounds, and 25 pounds; that under the terms of the statute the complainant would be required to pay the same amount of tax for a package of 24 ounces that other commodities and manufacturers thereof pay for a package of 100 pounds; and that this discrimination is unresonable and unconstitutional.

That the enforcement of the requirement as to the affixing of stamps and payment therefor is a tax upon the complainant's property and business, and is not a license fee determined by any reasonable requirement, or for the purpose of carrying out the inspection required, but, on the contrary, under the guise of a police regulation constitutes a measure for raising revenue for the general work and expense of the Indiana Agricultural Experiment Station. That the act is contrary to section 10 of article I of the Constitution of the United States, that no State shall without the consent of Congress lay any imposts or duties on imports, except what may be absolutely necessary for executing its inspection law.

The bill prays that the defendant may be enjoined from taking any action against the complainant, interfering with his right to vend and convey his preparations in the State of Indiana, from instituting any proceedings to punish him for failure to comply with the defendant's demands, from giving out orally or in writing to the various prosecuting officers of the State, or to any other agents thereof charged with the enforcement of its law, or to the public, any threats of prosecution or information upon which prosecutions are requested, or may be based, and from otherwise seeking to prevent the conduct of the complainant's business in the State or to discredit the reputation of his remedy.

The defendant demurred to the bill upon the ground that it was wholly without equity, and that the court was without jurisdiction. Upon the former ground the bill was dismissed.

OPINION OF THE COURT

Mr. Justice HUGHES, after making the above statement, delivered the opinion of the court.

The principal contention in support of this appeal is that the statute of Indiana (Acts 1907, ch. 206), the provisions of which have been set forth, is an unconstitutional interference with the complainant's right to engage in interstate commerce.

A preliminary question arises with respect to the jurisdiction of this court, by reason of the allegation of the bill that the complainant's product is not a "concentrated commercial feeding stuff" within the true meaning of the act, and that so interpreted the statute would not apply. But it was also alleged that the State chemist, who was authorized to enforce the statute, had construed it to be applicable to the commodity, which is commercially known as "International Stock Food"; and thus charged by the officer with

the duty of obedience, the complainant in his bill challenged the constitutionality of the legislation. The grounds for the attack were not found in the conclusions reached by the officer, as to the nature of the article, in administering an act otherwise conceded to be valid (*Arbuckle* v. *Blackburn*, 191 U.S. 405, 414), but in the provisions of the statute itself as applied to the articles within its purview while in the course of interstate commerce. A general demurrer, for want of equity, was sustained, and in view of the substantial character of the contention the case must be regarded as one in which the law of a State is claimed to be in contravention of the Constitution of the United States. Act of March 3, 1891, ch. 517, sec. 5, 26 Stat. 826; *Penn Mutual Life Insurance Co.* v. *Austin*, 168 U.S. 685, 694; *Loeb* v. *Columbia Township Trustees*, 179 U.S. 472, 478; *Lampasas* v. *Bell*, 180 U.S. 276, 282.

It is said that the complainant is not entitled to invoke the constitutional protection, in that he fails to show injury. *Southern Railway Co.* v. *King*, 217 U.S. 524, 534. The argument rests upon the averment in the bill that his sales were made at Minneapolis, the goods "to be delivered free on board of cars" at that point, "and delivered to purchasers and consumers within the State of Indiana in the original unbroken packages, freight being paid thereon by the consumers and purchasers." In answer, it must again be said that "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." *Swift & Co.* v. *United States*, 196 U.S. 375, 398; *Rearick* v. *Pennsylvania*, 203 U.S. 507, 512. It clearly appears from the bill that the complainant was engaged in dealing with purchasers in another State. His product manufactured in Minnesota was, in pursuance of his contracts of sale, to be delivered to carriers for transportation to the purchasers in Indiana. This was interstate commerce, in the freedom of which from any unconstitutional burden the complainant had a direct interest. The protection accorded to this commerce by the Federal Constitution extended to the sale by the receiver of the goods in the original packages. *Leisy* v. *Hardin*, 135 U.S. 100; *In re Rahrer*, 140 U.S. 545, 559, 560; *Plumley* v. *Massachusetts*, 155 U.S. 461, 473; *Vance* v. *Vandercook Co.*, 170 U.S. 438, 444, 445; *Schollenberger* v. *Pennsylvania*, 171 U.S. 1, 22–25; *Heyman* v. *Southern Railway Co.*, 203 U.S. 270, 276. An attack upon this right of the importing purchasers to sell in the original packages bought from the complainant, not only would be to their prejudice, but inevitably would inflict injury upon the complainant by reducing his interstate sales, a result to be avoided only through his compliance with the act by filing the statement and affixing to his goods the labels it required. According to the bill, the State chemist had threatened the complainant that in default of such compliance he would cause the arrest and prosecution of every person dealing in the article within the State and had distributed broadcast throughout the State warning circulars. If the statute of Indiana, as applied to sales by importing purchasers in the original packages, constitutes an unwarrantable interference with interstate commerce in the complainant's product, he had standing to complain, and was entitled to relief against enforcement by the defendant of the illegal demands. *Scott* v. *Donald* 165 U.S. 107, 112; *Ex parte Young*, 209 U.S. 123, 159, 160; *Ludwig*

v. *Western Union Telegraph Co.*, 216 U.S. 146; *Hopkins* v. *Clemson College*, 221 U.S. 636, 643–645; *Philadelphia Co.* v. *Stimson*, 223 U.S. 605, 620, 621.

We are thus brought to the examination of the statute. The question of its constitutional validity may be considered in two aspects, (1) independently of the operation and effect of the act of Congress of June 30, 1906, ch. 3915 (34 Stat. 768), known as the "Food and Drugs Act", and (2) in the light of this Federal enactment.

First. The statute relates to the sale of various sorts of food, for domestic animals, embraced in the term "concentrated commercial feeding stuff" as defined in the act. It requires the filing of a statement and a sworn certificate, the affixing of a label bearing certain information, and a stamp.

By section 1 it is provided, in substance, that before any such feeding stuff is sold, or offered for sale, in Indiana, "the manufacturer, importer, dealer, agent, or person", selling or offering it, shall file with the State chemist a statement that he desires to sell the feeding stuff, and also a sworn certificate, for registration, stating (*a*) the name of the manufacturer, (*b*) the location of the principal office of the manufacturer, (*c*) the name, brand, or trade mark under which the article will be sold, (*d*) the ingredients from which it is compounded, and (*e*) the minimum percentage of crude fat and crude protein, allowing 1 percent of nitrogen to equal 6.25 percent of protein, and the maximum percentage of crude fiber which the manufacturer or person offering the article for sale guarantees it to contain; these constituents to be determined by the methods recommended by the Association of Official Agricultural Chemists of the United States. The State chemist is to register the facts set forth in the certificate in a permanent record (sec. 3).

Section 2 provides that there shall be affixed to every package or sample of the article a tag or label which shall be accepted as a guaranty of the manufacturer, importer, dealer, or agent and shall have plainly printed thereon (*a*) the number of net pounds of feeding stuff in the package, (*b*) the name, brand, or trade mark under which it is sold, (*c*) the name of the manufacturer, (*d*) the location of the principal office of the manufacturer, and (*e*) the guaranteed analysis stating the minimum percentage of crude fat and crude protein determined as described in section 1, and the ingredients from which the article is compounded.

A stamp purchased from the State chemist, showing that the article has been registered and that the inspection tax has been paid, is to be affixed for each 100 pounds or fraction thereof, special provision being made for the delivery of an equivalent number of stamps on sale in bulk. By an amendment of 1909, stamps are to be issued by the State chemist to cover 25, 50, and 100 pounds (acts 1909, ch. 46, p. 106). He is not required to sell stamps in less amount than to the value of $5, or multiples thereof, for any one feeding stuff, or to register any certificate unless accompanied by an order and fees for stamps to the amount of $5, or some multiple of that sum (sec. 3). Sworn statements are to be filed annually of the number of net pounds of each brand of feeding stuff sold or offered for sale in the State (sec. 4).

The price of the stamps under the original act was $1 per hundred; but by the amendment of 1909, *supra*, the charge was made 80 cents per hundred, for stamps to cover 100 pounds, and 40 cents and 20 cents respectively for stamps to cover 50 and 25 pounds. The fees received are to be paid into the treasury of the Indiana Agricultural Experiment Station and expended "in meeting all necessary expenses in carrying out the provisions of this act, including the employment of inspectors, chemists, expenses in procuring samples, printing bulletins giving the results of the work of feeding stuff inspection, as provided for by this act, and for any other expenses of said Indiana Agricultural Experiment Station, as authorized by law." A classified report of the receipts and expenditures is to be made to the Governor of the State annually (sec. 5).

Anyone selling, or offering for sale, any feeding stuff which has not been registered, and labeled and stamped as required by the act, or which is found by an analysis made by the State chemist or under his direction to contain "a smaller percentage of crude fat or crude protein than the minimum guaranty", or is "labeled with a false or inaccurate guaranty", and anyone who adulterates any feeding stuff "with foreign mineral matter or other foreign substance, such as rice hulls, chaff, mill sweepings", etc., "or other materials of less or of little or no feeding value without plainly stating on the label hereinbefore described, the kind and amount of such mixture", or who adulterates with any substance injurious to the health of domestic animals, or alters the State chemist's stamp, or uses it a second time, or fails to make the sworn statement as to animal sales as required, is guilty of a misdemeanor and is subject to fine (sec. 6).

The State chemist and his deputies are empowered to procure from any lot or package of the described feeding stuffs offered for sale or found in Indiana a quantity not exceeding 2 pounds, to be drawn during reasonable business hours, or in the presence of the owner or his representatives (sec. 7), and it is made a misdemeanor to interfere with such inspection and sampling (sec. 8). He is also authorized to prescribe and enforce regulations as he may deem necessary to carry the act into effect; and he may refuse "the registration of any feeding stuff under a name which would be misleading as to the materials of which it is made, or when the percentage of crude fiber is above or the percentage of crude fat or crude protein below the standards adopted for concentrated commerical feeding stuffs".

The evident purpose of the statute is to prevent fraud and imposition in the sale of food for domestic animals, a matter of great importance to the people of the State. Its requirements were directed to that end, and they were not unreasonable. It was not aimed at interstate commerce, but without discrimination sought to promote fair dealing in the described articles of food. The practice of selling feeding stuffs under general descriptions gave opportunity for abuses which the Legislature of Indiana determined to correct, and to safeguard against deception it required a disclosure of the ingredients contained in the composition. The bill complains of the injury to manufacturers if they are forced to reveal their secret formulas and processes. We need not here express an opinion upon this question, in the breadth suggested, as the statute does not compel a disclosure of formulas or manner of combination. It does demand

a statement of the ingredients, and also of the minimum percentage of crude fat and crude protein and of the maximum percentage of crude fiber, a requirement of obvious propriety in connection with substances purveyed as feeding stuffs.

The State cannot, under cover of exerting its police powers, undertake what amounts essentially to a regulation of interstate commerce, or impose a direct burden upon that commerce. *Railroad Co.* v. *Husen*, 95 U.S. 465, 475; *Walling* v. *Michigan*, 116 U.S. 446; *Bowman* v. *Chicago, &c. Ry. Co.*, 125 U.S. 465; *Leisy* v. *Hardin*, 135 U.S. 100; *Minnesota* v. *Barber*, 136 U.S. 313; *Brimmer* v. *Rebman*, 138 U.S. 78; *Scott* v. *Donald*, 165 U.S. 58; *Schollenberger* v. *Pennsylvania*, 171 U.S. 1, 13; *Houston & Texas Central R.R.Co.* v. *Mayes*, 201 U.S. 321; *Atlantic Coast Line* v. *Wharton*, 207 U.S. 328; *Adams Express Co.* v. *Kennedy*, 214 U.S. 218. But when the local police regulation has real relation to the suitable protection of the people of the State, and is reasonable in its requirements, it is not invalid because it may incidentally affect interstate commerce, provided it does not conflict with legislation enacted by Congress pursuant to its constitutional authority. *Plumley* v. *Massachusetts*, 155 U.S. 461; *Hennington* v. *Georgia*, 163 U.S. 299, 317; *N. Y., N. H. & H. Ry. Co.* v. *New York*, 165 U.S. 628; *Chicago, M. & St. P. Ry. Co.* v. *Sloan*, 169 U.S. 133; *Missouri, Kansas & Texas Ry. Co.* v. *Haber*, 169 U.S. 613; *Patapsco Guano Co.* v. *North Carolina*, 171 U.S. 345; *Reid* v. *Colorado*, 187 U.S. 137; *Pennsylvania R.R. Co.* v. *Hughes*, 191 U.S. 477; *Crossman* v. *Lurman*, 192 U.S. 189; *McLean* v. *Denver & Rio Grande R.R. Co.*, 203 U.S. 38, 50; *Asbell* v. *Kansas*, 209 U.S. 251, 254–256; *Chicago, R. I. & P. Ry. Co.* v. *Arkansas*, 219 U.S. 453.

In *Plumley* v. *Massachusetts*, a law of that Commonwealth was sustained which had been passed "to prevent deception in the manufacture and sale of imitation butter." The article, for the sale of which the plaintiff in error was convicted in the State court, had been received by him from the manufacturers in Illinois, as their agent, and had been sold in Massachusetts in the original package. The court said (*supra*, pp. 468, 472), referring to the purpose and effect of the statute:

> He is only forbidden to practice, in such matters, a fraud upon the general public. The statute seeks to suppress false pretenses and to promote fair dealing in the sale of an article of food. It compels the sale of oleomargarine for what it really is, by preventing its sale for what it is not. Can it be that the Constitution of the United States secures to any one the privilege of manufacturing and selling an article of food in such manner as to induce the mass of people to believe that they are buying something which, in fact, is wholly different from that which is offered for sale? Does the freedom of commerce among the States demand a recognition of the right to practice a deception upon the public in the sale of any articles, even those that may have become the subject of trade in different parts of the country? * * * Such legislation may, indeed, indirectly or incidentally affect trade in such products transported from one State to another State. But that circumstance does not show that laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the States.

In *Patapsco Guano Co.* v. *North Carolina*, *supra*, the court had before it a statute of North Carolina relating to fertilizing materials. It provided:

> Every bag, barrel, or other package of such fertilizers or fertilizing materials as above designated offered for sale in this State shall have thereon plainly

printed a label or stamp, a copy of which shall be filed with the Commissioner of Agriculture, together with a true and faithful sample of the fertilizer or fertilizing material which it is proposed to sell, * * * and the said label or stamp shall truly set forth the name, location, and trade-mark of the manufacturer; also the chemical composition of the contents of such package, and the real percentage of any of the following ingredients asserted to be present: to wit, soluble and precipitated phosphoric acid, which shall not be less than eight per cent; soluble potassa, which shall not be less than one per cent; ammonia, which shall not be less than two per cent, or its equivalent in nitrogen; together with the date of its analyzation, and that the requirements of the law have been complied with; and any such fertilizer as shall be ascertained by analysis not to contain the ingredients and percentage set forth as above provided shall be liable to seizure and condemnation.

A charge of 25 cents per ton on such materials was laid for the purpose of defraying the expenses connected with the inspection; and the Department of Agriculture was authorized to establish an experiment station and to employ an analyst, whose duty it was to analyze such fertilizers and products as might be required by the department and to aid so far as practicable in suppressing fraud in their sale.

The court upheld the statute, saying (*supra*, p. 357):

Whenever inspection laws act on the subject before it becomes an article of commerce they are confessedly valid, and also when, although operating on articles brought from one State into another, they provide for inspection in the exercise of that power of self-protection commonly called the police power.

After referring to the decision in *Plumley* v. *Massachusetts*, *supra*, the court continued (pp. 358, 361):

Where the subject is of wide importance to the community, the consequences of fraudulent practices generally injurious, and the suppression of such frauds matter of public concern, it is within the protective power of the State to intervene. Laws providing for the inspection and grading of flour, the inspection and regulation of weights and measures, the weighing of coal on public scales, and the like, are all competent exercises of that power, and it is not perceived why the prevention of deception in the adulteration of fertilizers does not fall within its scope. * * * The act of January 21, 1891, must be regarded, then, as an act providing for the inspection of fertilizers and fertilizing materials in order to prevent the practice of imposition on the people of the State, and the charge of twenty-five cents per ton as intended merely to defray the cost of such inspection. It being competent for the State to pass laws of this character, does the requirement of inspection and payment of its cost bring the act into collision with the commercial power vested in Congress? Clearly this cannot be so as to foreign commerce, for clause two of section ten of article one expressly recognizes the validity of State inspection laws, and allows the collection of the amounts necessary for their execution; and we think the same principle must apply to interstate commerce. In any view, the effect on that commerce is indirect and incidental, and "the Constitution of the United States does not secure to any one the privilege of defrauding the public."

It cannot be doubted that, within the principle of these decisions, and of the others above cited, the State of Indiana—assuming for the present that there was no conflict with Federal legislation—was entitled, in the exercise of its police power, to require the disclosure of the ingredients contained in the feeding stuffs offered for sale in the State, and to provide for their inspection and analysis. The provisions for the filing of a certificate, for registration and for labels, were merely incidental to these requirements and were appropriate means for accomplishing the legitimate purpose of the act. It is said that the statute permits the State, through its officials, to set up arbitrary standards governing conditions of manufacture. But it does not appear that any arbitrary standard has been set up, or that there

has been any attempt to enforce one against the complainant. See *Western Union Telegraph Co.* v. *Richmond*, 224 U.S. 160, 168. The complainant has declined to file the statement and to affix the labels containing the disclosure of ingredients for which the statute provides, and instead he resorts to this suit.

The contention is made that the statute is a disguised revenue measure, but on a review of its provisions we find no warrant for such a characterization of it. The bill sets forth no facts whatever to show that the charge for stamps is unreasonable in its relation to the cost of inspection, and certainly it cannot be said that aught appears "to justify the imputation of bad faith and change the character of the act." *Patapsco Guano Co.* v. *North Carolina*, *supra*; *McLean* v. *Denver & Rio Grande R.R. Co.*, *supra*; *Red "C" Oil Co.* v. *North Carolina*, 222 U.S. 380, 393. With respect to the requirement of an advance payment for stamps, to the value of $5, to accompany the certificate, we need not say more than that the complainant is plainly not prejudiced, in view of the alleged extent of his sales.

Second. The question remains whether the statute of Indiana is in conflict with the act of Congress known as the Food and Drugs Act of June 30, 1906 (34 Stat. 768, ch. 3915). For the former, so far as it affects interstate commerce even indirectly and incidentally, can have no validity if repugnant to the Federal regulation. *Reid* v. *Colorado*, 187 U.S. 137, 146, 147; *Asbell* v. *Kansas*, 209 U.S. 251, 256, 257; *Northern Pacific Ry. Co.* v. *Washington*, 222 U.S. 370, 378; *Southern Ry. Co.* v. *Reid*, 222 U.S. 424, 436.

The object of the Food and Drugs Act is to prevent adulteration and misbranding, as therein defined. It prohibits the introduction into any State from any other State "of any article of food or drugs which is adulterated or misbranded, within the meaning of this act." The purpose is to keep such articles "out of the channels of interstate commerce or, if they enter such commerce, to condemn them while being transported or when they have reached their destinations, provided they remain unloaded, unsold, or in original unbroken packages." *Hipolite Egg Co.* v. *United States*, 220 U.S. 45, 54. To determine the scope of the act with respect to feeding stuffs we must examine its definitions of the adulteration and misbranding of food, the term "food" including "all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound" (sec. 6). These definitions are found in sections 7 and 8, which are set forth in the margin.[51]

It will be observed that in its enumeration of the acts which constitute a violation of the statute, Congress has not included the failure to disclose the ingredients of the article, save in specific instances, where, for example, morphine, opium, cocaine, or other substances particularly mentioned, are present. It is provided that the article "for the purposes of this act" shall be deemed to be misbranded if the package or label bear any statement, design, or device regarding it or the ingredients or substances it contains which shall be false or misleading (sec. 8). But this does not cover the entire ground. It is one thing to make a false or misleading statement regarding the article or its ingredients and it may be quite

[51] Omitted.

another to give no information as to what the ingredients are. As is well known, products may be sold, and in case of so-called proprietary articles frequently are sold, under trade names which do not reveal the ingredients of the composition and the proprietors refrain from revealing them. Moreover, in defining what shall be adulteration or misbranding for the purposes of the Federal act, it is provided that mixtures or compounds known as articles of food under their own distinctive names, not taking or imitating the distinctive name of another article, which do not contain "any added poisonous or deleterious ingredients" shall not be deemed to be adulterated or misbranded if the name be accompanied on the same label or brand with a statement of the place of manufacture (sec. 8).

Congress has thus limited the scope of its prohibitions. It has not included that at which the Indiana statute aims. Can it be said that Congress, nevertheless, has denied to the State, with respect to the feeding stuffs coming from another State and sold in the original packages, the power the State otherwise would have to prevent imposition upon the public by making a reasonable and nondiscriminatory provision for the disclosure of ingredients, and for inspection and analysis? If there be such denial it is not to be found in any express declaration to that effect. Undoubtedly Congress, by virtue of its paramount authority over interstate commerce, might have said that such goods should be free from the incidental effect of a State law enacted for these purposes. But it did not so declare. There is a proviso in the section defining misbranding for the purposes of the act that "nothing in this act shall be construed" as requiring manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas "except insofar as the provisions of this act may require to secure freedom from adulteration or misbranding" (sec. 8). We have already noted the limitations of the provisions referred to. And it is clear that this proviso merely relates to the interpretation of the requirements of the act, and does not enlarge its purview or establish a rule as to matters which lie outside its prohibitions.

Is, then, a denial to the State of the exercise of its power for the purposes in question necessarily implied in the Federal statute? For when the question is whether a Federal act overrides a State law, the entire scheme of the statute must, of course, be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the State law must yield to the regulation of Congress within the sphere of its delegated power. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426; *Northern Pacific Ry. Co.* v. *Washington*, *supra*; *Southern Ry. Co.* v. *Reid*, *supra*.

But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State. This principle has had abundant illustration. *Chicago, &c. Ry. Co.* v. *Solan*,

169 U.S. 133; *Missouri, Kansas & Texas Ry. Co.* v. *Haber*, 169 U.S. 613; *Reid* v. *Colorado*, 187 U.S. 137; *Pennsylvania R.R. Co.* v. *Hughes*, 191 U.S. 477; *Crossman* v. *Lurman*, 192 U.S. 189; *Asbell* v. *Kansas*, 209 U.S. 251; *Northern Pacific Ry. Co.* v. *Washington*, 222 U.S. 370, 379; *Southern Ry. Co.* v. *Reid*, 222 U.S. 424, 442.

In *Missouri, Kansas & Texas Ry. Co.* v. *Haber*, *supra*, the Supreme Court of Kansas had affirmed a judgment against the railway company for damages caused by its having brought into the State certain cattle alleged to have been affected with Texas fever which was communicated to the cattle of the plaintiff. The recovery was based upon a statute of Kansas which made actionable the driving or transporting into the State of cattle which were liable to communicate the fever. It was contended that the act of Congress of May 29, 1884, ch. 60 (23 Stat. 31), known as the Animal Industry Act, together with the act of March 3, 1891, ch. 544 (26 Stat. 1044), appropriating money to carry out its provisions, and section 5258 of the Revised Statutes, covered substantially the whole subject of the transportation from one State to another State of live stock capable of imparting contagious disease, and therefore that the State of Kansas had no authority to deal in any form with that subject. The act of 1884 provided for the establishment of a bureau of animal industry, for the appointment of a staff to investigate the condition of domestic animals and for report upon the means to be adopted to guard against the spread of disease. Regulations were to be prepared by the Commissioner of Agriculture, and certified to the executive authority of each State and Territory. Special investigation was to be made for the protection of foreign commerce, and the Secretary of the Treasury was to establish such regulations as might be required concerning exportation. It was provided that no railroad company within the United States, nor the owners or masters of any vessel, should receive for transportation, or transport, from one State to another any live stock affected with any communicable disease, nor should any one deliver for such transportation, or drive on foot or transport in private conveyance from one State to another, any live-stock, knowing them to be so affected. It was made the duty of the Commissioner of Agriculture to notify the proper officials or agents of transportation companies doing business in any infected locality of the existence of contagion; and the operators of railroads, or the owners or custodians of livestock within such infected district, who should knowingly violate the provisions of the act were to be guilty of a misdemeanor punishable by fine or imprisonment.

The court held that this Federal legislation did not override the statute of the State; that the latter created a civil liability as to which the Animal Industry Act of Congress had not made provision. The court said (*supra*, pp. 623, 624):

> May not these statutory provisions stand without obstructing or embarrassing the execution of the act of Congress? This question must of course be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the State is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together. *Sinnot* v. *Davenport*, 22 How. 227, 243. * * * Whether a corporation transporting, or the person causing to be transported, from one State to another, cattle of the class specified in the Kansas

statute, should be liable in a civil action for any damages sustained by the owners of domestic cattle by reason of the introduction into their State of such diseased cattle, is a subject about which the Animal Industry Act did not make any provision. That act does not declare that the regulations established by the Department of Agriculture should have the effect to exempt from civil liability one who, but for such regulations, would have been liable either under the general principles of law or under some State enactment for damages arising out of the introduction into that State of cattle so affected. And, as will be seen from the regulations prescribed by the Secretary of Agriculture, that officer did not assume to give protection to any one against such liability.

In *Reid* v. *Colorado*, *supra*, the question arose under a statute of Colorado which had been passed to prevent the introduction into the State of diseased animals. The statute made it a misdemeanor for anyone to bring into the State, between April 1 and November 1, any cattle or horses from a State, Territory, or county south of the thirty-sixth parallel of north latitude, unless they had been held at some place north of that parallel at least ninety days prior to importation, or unless the owner or person in charge should procure from the State Veterinary Sanitary Board a certificate, or bill of health, to the effect that the cattle or horses were free from all infectious or contagious diseases and had not been exposed thereto at any time within the preceeding ninety days. The expense of any inspection in connection therewith was to be paid by the owner.

The plaintiff in error had been convicted of bringing cattle into the State in violation of the statute. There was no proof in the case that the particular cattle had any infectious or contagious disease, but it did appear that they were brought from Texas, south of the thirty-sixth parallel, without being held or inspected as the statute required. Its provisions were ignored altogether as invalid legislation. When the plaintiff in error refused assent to the State inspection he showed to the authorities a certificate signed by an assistant inspector of the Federal Bureau of Animal Industry who certified that he had carefully inspected the cattle in Texas and found them free from communicable disease. It was insisted that the statute of Colorado was in conflict with the Animal Industry Act of Congress, but the court sustained the State law for the reason that, although the two statutes related to the same general subject, they did not cover the same ground and were not inconsistent with each other.

The court thus emphasized the general principle involved (*supra*, p. 148):

> It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that "in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together."

And in the course of its review of the subjects embraced in the Federal legislation the court said (pp. 149, 150):

> Still another subject covered by the act is the driving on foot or transporting from one State or Territory into another State or Territory, or from any State into the District of Columbia, or from the District into any State, of any livestock known to be affected with any contagious, infectious, or communicable disease. But this provision does not cover the entire subject of the transporting or shipping of diseased livestock from one State to another. The owner of such

stock, when bringing them into another State, may not know them to be diseased; but they may, in fact be diseased, or the circumstances may be such as fairly to authorize the State into which they are about to be brought to take such precautionary measures as will reasonably guard its own domestic animals against danger from contagious, infectious, or communicable diseases. The act of Congress left the State free to cover that field by such regulations as it deemed appropriate, and which only incidentally affected the freedom of interstate commerce. Congress went no farther than to make it an offense against the United States for any one knowingly to take or send from one State or Territory to another State or Territory, or into the District of Columbia, or from the District into any State, livestock affected with infectious or communicable disease.

The Animal Industry Act did not make it an offense against the United States to send from one State into another livestock which the shipper did not know were diseased. The offense charged upon the defendant in the State court was not the introduction into Colorado of cattle that he knew to be diseased. He was charged with having brought his cattle into Colorado from certain counties in Texas, south of the thirty-sixth parallel of north latitude, without said cattle having been held at some place north of said parallel of latitude for at least the time required prior to their being brought into Colorado, and without having procured from the State Veterinary Sanitary Board a certificate of bill of health to the effect that his cattle—in fact—were free from all infectious or contagious diseases, and had not been exposed at any time within 90 days prior thereto to any such diseases, but had declined to procure such certificate or have the inspection required by the statute. His knowledge as to the actual condition of the cattle was of no consequence under the State enactment or under the charge made.

Our conclusion is that the statute of Colorado as here involved does not cover the same ground as the act of Congress and therefore is not inconsistent with that act; and its constitutionality is not to be questioned unless it be in violation of the Constitution of the United States, independently of any legislation by Congress.

In *Asbell* v. *Kansas*, *supra*, the plaintiff in error had been convicted under a statute of the State of Kansas which made it a misdemeanor to transport cattle into the State from any point south of the south line of the State, except for immediate slaughter, without having first caused them to be inspected and passed as healthy by the proper State officials or by the Bureau of Animal Industry of the Interior [Agriculture?] Department of the United States. The court held that the statute was a valid exercise of the power of the State unless it were in conflict with the act of Congress. It appeared that since the decision in *Reid* v. *Colorado*, *supra*, Congress had provided that where an inspector of the Bureau of Animal Industry had issued a certificate that he had inspected livestock and found them free from communicable disease they should be transported into any State or Territory without further inspection or the exaction of fees of any kind, except such as might be required by the Secretary of Agriculture. But as the law of Kansas recognized the Federal certificate, a conflict with the act of Congress was avoided, and hence the conviction under the State law was sustained.

Applying these established principles to the present case, no ground appears for denying validity to the statute of Indiana. That State has determined that it is necessary in order to secure proper protection from deception that purchasers of the described feeding stuffs should be suitably informed of what they are buying and has made reasonable provision for disclosure of ingredients by certificate and label, and for inspection and analysis. The requirements, the enforcement of which the bill seeks to enjoin, are not in any way in conflict with the provisions of the Federal act. They may be sustained without impairing in the slightest degree its operation and

effect. There is no question here of conflicting standards or of opposition of State to Federal authority. It follows that the complainant's bill in this aspect of the case was without equity.

Other objections urged by the bill to the validity of the statute, save so far as they may be deemed to involve the questions that have already been considered, have not been pressed in argument and need not be discussed.

Recurring to the contention that the product of the complainant is not within the statute, it is evident that, assuming the validity of the enactment, the complainant showed no ground for resorting to equity, as the nature of the composition must be determined according to the fact in the course of due proceedings for that purpose.

The demurrer was properly sustained.

Affirmed.

UNITED STATES v. THOMSON & TAYLOR SPICE CO.

(District Court, N.D. Illinois, June 17, 1912)

198 Fed. 565; N.J. No. 1823

Information charging violation of section 2 of the Food and Drugs Act. Judgment for the United States.

LANDIS, *District Judge*. In this case the defendant company is charged with violation of the misbranding section of the Pure Food Law, in that there has been the use of the geographical name "Mocha" in connection with the sale of coffee grown in Abyssinia. Against the defendant it is urged that the word Mocha can lawfully be used only to designate coffee grown in Arabia. The facts are that on one side of the Red Sea is Arabia, and on the other side is Abyssinia. Coffee is, and for centuries has been, grown in both of these countries. Up to about 200 years ago practically all of the Arabian product and a portion of the Abyssinian product was shipped through the port of Mocha, located on the Arabian side of the Red Sea. Because of this fact this coffee was called Mocha. At that time, owing to the formation of a sand bar obstructing the entrance of the harbor of Mocha, that port ceased to be the point of shipment for the coffee product, and since that time it has come out mainly through the port of Aden in Arabia. This is the case now with respect to both the Arabian and Abyssinian product, as it was up to 200 years ago with respect to both products at the port of Mocha.

The pure food regulation adopted under the authority conferred by the pure food law is as follows:

> (c) The use of a geographical name in connection with a food or drug product will not be deemed a misbranding when, by reason of long usage, it has come to represent a generic term, and is used to indicate a style, type, or brand, but in such cases the State or Territory where any such article is manufactured or produced shall be stated upon the principal label.

As above observed, Mocha is not a place where the coffee is manufactured or produced. As above stated, it is merely the port through which originally the coffee referred to found its way to market.

This being true, the above regulation plainly requires the use of the word "Abyssinian" in connection with the word "Mocha" to cover coffee grown in Abyssinia, as the same law plainly requires the use of the word "Arabian" in connection with "Mocha" to cover coffee grown in Arabia.

In view of the fact that it was agreed on all sides that this case was brought as a test to determine this question, the minimum penalty of $1 will be imposed.

HALL-BAKER GRAIN CO. v. UNITED STATES

(Circuit Court of Appeals, Eighth Circuit, Aug. 19, 1912)

198 Fed. 614; N.J. No. 2702

Error to the District Court of the United States for the Western District of Missouri. Judgment reversed.[52]

Before SANBORN and HOOK, Circuit Judges.

SANBORN, *Circuit Judge.* The defendant below, the Hall-Baker Grain Company, a corporation, engaged in the purchase and sale of grain at Kansas City, Mo., was convicted of misbranding a carload of mixed wheat, No. 2 red wheat, and of adulterating the same by mixing other inferior wheat with it, in violation of the Pure Food Act of June 30, 1906, 34 Stat. 768, sections 7 and 8. It attacks the judgment against it on many grounds, one of which is that there was no substantial evidence of the charges against it and the court below refused to instruct the jury, as it requested, to return a verdict in its favor.

The defendant was found guilty of misbranding under the second, and adulteration under the fourth, count of the indictment. The second count was based on these provisions of section 8 of the act:

> That for the purposes of this act an article shall also be deemed to be misbranded, * * * in the case of food, first, if it be an imitation of, or offered for sale under, a distinctive name of another article; second, if it be labeled or branded so as to deceive or mislead the purchaser.

And the second count charged that the mixed wheat was offered for sale by the defendant as No. 2 red wheat, and that it was labeled No. 2 red wheat, when it was in fact mixed wheat, so as to deceive and mislead the purchasers thereof.

The fourth count was founded on this declaration of section 7 of the act:

> That for the purposes of this act an article shall be deemed to be adulterated in the case of food, first, if any substance has been mixed and packed with it so as to reduce, or lower, or injuriously affect its quality or strength; second, if any substance has been substituted in whole or in part for the article; third, if any valuable constituent of the article has been wholly or in part abstracted; fourth, if it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

And the fourth count charged that each of these things had been done to the carload of wheat. There was evidence tending to estab-

[52] Reversing *United States* v. *Hall-Baker Grain Co.*, p. 291, *ante.*

lish these facts: Kansas City, Mo., was a grain market. There was a public elevator capable of containing 1,000,000 bushels of wheat, operated by a corporation which had no interest in this transaction, which classified wheat purchased by the defendant and other dealers according to its quality and grade as it came to it and was inspected by the official Missouri inspectors and stored it in its various bins, so that wheat of the same grades or qualities went into the same bins and those of different grades and qualities into different bins. On receipt of orders from the owners of this wheat to ship out wheat of any grade, the elevator company loaded it out of the bin containing that grade of wheat into a car, that carload of wheat was then inspected by an official inspector of the State of Missouri and certified to be of the grade and character which he found and adjudged it to be. There were rules for this inspection that had been established pursuant to laws of the State of Missouri and the inspection was made by officers of the State. One of these rules was that No. 2 red wheat was "to be sound, well cleaned, dry, red winter wheat, weighing not less than 59 pounds to the measured bushel."

On April 3, 1909, the defendant agreed to sell 5,000 bushels of No. 2 red wheat according to Missouri State inspection and Kansas City weights to the Walker Grain Company at Fort Worth, Tex. On April 29, 1909, the elevator company, pursuant to an order from the defendant, loaded into a car 45,000 pounds of wheat which an official inspector of the State of Missouri inspected, adjudged, and certified to be No. 2 red wheat, and caused this carload of wheat to be forwarded to the Walker Grain Company in Texas. No officer or employé of the defendant ever saw this load of wheat, or had anything to do with its shipment, except to order the elevator company to ship a carload of No. 2 red wheat. There was an invoice of this wheat dated May 3, 1909, which stated that the Walker Grain Company bought of the defendant on April 3, 1909, this and another carload of "2 red wheat. * * * K. C. Wts. and Grades." No. 2 red wheat is a soft wheat, containing not over 5 percent of hard wheat, and soft wheat which contains from 20 percent to 45 percent of hard wheat is No. 2 or No. 3 mixed wheat, or some other grade of wheat, and the mixture of such a percentage of hard wheat with No. 2 red wheat depreciates its value in the Southwestern markets. This wheat was delivered to the consignee in Texas in the same condition that it was when inspected in Kansas City. When this load of wheat arrived in Texas, it was inspected by a Texas inspector, a Federal inspector, and others, who found it to contain from 20 percent to 45 percent of hard wheat. They differed in their estimates of the percentage of hard wheat in it and in the grade of mixed wheat to which it belonged, but agreed that it was not No. 2 red wheat. It is impracticable to keep the crops of wheat of different farms separate in the transportation of and traffic in this article from the purchaser to the consumer, and it is generally bought and sold by official or established grades, according to the inspection of specified officers or persons. Such officers or persons sometimes differ in their judgments of the grades to which specific lots belong. Wheat generally contains some hard wheat and some soft wheat. Some wheat is very hard and some very soft. There are many

degrees of hardness and of softness of wheat which pass imperceptibly into each other, and there is no fixed and clear line of demarcation whereby all wheat may be indubitably separated into hard wheat and soft wheat. No other facts were disclosed at the trial which are material to the question before us.

The act for the violation of which the defendant was convicted is entitled "An act for preventing the manufacture, sale, or transportation of adulterated, or misbranded, or poisonous, or deleterious foods, drugs, medicines, and liquors." This title and the act itself, when carefully read and considered, demonstrate the fact that the sole purpose of its enactment was (1) to protect purchasers from injurious deceits by the sale of inferior for superior articles; and (2) to protect the health of the people by preventing the sale of normally wholesome articles to which have been added substances poisonous or detrimental to health. The clauses of the act under which the defendant was convicted were evidently enacted to prevent the injurious deceit of purchasers. But where in the facts that were proved and that have been recited is there any evidence of any intent to accomplish deceit, or of any violation of the provisions of this law?

The first charge was that the carload of wheat was offered for sale under a distinctive name of another article of food, to wit, No. 2 red wheat, when it was in fact mixed wheat. The proof was that the defendant offered to sell and sold 5,000 bushels, not of No. 2 red wheat but of such wheat as under the laws of Missouri the official inspector of that State at Kansas City should decide and certify to be No. 2 red wheat, that it delivered the load of wheat in question pursuant to that contract and that this load of wheat was such wheat as under the laws of Missouri the official inspector of that State at Kansas City did adjudge and certify to be No. 2 red wheat. Concede that the inspector was mistaken, and that the wheat was in fact mixed wheat. Nevertheless it was the wheat which the Missouri inspector adjudged and certified to be No. 2 red wheat, and the wheat that he should so adjudge and certify and no other, whatever its actual grade, was the article the defendant offered to sell and sold. It was the undoubted right of the parties to this sale to make the Missouri official inspector the arbiter between them of the character and grade of the wheat in which they dealt, and to make his decision and inspection an ineradicable term of its description. That they did, when they agreed that the wheat sold should be No. 2 red wheat according to the Missouri inspection, and, as the defendant offered and sold no other, there was no evidence in this case that he offered one article under the distinctive name of another.

The second charge was that the wheat was labeled and marked No. 2 red wheat when it was in fact mixed wheat, so as to deceive and mislead the purchasers thereof. But there was no evidence that it was ever labeled or marked at all. The Government offered the invoice of the wheat in evidence, over the objection of the defendant, to prove a label, but this invoice contained a provision similar to that in the contract of sale to the effect that the wheat was to be governed by the Missouri grades, and the wheat had been already inspected and graded No. 2 red wheat by the official inspector several days before the invoice was issued. There was no evidence of any false labeling to deceive purchasers here.

The fourth count of the indictment charged (*a*) that other grades of wheat had been mixed with the wheat shipped so as to injuriously affect it; (*b*) that other grades of wheat had been substituted in part for the No. 2 red wheat pretended to be sold; (*c*) that a part of the No. 2 red wheat had been abstracted and a like quantity of wheat of inferior grade substituted; and (*d*) that the wheat was mixed and packed with other grades of wheat whereby damage and inferiority was concealed. But, as has already appeared, the proof was conclusive that the wheat sold and delivered was the identical article offered for sale, to wit, that wheat which under the laws of Missouri the official inspector of that State should and did adjudge and certify to be No. 2 red wheat. There was no evidence that any other grade of wheat was ever mixed with that wheat or substituted in part for it, or mixed or packed with it, or that any part of it had been abstracted. The proof was that on the order of the defendant the operator of the public elevator loaded it into the car, the official inspector tested it, adjudged, and certified it to be No. 2 red wheat, it was hauled without mixing, abstraction, or substitution, to the consignee in Texas, where other inspectors found it to be mixed wheat, and there the evidence on this subject ceases. There was no evidence to sustain the conviction of this defendant on either count of this indictment.

The act of Congress was not enacted to catch and punish merchants who are conducting their business by customary and approved methods with no intent to deceive purchasers, or to injure the public health, for the mistakes of third persons over whom they have no control, nor for trivial errors of their own, which at first blush may seem to bring their action within the inhibition of the law, but by which in reality they violate neither its letter nor its spirit. Many other questions of law arose at the trial and were discussed by counsel at the bar. But the conclusion which has been reached renders it unnecessary to consider them, and because there was no evidence to sustain any of the charges in this indictment the judgment below must be reversed and the case must be remanded to the court below for a new trial; and it is so ordered.

UNITED STATES v. 30 CASES PURPORTING TO BE GRENADINE SYRUP

(District Court, D. Massachusetts, Aug. 22, 1912)

199 Fed. 932; N.J. No. 2477

Libel under section 10 of the Food and Drugs Act. Trial before the court. Decree for claimant.

Dodge, *District Judge.* The thirty cases were transported from New York to Boston for delivery to a consignee. The consignee has filed a waiver of its rights in favor of the shipper. The shipper has appeared as claimant and answered the information.

The bottles contained in the cases seized are labeled "Grenadine Syrup."

The first count of the information charges that the liquor in the bottles is adulterated within the meaning of the Food and Drugs Act of June 30, 1906, in that a compound sugar syrup has been substituted wholly or in part for the food named. The second count charges misbranding within the meaning of said act, in that the label would deceive and mislead the purchaser into the belief that the food consisted of grenadine syrup, whereas, in truth and in fact, it was not grenadine syrup. The claimant denies that there has been any adulteration within the meaning of the act, and denying also that there has been any misbranding within the meaning of the act, expressly says and avers "that said food was in truth and in fact 'grenadine syrup.'"

The Government's contention is that "Grenadine Syrup" means only syrup composed of sugar and the juice of the pomegranate. This the claimant denies and contends that according to the accepted meaning of the words they signify only a sugar syrup having a certain color and flavor. The claimant is the manufacturer of the syrup seized and concedes that in its manufacture no pomegranates are used. According to the claimant's evidence, the syrup is composed of sugar, citric and tartaric acid, and the juices of certain fruits not disclosed. There is no evidence to the contrary, and I find this to be the fact. That the syrup contains anything which may render it injurious to health, the Government does not claim.

The Government has proved adulteration and misbranding if it has proved that "Grenadine Syrup" has, in common acceptation, the limited meaning it asserts. If this is the fact, a purchaser relying on the label has the right to expect to get a syrup made with pomegranate juice, and is cheated if he gets a syrup from which such juice is absent. But unless the Government has sustained the burden of proving that the words of the label carry with them the meaning claimed, according to an understanding so general as to give any purchaser the right to believe that syrup so composed is what he is buying, neither charge has been established.

"Orange syrup" or "lemon syrup" are words which, if used as labels, would no doubt give a purchaser the right to expect the syrup so labeled to have been made from the familiar fruits named. The pomegranate is a less familiar fruit, nor is "grenade", its French name, the name by which it is commonly known among us. "Grenadine" is nowhere used as the name of a fruit. The word is no doubt derived from "grenade", and among its meanings, in French, as the dictionaries of that language referred to show, is a syrup made of sugar and pomegranate juice. It does not necessarily follow, however, that the same meaning of the word is commonly used and accepted in this country. The question is one not to be settled by derivation or by dictionaries, except so far as these may tend to show the meaning of the word in common acceptation here. And whatever might otherwise be the force of the French definitions of "grenadine" as tending to establish the Government's contention, I must regard it as greatly diminished by the fact that there is shown to be in force in France, since April 3, 1909, a decree of the French Government, made in pursuance of legislation in 1905, for the suppression of fraud in the sale of goods and of food adulteration, which

expressly provides that "the name 'Syrup of Grenadine' is limited to syrup of sugar with the addition of citric acid or of tartaric acid and flavored with vegetable substances."

Many English dictionaries have been referred to by counsel, but in only one of them is "grenadine" defined as a syrup made from pomegranates. This is Webster's New International Dictionary, published by Merriam & Co. (eds. 1910 and 1912). Two other meanings are also given, having no relation to any kind of syrup, and the meaning first referred to is, as I understand it, given as a French meaning, rather than as a commonly accepted English meaning. No such meaning is given in Webster's International Dictionary, published by the same firm in 1904. The Century Dictionary and Cyclopedia Supplement, ed. 1911, gives as one definition "a syrup, used for colds", and for this Larousse, one of the French dictionaries above referred to, is cited; but nothing is said about the syrup being made from pomegranates. I do not find "grenadine" defined in any other English dictionary as a syrup of any kind, the other wholly different meanings of the word are the only ones given.

According to the evidence at the trial "Grenadine Syrup" has been an article of commerce in this country only during the last 10 or 15 years. Some of the syrup dealt in under that name appears to have been imported, chiefly if not wholly, from France, and some of it to have been of domestic manufacture. No evidence was offered by the Government tending to show that any of it, whether imported or made here, has been actually made from pomegranates, or has actually contained any pomegranate juice. The evidence satisfies me, on the other hand, that, speaking generally, no pomegranates or pomegranate juice are or have been used in making either the imported or domestic syrup, and that the imported syrup has been and is made as indicated in the decree of the French Government above referred to.

The evidence fails also to satisfy me that "Grenadine Syrup" has, in common acceptation, the limited meaning claimed by the Government. While it may be true that the names under which similar syrups are known and sold are generally taken from the source of the materials used, they are also sometimes indications only of the flavor or color, and are sometimes merely fanciful—as was admitted by one of the Government witnesses. It appears to be true that, in France, whatever the definitions found in French dictionaries, syrup actually made from pomegranates would more properly be called "sirop de grenade" than "grenadine", "sirop grenadine", or "sirop de grenadine." To my mind, the fair conclusion from the evidence in the case is, that the claimant's label, in common acceptation, means not that the syrup labeled is actually made from pomegranates, but that it possesses a certain characteristic flavor and color, desired by consumers. That the purchaser of such syrup has the right, according to common understanding, to expect a syrup actually made from pomegranates, I am unable to regard as sufficiently proved. Indeed, it seems to me by no means proved that a syrup actually made from pomegranates would possess the flavor and color which purchasers of "Grenadine Syrup" have learned to desire and expect. A witness for the Government testified that he had made syrup from pome-

granates, and he produced samples of the result; but it did not appear that he had ever tried to sell any of it as "Grenadine Syrup." A witness for the defense who had tried the same experiment in manufacture testified that the results were unsatisfactory both as to color and flavor.

By consent of both parties, the case has been heard before the Court without a jury. My views of the law and the evidence being as above stated, I must find for the claimant, and dismiss the information.

UNITED STATES v. D. GHIRARDELLI CO.

(District Court, N.D. California, Sept. 24, 1912)

N.J. No. 2238

Indictment charging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of not guilty.

In this case a product labeled "Ghirardelli's Italian Chocolates, D. Ghirardelli Company, San Francisco, California", contained in a box done in colors and design of the Italian flag, except that the crown above the shield was not used, was alleged to be misbranded for the reason that each box thereof was so labeled as to deceive and mislead the purchaser into the belief that he was buying, and that the product was in fact, a foreign product, for the reason that each box thereof contained the words in large letters "Italian Chocolates" and was so labeled as to imitate the colors of the Italian flag and to give the package the semblance and appearance of having been manufactured in Italy, whereas in truth and in fact it was a domestic product manufactured by said defendant in San Francisco, Cal., and was not genuine Italian chocolate. The candy contained in the boxes referred to was made up of a variety of shapes, wrapped in various colored tin foils similar in style to Italian chocolate candies imported through the port of San Francisco.

The following charge was delivered to the jury:

By the Court. As I have said several times during the progress of the trial, the case lies within a very narrow compass; and it will really depend upon your answer to the question whether or not that label is calculated to deceive a purchaser into the belief that the article contained in the box, chocolate, was manufactured in Italy.

You have heard the testimony of witnesses as to the import of the term "Italian Chocolates", and weighing the testimony that was introduced by the Government in relation thereto, and also that on the part of the defendant, just answer that question.

You must be satisfied, beyond all reasonable doubt, that a purchaser of a box of chocolates labeled as charged in the indictment, reading the label would at once conclude that the chocolates were manufactured in Italy. If there is any other construction to be placed upon it, your verdict must be for the defendant.

You will now retire, gentlemen. The clerk has prepared forms of verdict, which you will take with you.

SCHRAUBSTADTER ET AL. v. UNITED STATES

(Circuit Court of Appeals, Ninth Circuit, Oct. 7, 1912)

199 Fed. 568; N.J. No. 2773

Error to the District Court of the United States for the Northern District of California. Judgment affirmed.[53]

Plaintiffs in error were indicted under the Pure Food and Drugs Act, convicted, and fined, from which judgment this writ of error is prosecuted. The indictment contains three counts. In each of the counts the defendants are described as "Ernest Schraubstadter and Emile A. Groezinger, doing business in the city and county of San Francisco, under the firm name and style of A. Finke's Widow, hereinafter called the defendants." By the first count it is charged that they did wilfully, unlawfully, and knowingly ship and cause to be shipped from San Francisco, Calif., to D. Holzman, at Spokane, Wash., "five cases of half bottles of so-called champagne, each bottle of which so-called champagne in each of the cases aforesaid was misbranded in the following particulars, to wit: The label on the neck of each of the bottles aforesaid contained the words 'Extra Dry Champagne' (with a design of a crown), and the main label on each of the bottles aforesaid contained the words: 'Champagne Brand Defleur Fils & Cie. Grand Vin Royal. Guaranteed under the Pure Food and Drugs Act, June 30th, 1906, Serial No. 7016' (with a design of a fancy coat of arms)." It is then charged that the said labels were designed to mislead the purchaser into the belief that the product was a champagne manufactured in a foreign country, when in truth and in fact it is not a champagne at all, but a white wine artificially carbonated, and said labels do not give any information as to the real place of production or manufacture, and the real fact is that the product in said bottles is a domestic wine artificially carbonated.

The second count charges a shipment of a like number of cases of "so-called champagne" from San Francisco to Spokane, each bottle of which was misbranded in the following particulars, to wit: "The label on the neck of each of the bottles aforesaid contained the words 'Extra Dry' (with a design of a crown), and the main label on each of the bottles aforesaid contained the words 'Crown Brand Champagne' (with the design of a crown and crossed scepters), and underneath the words: 'Guaranteed under the National Pure Food and Drugs Act, June 30th, 1906.'" And it is further charged that the product in said bottles contained was not in fact champagne, but a domestic wine artificially carbonated, and the said product was and is calculated to deceive the purchaser thereof.

The third count pertains to a sale and delivery to McDonald & Cohn, importers and wholesale liquor dealers of San Francisco, of two cases of half bottles of so-called champagne, misbranded in the following particulars, to wit: "The label on the neck of each of the bottles aforesaid containing the words 'Extra Dry Champagne' (with a design of a shield and the monogram A.F.W.), and the main

[53] Affirming *United States* v. *Schraubstadter et al.*, p. 237, *ante*.

label on each of the bottles aforesaid contained the words: ' Cuvée Special E. L. Mercier & Cie. Brand. Extra Dry. Guaranteed under the Pure Food and Drugs Act, June 30, 1906. Serial No. 7016 '"—which the said McDonald & Cohn caused to be shipped from San Francisco to Benson, Ariz. It is then charged with like effect as in the first count, and, further, that defendants gave to the purchaser a written guaranty that the goods so purchased complied with the provisions of the Pure Food and Drugs Act, and that in so selling said wine defendants did so with the knowledge that the same might be entered into the commerce of the country as a champagne.

Trial was entered upon before a jury, but before the same was completed the jury was discharged under an agreement that the trial should be had before the court, waiving a jury. On conclusion of the testimony, and after hearing the argument of counsel, it was "by the court ordered that a judgment of guilty be, and the same is hereby, entered as charged in the indictment herein."

Before GILBERT and Ross, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, *District Judge* (after stating the facts as above). The first objection interposed by defendants challenges the sufficiency of the indictment. The alleged misbranding was preliminarily investigated by the proper officer of the Department of Agriculture, but it will be seen that the fact of such investigation is not set forth in the indictment, nor does it show that any notice was given by the Secretary of Agriculture to the defendants, notifying them of the violation of said act, nor that defendants were thereby afforded an opportunity to present evidence or to be heard. For these and other grounds of like nature it is contended that the indictment is insufficient. In other words, it is argued that the indictment should set forth the doing of the things required to be done under sections 4 and 5 of the act in question. The very contention has been set at rest to the contrary in the case of *United States* v. *Morgan*, 222 U.S. 274, 32 Sup. Ct. 81, 56 L.Ed. 198. The defendants in that case added mineral salts to water drawn from the water supply in New York City, and, charging it with carbonic acid, bottled and sold it as "Imperial Spring Water." An invoice of this they sold and shipped into New Jersey, and were indicted for shipping misbranded goods in interstate commerce. The indictment there, as here, did not set forth the facts the want of which it is claimed renders the present one objectionable. The court held the indictment sufficient, however, reversing the judgment of the court below to the contrary. The court says:

> The provision as to the hearing is administrative, creating a condition where the district attorney is compelled to prosecute without delay. When he receives the Secretary's report, he is not to make another and independent examination, but is bound to accept the finding of the department that the goods are adulterated or misbranded, and that the party from whom they had been obtained held no guaranty. But the fact that the statute compels him to act in one case does not deprive him of the power voluntarily to proceed in that and every other case under his general powers. If, for any reason, the executive department failed to report violations of this law, its neglect would leave untouched the duty of the district attorney to prosecute "all delinquents for crimes and offenses cognizable under the authority of the United States." Rev. Stats. secs. 771, 1022. So an improper finding by the department would no more

stay the grand jury than an order of discharge by a committing magistrate after an ordinary preliminary trial; for the statute contains no expression indicating an intention to withdraw offenses under this act from the general powers of the grand jury, who are diligently to inquire and true presentment make of all matters called to their attention by the court, or that may come to their knowledge during the then present service.

The indictment in the case at bar must be held sufficient.

It is suggested that the evidence indisputably shows (and the entire evidence is in the record) that the defendants used the labels in good faith, believing that they had a perfect right to call their wine "California Champagne"; that it was sold as such without objection, and had been known to the trade for many years under that designation. The labels, however, which are evidentiary of the misbranding, contain no such designation or legend as "California Champagne", and the trial court found that they were misleading and that the dress on each of the packages indicated a design to create in the minds of the consumers the impression that they were "purchasing a foreign and not a domestic product." Unquestionably there is evidence in the record tending to support this conclusion, and, being a question of fact, this court will take no note as respects the weight of the evidence.

Three other contentions are made: First, that the judgment is void, because it is single, and not upon each count, and for $300, an amount in excess of the maximum fine for the first offense; second, that the indictment was against the defendants as an association, and hence a single fine should have been imposed; and, third, that there was no separate conviction upon each count of the indictment, hence a single judgment should have been imposed, which should not have exceeded by fine $200. We will answer the second first, and then the third.

The indictment is against "Ernest Schraubstadter and Emile A. Groezinger, doing business in the city and county of San Francisco under the firm name and style of A. Finke's Widow, hereinafter called the defendants." The very statement shows an intendment to indict the defendants personally, and not the firm as a firm. The recitation "doing business" in San Francisco, etc., is but descriptive of the persons composing the firm, and it would be exceedingly technical to hold that such an indictment was an indictment of the firm, and not of the persons composing it. An indictment so drawn will be treated as an indictment of the individual members of the firm, and not of the firm under its firm name. *State* v. *Powell*, 3 Lea (Tenn.) 164. The indictment here should be treated likewise.

The form of conviction is: "Guilty as charged in the indictment." This was a conviction of the three offenses charged by the three counts of the indictment. In *Ballew* v. *United States*, 160 U.S. 187, 16 Sup.Ct. 263, 40 L.Ed. 388, the defendant was indicted by two counts; one charging him with wrongfully withholding from a pensioner part of the pension allowed and due her, and the other with demanding and receiving as agent a greater compensation for services in prosecuting the claim for pension than is provided by law, and the jury returned a general verdict of guilty. Speaking of the verdict, the court says:

"That in a case such as this a general verdict is proper, and imports of necessity a conviction as to both crimes, is settled"—citing

Claassen v. *United States*, 142 U.S. 140, 146, 12 Sup.Ct. 169, 35 L.Ed. 966.

The verdict in the case at bar was therefore tantamount to a conviction upon each of the three counts contained in the indictment. It is beyond controversy that each of said counts charges a separate and distinct offense, based upon altogether different acts of the defendants, but of such character as were properly included in one indictment. The offenses charged are shipping or causing to be shipped misbranded goods in interstate commerce.

This brings us back to the first of the three contentions stated. The form of the judgment is that: "Each of said defendants pay a fine of one hundred (100) dollars, on each count of the indictment, consisting of three counts, to wit, the sum of three hundred (300) dollars each." The judgment could not be more specific, declarative of a purpose of imposing a fine of $100 on each defendant under each count of the indictment; the maximum fine for the first offense being $200. Act June 30, 1906, ch. 3915, sec. 2, 34 Stat. 768. So that the fine imposed was not excessive. The stating of the aggregate of the fines to be $300 did not invalidate the judgment. The case of *United States* v. *Peeke*, 153 Fed. 166, 82 C.C.A. 340, 12 L.R.A. (N.S.) 314, does not help the defendants' contention. It relates to cumulative sentences of imprisonment. In this case it is a sentence by fine, and when properly analyzed, it is not even cumulative, as a fine of $100 is imposed upon each count.

Affirmed.

UNITED STATES v. J. L. HOPKINS & CO.

(District Court, E.D. New York, Oct. 19, 1912)

199 Fed. 649, N.J. No. 2436

Indictment alleging violation of section 2 of the Food and Drugs Act. Plea in bar overruled. Jury trial. Verdict of guilty. Motion to set aside verdict denied.

CHATFIELD, *District Judge* (charge to jury). An information has been filed against the defendant company, charging a violation of the law of June 30, 1906, chapter 3915, known as the Pure Food and Drugs Law. The information alleges that the defendant corporation, on September 1, 1909, did, within the County of Kings and State of New York, unlawfully ship and deliver for shipment, by a steamboat line, from Brooklyn to Norfolk, in the State of Virginia, a certain drug, which was not properly branded as required by statute.

The other allegations have nothing to do with the questions now raised by the defendant, who has interposed a plea in bar, after appearing by attorney. This plea attacks, first, the jurisdiction of the district court, in this the Eastern District of New York, alleging that the defendant corporation is organized under the laws of the State of New York, with its office and principal place of business within the Southern District, and not within the Eastern District.

This objection cannot be raised by a plea based upon the wording of the information. On demurrer this objection would be unavailing, for the wording of the information states specifically and solely that the corporation was a corporation of this, the Eastern District. The plea, therefore, is intended to raise an issue as to the actual district in which the corporation is domiciled. But this issue does not necessitate the taking of testimony, for the Government has admitted that the place of business and principal office of the corporation is 100 William Street, as stated by the defendant.

For the purposes of the argument, therefore, we can take the statement of the plea to be a correct statement of fact, and consider whether or not a corporation, having its principal place of business and its home office in the Southern District of New York, and therefore having the right, under the statute relating to civil actions, to be sued only in that district, can present the same questions and insist upon the same rights, if charged with a crime under the statute upon which the present information is based.

The law, in section 2, prohibits the *introduction into* any State of any article of food or drugs, adulterated or misbranded, and provides that any person who shall *ship* or *deliver for* shipment, from any State to any other State, any such adulterated article, shall be guilty of a misdemeanor.

The defendant contends that, inasmuch as the statute relates to interstate commerce, no jurisdiction can be acquired, except through the existence of interstate commerce.

That much of the defendant's contention is correct, and prosecution can be had in no district, except one in which prosecution is authorized and jurisdiction given by the statute. The question of regulation, or the manner of administration in the Department of Agriculture, could not prevail over the express language of the statute.

In section 4 it is provided, that the Secretary of Agriculture shall at once certify the fact to the *proper* United States district attorney. This means, and means no more, than that the proceedings shall be certified to the district attorney in whose district prosecution should be had.

Section 10 provides for the seizure of goods within any district where the same may be found. But that relates to a civil proceeding against the goods themselves, and does not in any way determine in what jurisdiction a criminal proceeding can be brought. The provision of the Constitution, that the trial of all crimes shall be by jury, and such trial held in the State where the crime shall have been committed, does not in any way affect prosecution under this statute, for the State in which prosecution is to be had, is clearly defined by the statute itself.

The defendant claims that the prohibited act is the "introduction into" another State. Yet the defendant seems to admit that the prosecution can be had in the *State* of New York, although, if a strict construction were to be given to the defendant's argument, it would be necessary to hold that the crime occurred at the place of introduction of the goods into another State, thus making the place in which trial should be had, the State where the goods are received, rather than that in which they are shipped.

But this is contrary to the express provision of the statutes, which prohibits *introduction* into another State by interstate commerce,

but makes the *crime* the shipping or delivering for shipment at the place in which the commerce is instituted by the physical act of shipment.

The position taken by the defendant, however, is that the prosecution can only be brought in the district where the corporation, insofar as it is able, carries out the mental and physical process, through its agent, of setting in motion activities which shall result in the shipment of the goods, through interstate commerce. But such a contention is not a literal statement of the words of the statute, nor would this law be capable of such application. Where two constructions of a statute are possible, one leading to a practical method of procedure, while the other leads only to an ineffectual or impossible position, the practical meaning should be taken, and the statute so construed as to accomplish the object for which it was intended, unless this object be plainly contrary to the results which would be obtained by the construction followed.

It is evident that the result of prosecution, in the present instance, in the Southern District of New York, would lead to the dismissal of an indictment, for no contract or order to cause the shipment of goods by interstate commerce could be construed as the actual act of shipment. Hence, the result of such a holding would be to limit prosecution under the statute to a district where prosecution could not be successful, and such construction would have been made in the face of the plain statement that the crime consists of "shipping or offering for shipment", which is the act of starting the shipment of tthe goods by some common carrier, or other means of transportation, having as its first step a delivery for shipment. To hold otherwise would mean a differentiation in the possession of the goods by the defendant before they were packed, while they were packed up in the warehouse, and while they were on its delivery wagon or other means of transfer, and while its own possession of these goods was entirely undisturbed.

For these reasons it is plain that the information is correct in form, in charging that the crime, if committed under the statute, began with the delivery of the goods to the steamship company in Brooklyn, and that prosecution should be had in this district.

The defendant also pleads the statute of limitation in an original way. The Pure Food and Drugs Law provides for a hearing upon notice, after examination, and, if an adulteration of a drug shall be found, that an opportunity of hearing shall be given. If after the hearing it appears that any of the provisions of the act have been violated, the statute is specific and technical in its description of the acts prohibited, and in the statement of the penalty therefor. The defendant, therefore, invokes the well-known doctrine that a specific statute, repealing in terms or in necessary effect, the provisions of the general statute, shall be held to prevail over all the provisions of a general statute, which are thus expressly or impliedly set aside.

The general statute of limitations, formerly two years and now three years, by the statute of 1876 (act April 13, 1876, ch. 56, 19 Stat. 32) is claimed by the defendant to have been repealed, inasmuch as no specific limitation is placed upon the prosecution under the Pure Food and Drugs Law, and as the language of the sections

throughout the entire statute indicates that immediate and prompt action is to be had. The defendant invokes the doctrine of laches, not so much as a sufficient defense to the prosecution of this information itself, but it relies upon that doctrine as an argument for its claim that the general statute of limitations is inapplicable, and hence, that it is inferentially repealed through the intent spelled out of the requirement for immediate action.

The defendant would apparently seek to substitute for the general statute of limitations, of 3 years after the commission of an offense, an ambiguous and uncertain equitable determination by the court as to whether the proceedings had been so promptly conducted that the prosecution should be allowed to go on. The theory of a statute of limitations is no longer dependent upon the presumption of some grant freeing the person interested from prosecution, or the lapse of time within which the evidence has presumably been lost. It is rather a definite period prescribed by law, within which an indictment must be filed, provided the defendant is not a fugitive. There is nothing in the Pure Food and Drugs Law which interferes with the operation of a statute of 3 years, beyond which delay cannot be allowed. Whether or not laches on the part of the Government officials had intervened, and whether the defendant's rights had thereby been prejudicially affected, or whether the act which was charged as an offense has been reduced to a mere technicality, would be something for the court to take into account in imposing sentence. But it cannot be said that the intent of Congress was to set up different standards of time limits for the actual filing of an indictment (either greater or less than 3 years as the case might be) by provisions in the law intended to assure a speedy hearing and a prompt method of determining whether acts would be considered by the department as violations of the law, from which a criminal prosecution might result. Even if the acts in question had been terminated, and the prosecution might thereby depend upon methods or practices long since discontinued, or if the defendant, because of the delay in instituting proceedings, had continued upon a course which it ultimately found would bring itself in conflict with the Government, these matters, again, would be questions to be considered in imposing sentence, and are not a bar to the filing of an information at any time within the 3-year period.

The pleas must be overruled, and the defendant called upon to plead generally to the information.

On January 29, 1913, the case having come on for trial before the court and a jury, after the hearing of testimony and argument by counsel, the following charge was delivered to the jury by the court:

Veeder, *District Judge.* This case has taken quite a little time, and, necessarily so; because in dealing with a subject matter that you are not familiar with, a great deal of evidence has been necessary to put you in a position where you can consider the matter intelligently. In other words, much of the evidence has been descriptive. In the charge I shall be brief out of all proportion to the time consumed in introducing the evidence. You must understand, at the outset, that in disposing of the motions made on behalf of the defendant, I am not expressing any opinion on the ultimate question of fact which it is your province to determine. When I

deem it necessary to aid the jury in the discharge of their duty by way of explanation or otherwise, it is my practice to discuss the facts; but I do not regard it necessary in this case, and I shall not undertake to do it. I must not be understood as expressing any opinion on the facts, which are entirely within your province.

The statute of the United States commonly known as the Food and Drugs Act is, as expressed in its title, "an act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes." It contains a great variety of provisions—necessarily so in view of its purpose, and I shall read to you only the parts that bear on the issue before you. It provides:

That the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this Act, is hereby prohibited; and any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this Act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded foods or drugs, or export or offer for export the same to any foreign country, shall be guilty of a misdemeanor, and for such offense be fined not exceeding two hundred dollars for the first offense, and upon conviction for each subsequent offense not exceeding three hundred dollars or be imprisoned not exceeding one year, or both, in the discretion of the court.

I read continuously without eliminating unessential parts, so that you might get the entire sense. The punishment and penalty is something with which, of course, you have nothing to do. Now, that is the general statement of the offense. Of course, it becomes necessary, in the next place, to find out what is a food and what is a drug. We are concerned in this case with an alleged drug, and the act defines a drug in this way:

That the term "drug," as used in this act, shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals.

That is the definition of a drug under this act. Then it goes on to provide as to what shall be deemed under the act adulteration and misbranding. It says:

That for the purposes of this Act an article shall be deemed to be adulterated:
In the case of drugs:
First. If, when a drug is sold under or by a name recognized in the United States Pharmacopœia or National Formulary, it differs from the standard of strength, quality, or purity, as determined by the test laid down in the United States Pharmacopœia or National Formulary official at the time of investigation: *Provided*, That no drug defined in the United States Pharmacopœia or National Formulary shall be deemed to be adulterated under this provision if the standard of strength, quality, or purity be plainly stated upon the bottle, box, or other container thereof, although the standard may differ from that laid down in the United States Pharmacopœia or National Formulary.

I read you the whole paragraph. You see the general purpose is simply that the drug introduced into interstate commerce shall be what it purports to be. Then there is a definition of misbranding:

> That the term "misbranded," as used herein, shall apply to all drugs or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

That is the definition of misbranding. Differing somewhat from the case of adulteration, the act goes on to specify:

> That for the purposes of this act an article shall also be deemed to be misbranded:
> In case of drugs:
> First. If it be an imitation of or offered for sale under the name of another article.

Now that is as much of the law as is necessary to read for your consideration of this case. The information contains two counts. The first count charges adulteration, the second misbranding. The charge in the first count is that the defendant violated this law by this shipment in evidence, consigned to Burrow Martin and Company in the State of Virginia, which is alleged to be a drug and a medicine recognized in the United States Pharmacopœia for internal use and a substance intended for the cure, mitigation, and prevention of disease of man, to wit: A gum purporting to be gum tragacanth in a package and container labeled as follows: "5 lbs. No. 1 Tragacanth Gum, U. S. P. (astragalus gummifer) J. L. Hopkins & Co. New York." It is alleged that that article so shipped was adulterated in that it was sold under and by a name recognized in the United States Pharmacopœia, to wit: gum tragacanth, and differed from the standard of strength, quality, and purity as determined by the test laid down therein at the time of shipment, in that it was not gum tragacanth, and was not a gummy exudation from Astragalus gummifer Labillardiere or from other species of Astragalus, but was powdered Indian gum; also in that it failed to conform to the test laid down in said Pharmacopœia, among others, the test of sodium hydroxide, iodine, and alcohol, and the standard of strength, quality, and purity therein is not stated on said package, excepting the false statement that said article conformed to the standard prescribed in the United States Pharmacopœia, and the strength and quality fell below the professed quality and standard of the United States Pharmacopœia, and was not such, but was of the character hereinbefore described.

Now, in the first place, the Government must prove the sale and introduction into interstate commerce. The act, you will observe, makes the offense the introduction into interstate commerce; but in this first count of the information a sale has been alleged, and although I should be justified under certain circumstances in striking that out as surplusage, it has been alleged in such a way that it cannot be stricken out as surplusage, and therefore the Government must prove it. The evidence on that point is before you from inception to conclusion. The introduction into interstate commerce is comprised necessarily within the sale to this consignee in Vir-

ginia, if you find that there was a sale, but you are to find as a fact whether there was a sale. The motive back of the sale is something that you need pay no attention to. The fact is the thing that you are concerned with—was there an actual sale?

Then, was this article in exhibit 2 a drug, as alleged? Now a drug, I repeat—and this is your guide—includes all medicines, and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation and prevention of disease either of man or of other animals. It refers you to the United States Pharmacopœia. You are to look at the entry of tragacanth in that book, in connection with the limitation or explanation made in the preface, and then upon a consideration of that, in connection with all the other evidence in this case, you are to find the fact, was this a drug?

In the third place, was it adulterated within the meaning of this act. The definition of adulteration is, you will recall, if when a drug is sold under and by a name recognized in the United States Pharmacopœia or National Formulary it differs from the standard of strength, quality or purity as determined by the test laid down in the United States Pharmacopœia or National Formulary official at the time of investigation. There is your guide for the consideration of this question. Take the statement of the Pharmacopœia, not only in the text, but in the preface, and upon all the evidence in the case find whether this article was adulterated within the meaning of the act.

The second count relates to misbranding. That count is not complicated by any allegation of sale, so that, under this count, you are to find, first, whether the defendant shipped, introduced, into interstate commerce this article. Then, everything I have said to you in connection with the first count on the question whether the article is a drug applies here, because the defendant is charged with misbranding a drug. Then, as before, in the third place, with respect to this count you are to find whether the article was misbranded. I repeat the definition that the term misbranded, as used herein, shall apply to all drugs, the package or label of which shall bear any statement, design, or device regarding said article or ingredients or substances contained therein, which shall be false or misleading in any particular, and to any drug product which is falsely branded as to such territory or country in which it is manufactured and produced; for the purposes of this act, an article shall also be deemed to be misbranded, in case of drugs, if it be an imitation of or offered for sale under a name of another article. Here, as under the other count, you are to take the United States Pharmacopœia—not only the text, but the preface, with such limitation and explanation as it contains, and in the light of that, and all the other evidence, you are to find whether this article was misbranded as specified in the act.

That is practically all I have to say to you—to point out just what you have to do. It is for you to do it, on your own responsibility. A good deal has been said in the argument about crime. I must call your attention to a strict rule applicable to all criminal prosecutions, which applies in its full extent to this case. The Government must prove its case beyond a reasonable doubt. That is to say,

if, after a consideration of all this evidence, you have any reasonable doubt as to any one of the three elements that enter into each of these two counts, the defendant is to have the benefit of that doubt, and it is your duty to return a verdict of not guilty; or, to put it the other way, the Government must prove to you beyond reasonable doubt all the elements that I have enumerated under each count——

Mr. HITCHINGS. I understand, Your Honor, that you will mark on my requests——

The COURT. Yes; I was just looking them over. I don't think there is anything else there that I wish to charge that I have not already charged, although I may not have employed the precise language.

Mr. HITCHINGS. I understand Your Honor will mark on them separately, and I will have the benefit of an exception.

The COURT. Yes; I will mark each one.

Mr. HITCHINGS. I have only one request in addition to what Your Honor has said. I ask Your Honor to charge in the language of section four at the end, after judgment of the court, notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid.

The COURT. I refuse to charge it. That is something with which the jury has nothing to do.

Mr. HITCHINGS. Exception.

The COURT. I have expressly charged you in very general terms, and I shall only add that you are to recollect that there are two counts. The first one for adulteration, the second for misbranding. If you find the defendant not guilty on both counts, of course your verdict will be a general verdict of not guilty. Likewise, if you find the defendant guilty on both counts, your verdict will be a general verdict of guilty. But if you find reason to discriminate between the two counts you will so specify in your verdict. You understand that if you desire any of these exhibits you can call for them, and I will see if they cannot be supplied.

Thereupon the jury retired and, after deliberation, returned a verdict of guilty. When the verdict of the jury was announced counsel for defendants moved to set the same aside as contrary to the evidence.

The motions to set aside the verdict were denied, as will more fully appear from the following decision by the court:

VEEDER, *District Judge.* I have considered this case, and I see no reason why the verdict of the jury should be disturbed. I deny the motions to set aside the verdict.

Now, on the matter of sentence, I have this to say. Much was said during the trial of the case about criminality. Now, criminality, in the proper sense of the term, is not involved in a prosecution of this kind. Certainly there is nothing in this particular case involving any criminality. Some of the theories of the defense were not calculated to commend themselves to the court. But with the testimony of Mr. Hopkins himself—the president of this concern, the man most interested—I was favorably impressed. I think it was frank and straightforward. It shows that he proceeded upon a misapprehension of the law. I think it was an entire misapprehension;

but, at the same time, the law is not so perfectly clear that it can be said that it is impossible to misconceive it. This is what the finding in this case amounts to, and no more. Moreover, it was a violation of the law with respect to a drug that is entirely harmless and involves no danger to anybody. I think, therefore, that this is a matter of principle with the Government, not a matter that calls for punishment. I understand that this is the third prosecution for this particular offense, am I not right?

Mr. HITCHINGS. That is right.

The COURT. Now, the expense involved to the defendant in the defense of these prosecutions goes far beyond any fine that I am permitted by statute to impose, and in itself involves sufficient punishment. In this case, therefore, I suspend sentence.

UNITED STATES v. POTTER

(District Court, E.D. North Carolina, Oct. 29, 1912)

N.J. No. 2316

Information charging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of not guilty.

CONNOR, *District Judge* (charge to the jury). In this case, the Government charges that the defendants engaged in canning oysters in a manner which violates the provisions of the act of Congress passed for the purpose of securing pure food for the people of the United States. That oysters were canned by defendants in North Carolina and sold in West Virginia in violation of the provisions of that statute, in that the oysters were adulterated. The defendants admit that they packed oysters in North Carolina and shipped them to a house in Norfolk, Va., the Norfolk house shipping them to Charleston, W.Va.; in other words, the oysters were shipped from Hampstead, N.C., to Charleston, W.Va. The defendants say, however, that the oysters were not adulterated, and that is the question upon which you will pass. It is not a question of law—it is rather one of fact. The word "adulteration" has several definitions as applied to different subjects. In this connection, the statute undertakes to define the word "adulteration" to be to put something in the can, in this instance, which has the effect of reducing the quality or strength of the article to be sold. The oyster, of course, we all understand, is not only palatable as an article of food, but is nourishing. In it are certain elements which, being taken into the system as food are nourishing. It satisfies hunger and nourishes the body. Therefore, the statute provides that any substance put into the can which reduces, lessens or weakens the strength of the article of food, that is, renders it less efficient, less capable of performing the purpose for which it is eaten, is adulteration.

It is in evidence that several cans of oysters, which were shown to you, were prepared at Beaufort, N.C., by the defendants, were found in the store of Ruffner Bros., at Charleston, W.Va. Certain of these cans were obtained by the inspector sent out by the Depart-

ment of Agriculture, carried to Washington and there delivered to a chemist employed by the Department, for the purpose of ascertaining whether they measure up to the standard required by law.

It is in evidence here that two of these chemists examined these oysters. One of them tells you that he examined the can and found it to weigh 12.4 ounces gross. He then took the oysters out and found the net weight was 10.6 ounces. He then separated the oysters from the water found in the can and the water weighed 9.4 ounces, the oysters weighing 1.2 ounces, making the net weight of the contents of the can. He then shows you the can and what was in it, which you have seen, and you can use this information in coming to your verdict. These facts are without contradiction. The chemist tells you the process by which the oysters are prepared for canning. He tells how they are put in steam boxes, how steamed, shucked, run through fresh water, and washed out and put into the cans. He tells you it is usual to put into the can some water with a certain percent of salt. So much water is poured into the cans as will fill in the spaces which are left between the oysters, the cans are then filled up, and that quantity of water will not injure the oysters, and while not necessary for their preservation, will not greatly injure them. He then shows to you a sample of oysters purchased in Baltimore, for which he says he gave a higher price than for the oysters in controversy. It is conceded that the oysters canned by the defendants are sold at 40 cents a dozen cans and retail at 5 cents per can. The Government says that upon this testimony you ought to find that these oysters canned in the manner and found in the condition described are adulterated—that is, more water was put in than necessary for their preservation; in other words, water put in merely to fill up the can. They counted the oysters and found in one can 15 and in another 18. You saw what proportion of the glass they filled when poured out. One of the defendants goes upon the stand and states that he canned these oysters in the manner described by the Government expert, and says after the oysters are ready to be put into the cans that they have different standards, and that it depends not upon the quality but upon the quantity of oysters put into the can. For instance, they put into the cans of the "Jim Crow Brand" 1.5 ounces, and that they are then closed up and labeled or branded "Jim Crow Brand", and that the words "First Quality, Cove Oysters, Packed by the Little Neck Clam Company", etc., also appear; and he further says that he takes oysters, without regard to their size, and puts them into cans not exactly the same size, which he brands "Harbor Island", and these cans contain 3 or 4 ounces; that there are other brands which are sold at different prices. The defendant says that the brand does not indicate the quality of the oyster, the size or fitness for eating, but only the quantity put into the can, and that is what is meant when he says that the Jim Crow oyster is a "light weight", and that weight is the only standard by which the business is carried on and conducted.

The Department has, I think, correctly interpreted and construed this statute to mean that in putting up an article like oysters a sufficient quantity of brine may be put into the can to preserve it. Literally construed, to put any water into the can would be adulteration, but the Department says in administering this law it will recognize the right of a person canning these articles like oysters, etc., to

put into the can sufficient quantity of water or brine to preserve it. Therefore, in this case, if no more water was put into this brand of "Jim Crow" oysters than was necessary to keep them in proper shape and form for use and consumption, and it did not lower or lessen the value of the oysters, as an article of food, the defendants have not violated the law, and if you find that this is the case, you will say that the defendants are not guilty. However, if they put more water in this brand of oysters than was necessary to keep them in proper condition—more water than was reasonably necessary, and which had the effect upon the oysters of extracting from or weakening them as an article of food, then you will say that the defendants are guilty.

Mr. Potter tells you that the different prices charged indicate not the quality but the quantity of the oysters, and that there is no purpose in the way these oysters are branded to mislead anyone as to the quantity or quality, as the trade understands that when he says a light weight oyster the can contains only 1.5 ounces. The chemist says upon weighing this can and the contents he found the oysters only weighed 1.2 ounces, whereas according to the standard of Mr. Potter there ought to have been 1.5 ounces; therefore, if the oysters, as originally canned, only weighed 1.2 ounces, this can would not measure up to his own standard. How this difference occurred, I do not know, unless you should come to the conclusion that the difference in weight is accounted for by the effect of the water upon the oysters, absorbing from the oysters some organic matter. That is a matter for you to say, however. If you find that the effect of the water was to reduce the strength of the oysters, you will find the defendants guilty. Or, if you find that more water was put in than the proper method of canning as defined by the Department states shall be placed in such articles of food, you will say that they are guilty; otherwise, not guilty.

As it has been said to you, in a case of this kind of article, the purpose of the law is to protect the people against impure food, where the quantity or quality, or value of a food, is so adulterated as to reduce the strength of the food value. The whole purpose of the law is to have the quality of an article as well as the quantity just as described upon the label. You will try the case and say whether in your opinion the defendants are guilty; otherwise, you will say that the defendants are not guilty. Take the case, gentlemen.

UNITED STATES v. LEHN & FINK

(District Court, S.D. New York, Nov. 6, 1912)

N.J. No. 2841

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

The United States attorney filed an information against Lehn & Fink, alleging shipment from the State of New York into the State of Texas, of a quantity of oil of cassia which was adulterated and misbranded. The product was labeled: "1 lb. O. L. Cinnamoni Oil

Cassia U. S. P. Serial No. 2. Lehn & Fink, distillers and importers of essential oils New York."

Adulteration of the product was alleged in the information for the reason that it was sold under and by a name recognized in the United States Pharmacopœia or National Formulary, to wit, oil of cassia, and differed from the standard of strength, quality, and purity as determined by the tests laid down in said Pharmacopœia official at the time of investigation with respect to the specific gravity and rotation of said article, and the absence therefrom of resins, and the standard of strength, quality, and purity of said article was not stated upon the container thereof or in the label thereof. Misbranding was alleged for the reason that the package and label on the article bore a statement, to wit, "Oil Cassia U.S.P.", regarding it and the ingredients and substances contained therein which was false and misleading; that is to say, said statement conveyed the impression that the product was of the standard laid down in said Pharmacopœia for the article or drug which the product purported to be, to wit, oil of cassia, whereas it did not comply with the standard with respect to its specific gravity, rotation, and the absence of resins.

The case having come on for trial before the court and a jury, after the submission of evidence and argument by counsel, the following charge was delivered to the jury by the court:

Hough, *District Judge.* We have listened for a couple of hours to some long, hard words; but, like every criminal case, we get down to a question of fact, not difficult to state, and (I think) not difficult to understand.

The Pure Food and Drug Act has been much talked of in the last half dozen years. The object, as you have been told, is to enable the consumer to know what it is in the way of food or drugs that he is putting in his stomach, and to punish anybody who, whether by willful design or carelessness or inadvertence—it doesn't make a particle of difference which—puts forth for human consumption as food or drug that which is not what it pretends to be. The statute has other objects, but this is probably the leading purpose.

I do not quite agree with Mr. Newman, who told you that the point in this case is the difference between rosin and resin. There is a plain difference. We are told, if we needed to be told, that rosin is that well-known article of commerce that comes out of a species of pine tree, and is in a state of nature, mixed with what we call turpentine. It is used for a large number of well-known and homely purposes, as for instance soldering tin cans or helping to solder them. Rosin is a resin; that is, it is a resinous substance. It may be that some members of the jury were brought up in the country and can remember what spruce gum was like. Well, that is also a resinous substance, and there are many other resinous substances in nature.

This oil of cassia or cinnamon is made out of a plant that does not grow in this country. It is mostly manufactured in China by the process of distillation, and I take it that every man here has some general idea how whisky or other distilled spirits are made. In its simplest form the thing which is to be distilled is boiled and the steam of the boiling is condensed into a fluid which is in its ultimate form of the same kind, and yet chemically differs from that from which it originated.

It appears by the uncontradicted evidence that since the substance which results after distillation, oil of cassia, is very heavy, its heating has to be supplanted or aided by a direct blast of steam. Anyone can see that that may result in the carrying over of particles into the distillation that by a milder process, so to speak, would not be so carried over.

Mr. Wyckoff says that there is in this plant, which produces, among other things, the oil of cinnamon or cassia, a resinous substance, and that in the process of distillation such resinous substances by the force of the heat and steam are in part carried over into the oil; but they are a natural product of the plant and must be expected to be found in the finished product.

The chemists for the Government (as I understand them) deny that there is any such resinous property in the cassia cinnamon plant. I advise you that if there is any natural resinous substance in the cassia cinnamon plant, then there is nothing in the law which makes it unlawful for that resinous substance to be found in the finished product that we call oil of cinnamon or cassia. But, says the Government, we got oil of cinnamon or cassia that was sent by Lehn & Fink to Texas; we had that analyzed and the gentlemen who analyzed it have been before you. They say they know rosin when they see it, and they found that this particular oil of cassia contained 5 or 6 percent of *rosin.* Then it seems, by way of trying to straighten the matter out, that a portion of this sample of cinnamon oil was sent to Lehn & Fink, and Wyckoff analyzed it—and he says that he did not find any rosin. He did find, however, all the other things that the other gentlemen found, and (except as to rosin) there is no substantial difference between their chemical investigations. But, when he applied the test that ought to have showed rosin if there was any rosin there, he got no precipitate—found no solid residuum of rosin; but he did find about 5½ percent of a *resinous substance*, which, in his opinion, was the natural resin of the cassia cinnamon plant.

There is the whole story. Mr. Wyckoff says he found between 5 and 6 percent of resinous substance and says that is natural to the article; the Government inspectors found, they say, about the same percentage of rosin.

When we turn to the standard books in evidence before you, the Formulary says that it is common to adulterate oil of cassia with rosin and petroleum; and, when you turn to the Pharmacopœia various tests are given for the purpose of finding out whether there is rosin—not resinous substances, but rosin and petroleum—in oil of cassia. Nobody says there is any petroleum in this specimen, but the Government by its witnesses says there was rosin in it. The defendant by its witnesses says there wasn't any rosin in it at all, and that is the question.

Now, if you are thoroughly satisfied that there was rosin in this oil of cassia, then the defendant is guilty; if you are not satisfied, thoroughly satisfied, that there was rosin in this oil of cassia, then it is not guilty.

By way of argument the defendant advances to you this proposition. It is worthy of consideration. The Pharmacopœia says that the active principle—the cinnamic aldehyde—that is in oil of cassia need only amount to 75 percent, and this specimen had more of the

active principle in it than the Pharmacopœia required. That is admitted. Therefore the interrogatory is made, why should anybody adulterate something better than the standard?

Mr. Smith for the prosecution is entirely right in saying that there is not the slightest effort here to show that Lehn & Fink ever put anything in this oil. It is admitted they got this article from China and sold it to Texas as it came from China, so that whatever there was in the article when it got to Texas (so far as we know here) must have been put in in China. But when a man gets an article from the ends of the earth and then puts it forth with a label on it, which in effect says, "This corresponds to the law of the United States", it is his business to see that it does correspond, so it doesn't make any difference where it came from or who put in the rosin, if there was any. The question is as I put it to you now: Was there 5 or 6 percent of rosin in this oil of cinnamon, or was there not? If there was, then you should find a verdict for the Government; if there was not, then you are to find a verdict for the defendant.

Thereupon the jury retired and after due deliberation returned into court with a verdict of "guilty", and the court imposed a fine of $150, this being the second offense of the defendant corporation.

UNITED STATES v. PHILADELPHIA PICKLING CO.

(District Court, District of New Jersey, Nov. 19, 1912)

N.J. No. 2456

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Directed verdict of guilty.[54]

The jury was charged as follows:

RELLSTAB, *District Judge*. The question now before the court is whether the defense that the defendant has been permitted to introduce, is an answer to this indictment, it having been admitted by the defendant, first, that the nine barrels of tomato paste, which constitutes the shipment, contained adulterated food within the meaning of the Food and Drugs Act; and second, that it shipped them from Belleplain, New Jersey, to itself at its place of business in Philadelphia, Pa.

As I say, the question is whether, in view of those admissions, the defense that has been permitted to be introduced can be treated as a defense in law. If it can, it presents a question for the jury. If not, there is no question for the jury to pass upon, and it devolves upon the court to direct a verdict.

The view I have reached in the premises is that it does not constitute a defense, and I will briefly state my reasons, so that if the case should be taken up, the appellate court will know upon what grounds the defense was overruled.

The indictment contains but one count, and that charges the defendant, the Philadelphia Pickling Company, with wilfully and unlawfully shipping and delivering for shipment from Belleplain, N.J., to Philadelphia, Pa., by a certain railroad, nine barrels of

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[54] Affirmed, *Philadelphia Pickling Co.* v. *United States*, p. 451, *post*.

tomato paste, which, the indictment alleges, was a food adulterated within the meaning of the Food and Drug Act. It then specifies in what way it was adulterated. This act, as indicated in its title, is an act to prevent not only the manufacture and sale, but the transportation, of adulterated or misbranded foods and drugs, etc. Transportation as well as sale or manufacture, is therefore, within the congressional purpose in passing this enactment. Section 2 prohibits the introduction into any State from another State, of adulterated foods; or even the delivery for shipment from one State to another, and it declares the persons who shall so introduce and transport, to be guilty of a misdemanor.

Section 10, to which reference has been made, authorizes a proceeding in rem, and contemplates only the confiscation of the offending goods. Section 2, upon which the indictment is founded, directs a proceeding in personam, and the constituents of the offense therein denounced are found therein, no reference to section 10 being necessary.

It is said, however, that the shipment in question, though made with the view of sale, depended upon an inspection and test before a sale could take place, and, therefore, was not an offense within such section. In other words, that such a transaction was not commerce, and therefore not within the legislative purpose of the act. I cannot accede to this view. The defendant certainly contemplated making a sale of this paste. The examination and test were for that purpose; that the result thereof might prevent the consummation of the intended sale does not make this shipment any less a commercial transaction. The purpose of this act is very manifest, it is a beneficent purpose; it is to protect the public from the sale of impure food. The act itself furnishes the test of what is impure. Transportation with a view of putting into the hands of customers an adulterated article is within the beneficent purpose and within the terms of this enactment.

Now, it appears in this case that the defendant purchased in New Jersey, from a New Jersey manufacturer, a number of barrels of tomato paste, which it stored in its own place in New Jersey. The testimony on behalf of the defendant discloses not only that, but also that they knew at that time that it was adulterated within the meaning of this act, and that if such food should come into interstate commerce it would fall within the denouncement of such act, subject the defendant to indictment, and the goods themselves to confiscation.

The proviso to section 2, to which reference has been made, shows that Congress intended to except from the provisions of the act such articles, even though they were adulterated within the meaning of the act, where it was intended for export to a foreign country; but it expressly limits the proviso, and requires the persons so intending to use the adulterated food, to see that it is put in packages prepared and packed according to the specifications or directions of the foreign purchaser; that was not done in this case. The reason given why it was not done is that without an examination and test no such exportation was to take place, and that the prospective purchaser would not go to New Jersey to make the inspection, and that the goods were thereupon shipped to Philadelphia to have the examination and test

made there. We find, therefore, that a shipment was made of adulterated goods from one State to another. It is said it was made, however, from the owner to himself, the shipper and the consignee being the same person, and that from that we are to conclude that it was not commerce. I do not think the cases cited by counsel will support that insistence. Furthermore, it must not be overlooked that all those cases were dealing with section 10, seizures in which the element of sale is expressly inserted. It may very well be that a person cannot sell to himself; yet, a shipment by one to himself may be in contemplation of sale and fall within the statute's inhibition. If Stevens, the original owner, had shipped these goods direct to the defendant at Philadelphia, there would be no question but that it would be a shipment in interstate commerce. Will the mere fact that the purchase was made in New Jersey and shipped by the purchaser to himself in another State, take the transaction out of the act? To put such construction upon this section seems to me to be violative of the ordinarily accepted principles of statutory construction. This section declares that introducing from one State to another, shipping from one State to another, delivering for the purpose of shipping from one State to another, an article of food which is adulterated, is a misdemeanor. As already stated, these nine barrels of adulterated tomato paste were intended to be sold, and that with a view of facilitating and consummating such sale, the shipment was made from New Jersey to Pennsylvania. It would have been consummated, according to their own statement, if the goods had upon inspection and examination by the intended purchaser proved to be satisfactory to him. To hold that a shipment of that kind is not commerce, in my judgment, would be in absolute disregard of the meaning of the word. The defendant, if it had intended to make a shipment of these barrels under this proviso which I have mentioned—the proviso tacked on to the second section—should have made its inspection and examination in New Jersey and should there have prepared and marked the containers in the manner directed by the statute. It did not do that; but on the contrary, it made the shipment in disregard of such requirement, and hence, in violation of the section.

My direction, therefore, to you gentlemen is that you find a verdict in favor of the Government.

FOUR HUNDRED AND FORTY-THREE CANS OF FROZEN EGG PRODUCT v. UNITED STATES

(Supreme Court of the United States, Dec. 2, 1912)

226 U.S. 172; N.J. No. 2437

Appeal from and in error to the Circuit Court of Appeals for the Third Circuit. Reversed.[55]

Mr. Justice DAY delivered the opinion of the court.

This case is here on both writ of error to and appeal from a decree of the Circuit Court of Appeals for the Third Circuit, reversing the

[55] Reversing *United States* v. *443 Cans of Frozen Egg Product*, p. 345, *ante*. For the case in the lower court, *United States* v. *443 Cans of Frozen Egg Product*, see p. 197, *ante*.

judgment of the United States District Court for the District of New Jersey dismissing a libel brought by the United States which had for its object the condemnation of 443 cans of frozen egg product seized under the Pure Food Act of June 30, 1906 (34 Stat. 768, ch. 3915).

The United States filed its libel alleging that 443 cans of frozen egg product, in the possession of the Merchants' Refrigerating Co., at Jersey City, N.J., consisted in whole or in part of a "filthy, decomposed, and putrid animal, to wit, egg substance," and praying for their condemnation. At the trial the issues were narrowed so as to exclude filthy and putrid substances, leaving the charge to stand as to decomposed substance. Three hundred and forty-two cans were seized. The H. J. Keith Co. appeared and claimed the goods, denying the charges concerning them. The case was tried without a jury to the district judge, who entered a decree dismissing the libel. The United States took an appeal to the circuit court of appeals, and after consideration in that court the decree dismissing the libel was reversed and, upon the facts, a decree of condemnation in favor of the Government was entered (193 Fed. 589). The claimant, the H. J. Keith Co., thereupon appealed to this court, and also sued out a writ of error to the same decree.

We are met at the outset with a question of jurisdiction. Section 10 of the Pure Food Act provides:

> That any article of food * * * that is adulterated or misbranded within the meaning of this act, and is being transported from one State * * * to another for sale, * * * shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. * * * The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States.

It will be observed that the last sentence of the section provides that "the proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States." The contention of the Government upon this question of jurisdiction is that the words "conform, as near as may be, to the proceedings in admiralty," means, except in cases where jury trial is demanded, to include appellate proceedings, as well as original proceedings in the district court, and therefore the review of the judgments of the district court would be by appeal to the circuit court of appeals, as in admiralty cases under the Circuit Court of Appeals Act (26 Stat. 826, c. 517) and under the Judicial Code (36 Stat. 1087, 1133, ch. 231, sec. 128). If that is a proper construction of the statute, then the circuit court of appeals had the right to review the case upon the facts and enter a final decree, which, under the Circuit Court of Appeals Act and Judicial Code, would be reviewable here only upon writ of certiorari.

The appellant, also plaintiff in error, contends that the seizure being upon land, the proceeding was at law and reviewable only upon writ of error in the circuit court of appeals; that the attempted appeal did not give the circuit court of appeals jurisdiction, and that

upon the writ of error here this court should reverse the judgment and remand the case to that court with directions to dismiss the appeal.

The determination of this controversy requires some examination of previous legislation and of the decisions of this court interpreting such legislation as to the nature and extent of the jurisdiction of the district courts of the United States in seizure cases.

The Judiciary Act of 1789 (1 Stat. 73, 76, ch. 20, sec. 9) gave to the district courts:

> Exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it; and * * * also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States.

In the case of *The Sarah*, 8 Wheat. 391, a libel was filed against 422 casks of wine alleging a forfeiture by false entry. It appearing in the course of the trial that the seizure was made on land, it was held that this court could not review the case save upon writ of error. Chief Justice Marshall, delivering the opinion of the court, said (p. 394):

> By the act constituting the judicial system of the United States, the district courts are courts both of common law and admiralty jurisdiction. In the trial of all cases of seizure on land, the court sits as a court of common law. In cases of seizure made on waters navigable by vessels of ten tons burthen and upwards, the court sits as a court of admiralty. In all cases at common law, the trial must be by jury. In cases of admiralty and maritime jurisdiction, it has been settled, in the cases of *The Vengeance* (reported in 3 Dallas' Rep. 297); *The Sally* (in 2 Cranch's Rep. 406); and *The Betsy and Charlotte* (in 4 Cranch's Rep. 433), that the trial is to be by the court.
>
> Although the two jurisdictions are vested in the same tribunal, they are as distinct from each other as if they were vested in different tribunals, and can no more be blended than a court of chancery with a court of common law.

A statute, practically the same, with some slight changes, was embodied in section 563 of the Revised Statutes, subdivision 8, giving the district courts jurisdiction "of all civil causes of admiralty and maritime jurisdiction * * * and of all seizures on land and on waters not within admiralty and maritime jurisdiction," the subdivision mentioned omitting the provision found in the section of the Judiciary Act of 1789 to which we have referred as to seizures "within their respective districts," and including cases of "seizures on land and on waters not within admiralty and maritime jurisdiction." Under this statute it has been uniformly held that the district court as to seizures on land proceeds as a court of common law with trial by jury and not as a court of admiralty. *United States* v. *Winchester*, 99 U.S. 372.

Questions analogous to the one here came before this court in construing the Confiscation Acts enacted in 1861 and 1862. This court, in *Union Insurance Co.* v. *United States*, 6 Wall. 759, construed the act of Congress of August 6, 1861, entitled "An act to confiscate property used for insurrectionary purposes." That act provided for the seizure of such property and its condemnation in the district or circuit court having jurisdiction of the amount, or

in admiralty in any district in which the property might be seized, and authorized the Attorney General to institute proceedings of condemnation. In that case it was held that in the condemnation of real estate or property on land the proceedings were to be shaped in general conformity to the practice in admiralty, but in respect to trial by jury and exceptions to evidence the proceedings should conform to the course of proceeding by information on the common-law side of the court. It was held that where proceedings for the forfeiture of real estate were had in conformity with the practice in courts of admiralty they could not be reviewed in this court by appeal, and that the case could come here only for the purpose of reversing the decree and directing a new trial.

In the case of *Morris' Cotton*, 8 Wall. 507, this court had under consideration the acts of 1861 and of July 17, 1862, which act provided (12 Stat. 589, 591, sec. 7) for the institution of proceedings in the name of the United States in any district court, etc., where the property might be found, etc., " which proceedings shall conform as nearly as may be to proceedings in admiralty or revenue cases." In the *Morris Case* it was said (p. 511) :

> Where the seizure is made on navigable waters, within the ninth section of the Judiciary Act, the case belongs to the instance side of the district court; but where the seizure was made on land, the suit, though in the form of a libel of information, is an action at common law, and the claimants are entitled to trial by jury.
>
> Seizures, when made on waters which are navigable from the sea by vessels of ten or more tons burden, are exclusively cognizable in the district courts, subject to appeal, as provided by law; but all seizures on land or on waters not navigable, and all suits instituted to recover penalties and forfeitures incurred, except for seizures on navigable waters, must be prosecuted as other common-law suits, and can only be removed into this court by writ of error.

This jurisdiction of the district court was known to Congress at the time it passed the Pure Food Act, as were the decisions of this court construing the former acts of Congress, and it declared that such proceedings shall conform to those in admiralty, as near as may be, giving to either party, however, the right to demand a trial by jury in case of issues of fact joined. We think this act must be held to have been passed not to confer a new jurisdiction upon the district court, but in recognition of the jurisdiction already created in seizures upon land and water. The act makes no reference, in conforming the proceedings as near as may be to those in admiralty, to appellate procedure. It leaves that to be determined by the nature of the case and the statutes already in force. It is true that the right of trial by jury is preserved, where demanded by either party. We think Congress inserted this provision with a view to removing any question as to the constitutionality of the act. It was held under the Confiscation Acts, although no such specific provision is contained, that the action provided was one at common law, with a right to trial by jury. The Seventh Amendment to the Constitution preserves the right of trial by jury in suits at common law involving more than $20, and provides that no fact tried by a jury shall be reviewed otherwise than according to the rules of the common law. Having in mind these provisions and as well the construction of the previous acts, we think it was the purpose of Congress to leave no doubt as to the right of trial by jury in the law proceeding for condemnation which the act intended to provide.

These proceedings for the seizure and condemnation of property which is impure or adulterated are intended to be in a sense summary, and yet the statute as we have construed it gives the owner a right to a hearing in a court of record with a right of review upon questions of law by writ of error in the circuit court of appeals, and, where more than $1,000 is involved, finally in this court (sec. 6 of the Circuit Court of Appeals Act). It is to be noted in this connection that where the examination of specimens of food or drugs made by the Department of Agriculture shows that the articles are adulterated or misbranded, the parties from whom the specimens were obtained are (sec. 4 of the Pure Food Act) given a hearing before the matter is certified to the district attorney by the Secretary of Agriculture.

We do not think it was intended to liken the proceedings to those in admiralty beyond the seizure of the property by process *in rem*, then giving the case the character of a law action, with trial by jury if demanded and with the review already obtaining in actions at law. It is true that if the action is tried in the district court without a jury the circuit court of appeals is limited to a consideration of such questions of law as may have been presented by the record proper, independently of the special finding. *Campbell* v. *United States*, 224 U.S. 99. But the party on jury trial may reserve his exceptions, take a bill of exceptions, and have a review upon writ of error in the manner we have pointed out.

It is insisted for the Government that inasmuch as the hearing in the circuit court of appeals upon appeal was without objection by the claimant, the jurisdictional objection was waived. We cannot take that view. As we construe the statute, the circuit court of appeals had no jurisdiction upon the appeal, and neither the action of the court nor the consent of the parties could give it. *Leo Lung On* v. *United States*, 159 Fed. 125; *Jones* v. *La Vallette*, 5 Wall. 579; *United States* v. *Emholt*, 105 U.S. 414; *Perez* v. *Fernandez*, 202 U.S. 80, 100.

As the circuit court of appeals, in our opinion, proceeded without jurisdiction by reason of the appeal, this court, having acquired jurisdiction, should reverse the judgment of the circuit court of appeals and remand the case to that court with instructions to dismiss the appeal for want of jurisdiction. *Union & Planters' Bank* v. *Memphis*, 189 U.S. 71.

Judgment accordingly.

UNITED STATES v. HUDSON MANUFACTURING CO. ET AL.

(Circuit Court of Appeals, Fifth Circuit, Dec. 17, 1912)

200 Fed. 956; N.J. No. 2350

Appeal by the libelant from the decree of the District Court for the Western District of Texas dismissing a libel filed by the United States under section 10 of the Food and Drugs Act. Appeal dismissed.[56]

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[56] See *United States* v. *Three Barrels of Vanilla Tonka and Compound*, p. 201, *ante*.

ASSIGNMENT OF ERRORS

I. That the court erred in rendering judgment and entering decree against libelant on the pleadings in said cause, and that said decree is contrary to law and the facts as alleged and stated in the pleadings in said cause.

II. That the court erred in finding and holding upon the evidence and facts appearing on the trial of said cause, that the three barrels of vanilla tonka and compound seized and sought to be condemned herein were not transported and shipped in interstate commerce for sale within the meaning of the Food and Drugs Act of June 30, 1906, and upon such finding and holding entering judgment that the property libeled herein cannot be condemned, and that libelant take nothing by this its suit, and that the libel proceedings herein be dismissed.

III. That the court erred in finding and holding upon the evidence and facts appearing on trial of said cause that as no evidence had been introduced showing that the Secretary of Agriculture had caused notice to be given to the party from whom the sample was obtained and giving him an opportunity to be heard, as prescribed in section 4 of the Food and Drugs Act of June 30, 1906, that the libel proceedings against said three barrels of vanilla tonka and compound herein could not in law be instituted, had, and maintained herein, and in entering judgment that libelant take nothing by this its suit, and that the libel proceedings herein be dismissed.

IV. That the court erred in holding that libelant was not entitled to recover, and in granting and entering final decree that libelant take nothing by this its suit, and that the libel proceedings herein be dismissed, and in not entering a decree in favor of libelant. Wherefore, libelant, appellant, prays the judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the premises, and that the decree appealed from be reversed, and that it recover its costs herein incurred.

Before PARDEE and SHELBY, Circuit Judges, and FOSTER, District Judge.

PER CURIAM: This was a proceeding instituted by the United States under section 10 of the Food and Drugs Act of June 30, 1906, 34 Stat. 768, praying for the seizure and condemnation of three barrels of vanilla tonka and compound alleged to have been shipped from Chicago, Illinois, to San Antonio, Texas, and alleged to remain in San Antonio, Texas, in the original unbroken packages, where they were being offered for sale, and that the contents of said barrels were adulterated and misbranded within the meaning of the aforesaid act of Congress. In accordance with the prayer of the libel the three barrels aforesaid were seized at San Antonio. Appellee, Hudson Manufacturing Company, appeared as claimant of said goods and filed its answer denying the charge of adulteration and misbranding, denying that the goods remained at the time of seizure in the original unbroken packages, denying that they were being offered for sale, and alleging that the goods were not shipped in interstate commerce for sale, but were so shipped for manufacturing purposes solely.

On hearing in the district court a jury was waived and the matters of law and fact were submitted to the court. At the close of the evidence for the United States the court entered an order dismissing the proceedings on the ground that the evidence showed that the goods seized were not transported or shipped for sale, but were shipped for the purpose of being used in the manufacture of ice cream, and therefore not liable to seizure under said section 10, and on the further ground that the evidence failed to show a preliminary hearing was afforded to the party from whom the sample was obtained and an opportunity given him to be heard, as provided for in section 4 of said act.

From the order dismissing the proceedings as aforesaid the United States prosecutes this appeal, insisting that the trial court was in error, and the appellees move to dismiss the appeal on the ground that the proceeding in the court below was one at law and can only be reviewed in this court by writ of error.

The precise question has been dealt with in *Four Hundred and Forty-three Cans of Frozen Egg Product* v. *United States* (226 U.S. 172), No. 590 of the docket of the Supreme Court, at the present term, in a decision handed down December 2, 1912. In that case it is held that in seizures under the Pure Food Act of June 30, 1906 (34 Stat. 768), and on land, the proceedings in the district court are at law, and that the circuit courts of appeals are without jurisdiction to review the same on appeal.

The appeal in this case is dismissed.

WM. M. GALT & CO. v. UNITED STATES

(Court of Appeals, District of Columbia, Jan. 6, 1913)

39 App.D.C. 470; N.J. No. 2396

Appeal from decree of the Supreme Court of the District of Columbia, condemning 447 sacks of "Princess" flour and 72 sacks of "Fancy Melba" flour. Decree affirmed.[57]

Robb, *Judge.* This is an appeal from a decree in the Supreme Court of the District condemning 447 sacks of "Princess Flour" and 72 sacks of "Fancy Melba Patent" flour, under a libel filed by the United States through its attorney in and for the District of Columbia. The libel sets forth the possession by the appellants within this District of "three hundred and fifty sacks, more or less, of flour, labeled 'Princess Flour from Blanton Milling Co., Indianapolis, Ind.'; and further, fifty sacks, more or less, of flour labeled '140 lbs. Fancy Melba's Patent—Trade Mark Registered—From Choice Hard Wheat, Majestic Flour Manufacturing Co., U. S. A., Distributors'."

As originally filed the libel alleged that said flour was both adulterated and misbranded, in violation of the Pure Food Act of June 30, 1906 (34 Stat. 768). This averment was superseded by another which set forth that said flour is "adulterated within the meaning

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[57] Affirming *United States* v. *350 Sacks of "Princess Flour" and 50 Sacks of "Fancy Melba Flour,"* p. 351, *ante.*

and intent and in violation of the said act of Congress approved June thirtieth, A. D. 1906, and that the said flour consists in part of a filthy, decomposed and putrid animal and vegetable substance." Appropriate answer was filed and, a jury being waived, testimony was taken in open court, the parties agreeing that the court might "find the facts and declare the law applicable thereto and render judgment accordingly." The court filed a written opinion which "was treated and considered by both court and counsel as the court's finding of facts as aforesaid." Thereupon the case was appealed to this court, the parties, according to the stipulation filed herein, "taking and considering the said opinion as and for such finding of facts."

The evidence which was before the trial court and upon which the decree is based is not in this record, and hence not before us. Searching the opinion of the trial court, we learn that the Government on two occasions, permission of the court first having been obtained, took two sacks of flour "one from each of said *two lots* described, for the purpose of examination and analysis." Appellants were granted the same privilege, but did not exercise it. We now quote from the opinion:

> The result of the examination of the flour sacks taken by the Government as samples, was that one of them contained worms, insects, and beetles, aggregating 3,525, and the other three worms, insects, and beetles, aggregating 1,207, 1,448, and 1,959, respectively.
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> Experiments were made by the Department of Chemistry, showing that the said flour contained a large number of bacteria that were supposed to be injurious to the human body; and, in addition, to the worms, insects, and beetles, that had been sifted out of the flour, the evidence showed that there remained in the same, cases or husks made by the worms, as well as the excreta from them, all of which, it was claimed, rendered the said flour filthy within the meaning of said act.
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> There were a great many weevils discovered, and they were defined as the grain weevil, or wingless insects, which require a period of some six weeks, in warm weather, for full growth and development, during which time they pass through four distinct stages of existence, first in the form of the egg, then the form of the larva, then in the pupa form, and finally reaching the adult form; and that after maturing, these insects might live for several months, and possibly for a year. In cold weather a longer time was necessary for their growth.
>
> That the beetle known as "flour beetle," comes from a larva, or worm, about half an inch long, and it breeds in flour and grain. Several of these beetles, in the larva state, or in the adult state, appeared to be in said samples.
>
> The evidence was that the flour was injuriously affected by the presence of such worms, insects, and beetles, by reason of their feeding on the gluten, and thereby destroying the strength and value of the flour, and rendering it unfit for making bread, or other domestic use, even if the foreign, filthy matter could be bolted or sifted out of it.

The court further found that it is not clear whether weevils may not come into flour while in storage, without any fault of the owner. Speaking of the sacks of flour here involved, the court said: "It appears that the flour sacks taken were from different locations in the several piles of sacks, and it is argued on behalf of the Government, that all the sacks seized were in a position to become affected by the dirt and filth from a stable near by." The court finally found "as matter of fact from the evidence that the said several sacks of flour are in a filthy condition, under the provisions of said act, by reason of the presence of the said worms, insects, and beetles, in such

quantities as shown, and from the condition which they have produced in the said flour."

The so-called Pure Food Act is entitled "An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors", etc. Section 7 defines adulteration of foods and drugs, respectively, as follows: In the case of drugs (1) if a drug differs from the standard strength, quality, or purity, unless the actual standard be plainly stated upon the box or other container; (2) if its strength or purity fall below the professed standard or quality under which it is sold. In the case of confectionery, which the act defines as a food, if it contains any mineral substance or poison, color, or flavor, or other ingredients deleterious or detrimental to health, etc. In the case of food generally (1) if any substance has been mixed or packed with it so as to lower or injuriously affect its quality or strength; (2) if any substance has been substituted wholly or in part for the article; (3) if any valuable constituent of the article has been wholly or in part abstracted; (4) if it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed; (5) if it contain any added poisonous ingredient which may render such article injurious to health; (6) *if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance*, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter.

Section 8 of the act covers misbranding. It is provided therein that no label shall bear any statement, design, or device "which shall be false or misleading in any particular."

A most casual reading of this Pure Food Act discloses that the purpose of Congress in its enactment was the better protection of the people of this country from adulterated or deleterious foods, drugs, medicines, and liquors. It is the duty of the court, in interpreting such statutes, to keep constantly in mind the legislative intent, the evils sought to be overcome, and, if possible, to give substantial force and effect to that intent. *United States* v. *Corbett*, 215 U.S. 233; *United States* v. *Cella*, 37 App. D.C. 423. "It is the settled doctrine of this court", said Mr. Chief Justice Shepard in the *District of Columbia* v. *Gardiner*, present term, "that a liberal and reasonable construction shall be given these statutes in view of their remedial objects and purposes so as to effect the same."

The first contention of appellants in the present case is that the act makes a distinction between adulteration which consists in adding to an article that which is not properly a part of it, and adulteration existing when some part of the article itself is not what it ought to be; in other words, "when some part of the article, whether animal or vegetable, *is* filthy, decomposed, or putrid—not that the article *contains* a substance of that character foreign to its proper ingredients or constituents." In view of the finding of the court that the presence of worms, insects and beetles in the condemned flour have produced a filthy condition thereof, it is unnecessary to determine whether appellant's contention is well-founded. Aside from the fact that the evidence from which this finding was made is not before us, it is matter of common knowledge that the presence of such a large

number of worms, insects and beetles in such a substance as flour would render the flour filthy in the general acceptation of that term. This flour was not to be fed to swine, but was to be sold for human consumption. Even conceding that the worms, insects and beetles could be separated therefrom, the flour would still be contaminated by reason of its contact with them, and it would still contain more or less husks and excreta from the worms—that is, it would still be filthy within the meaning of the act.

Appellants further contend that there was no evidence of the condition of the flour actually condemned by the decree. Of course it is not contended that it was necessary for the Government to examine each of the large number of sacks of flour seized. The real contention, therefore, is that the samples examined were not representative of those remaining. 35 Cyc. 701 defines a sample as "that which is taken out of a large quantity as fairly representative of the whole." Whether a sample is fairly representative of the whole is a preliminary question to be decided by the trial court, and the decision then reached will not be revised in an appellate court unless the facts producing it are before that court—and then only when error clearly appears. *Brown* v. *Leach*, 107 Mass. 367. Of course, the situation may be such as to warrant the trial court in submitting this question to the jury. *Lake* v. *Clark*, 97 Mass. 347. In *Origet* v. *Hedden*, 155 U.S. 228, the point was made that the appraisers had examined certain cases only, out of two importations of a large number of cases of lace. The court said: "If there was a difference between the goods in the different cases of either importation, it is singular that the invoices are not set forth in the record. The inference is a reasonable one that they showed the goods in each importation to be of the same character and value, so that the examination of one case would be sufficient for all. There is nothing to indicate the contrary." The cases relied upon by appellants involved facts materially different from the facts in the present case, and in no way qualify the general rule previously stated.

Upon this branch of the case, the trial court found: "Considering *the testimony as presented*, and the absence of testimony on behalf of the claimants, the court is forced to the conclusion that if other samples had been taken and analysed, their examination would have shown similar conditions to those in the four sacks actually examined." The court further pertinently observed that, if the claimants could have shown to the contrary, it might be assumed they would have introduced evidence. It further appears from said opinion that the samples taken were "from each of said *two lots* described," and it further inferentially appears that all the sacks seized "were in a position to become affected by the dirt and filth from a stable nearby." In view of what appears in the court's opinion as to the conditions surrounding the storage of this flour, the conclusion reached by the court from the testimony presented by the Government—which testimony is not before us—and the failure of the claimants to present any evidence upon the point, we are clearly of the opinion that the samples examined must now be presumed to have been fairly representative of the two lots of flour. The decree will therefore be affirmed and with costs.

Affirmed.

UNITED STATES v. 175 BOXES MACARONI

(District Court, D. Massachusetts, Jan. 9, 1913)

N.J. No. 2959

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict for claimant.

This was a libel for the seizure and condemnation of 175 boxes of macaroni. The libel alleged that the product had been transported from the State of New York into the State of Massachusetts and remained unsold in the original unbroken packages. The product was labeled: "Macaroni Mosca Brand Artificially Colored Guaranteed by Manufacturer Serial No. 3880."

The following charge was delivered to the jury:

HALE, *District Judge.* A statute of the United States, called the Pure Food Law, provides "that it shall be unlawful for any person to manufacture within any Territory" of the United States "any article of food or drug which is adulterated or misbranded, within the meaning of" the act. It further provides "that the term 'misbranded,' as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading." And it further provides that, if the article "be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so," it shall be deemed to be misbranded.

The Government in this case seeks to condemn 175 boxes of macaroni, which they say "have been transported from Long Island City in the State of New York, that is to say, from the Atlantic Macaroni Company at Long Island City, into the Commonwealth of Massachusetts, to wit, at Boston in said district of Massachusetts, and remain in original packages at said Boston in the possession of parties to your informant unknown; that the food contained in said boxes is misbranded within the meaning of" this act of Congress, in two respects: First, that "the words 'Artificially colored' are printed thereon in an inconspicuous manner, which said statement, design and device was false and misleading, in that by reason of said inconspicuous appearance of said words a purchaser would thereby be led to believe that said food did not then and there contain artificial coloring matter, whereas it did"; and, second, that the label "contained pictures and scenes portrayed upon each of said packages in similitude and likeness to pictures and scenery of a certain foreign country, to wit, Italy, which said statement, design, and device was false and misleading, in that it would lead a purchaser to believe that said food was of foreign origin, whereas in truth and in fact said food was not of foreign origin."

The information proceeds, as I have said, against certain distinct things, namely, 175 boxes of macaroni.

A claimant appears, namely, the Atlantic Macaroni Company, and claims the goods. I do not think that it is necessary for me to read

the claim and answer. It says that the goods are not misbranded; that, for the reasons set out, the goods contained in these boxes are entirely free from the charges in the information.

Now, gentlemen, these questions of fact are before this jury. Juries are to pass upon all questions of fact. In the Federal court the jury is the judge of the facts; and, while the court may express an opinion upon all questions of fact, it is the jury's opinion that prevails upon questions of fact; and if you think you discover in any way what the court thinks upon any question of fact, it is not the court's opinion that prevails upon a question of fact, but it is yours. On the other hand, it is the duty of the court to tell you what the law is upon the subject, and you ought to take the law from the court.

Now, I have said that the jury is to pass upon all questions of fact. You are the judges of what belief any witness produces in your mind. It is what conclusion you form, what belief you find in your mind, as the result of all the testimony in the case. You hear the testimony of each witness, and the probative value, as it is called, of his testimony, is for you to pass upon. And let me say that all questions of evidence, too, what a witness has said, is for you; and if I quote what a witness says I may do it in an incomplete and inadequate way; so that it is for you to say what the witness has said; and, as I have said before, it is for you to say what belief is induced in your minds, and what conclusion is produced by the testimony of the witness.

Now, the Government says, first, that the words "Artificially colored" were printed on the label involved in this case "in an inconspicuous manner, which said statement, design, and device was false and misleading, in that by reason of said inconspicuous appearance of said words a purchaser would thereby be led to believe that said food did not then and there contain artificial coloring matter, whereas it did."

Now, you have heard the testimony in the case. The Government says, first, that the goods contained artificial coloring matter. The burden of proof upon this issue, as upon all issues where the Government has the affirmative to show, is upon the Government. By "burden of proof" I mean, as an eminent author has put it, "the risk of nonpersuasion." That is, if they do not persuade you that that is true, they fail.

Now, briefly, the Government says, on this question of artificial coloring matter, that the coloring matter in these goods was something more than a trace—it was an actual amount of coloring matter. They have put on an expert, who says that he made an examination of the stuff itself, and he has produced the results of the coloring matter on wool. He says that the coloring matter was of a harmless kind, was of a kind that has been passed upon by the Government as being of a harmless variety, but that there was enough coloring matter in it to color goods somewhat; and he has, as I say, produced a piece of wool that he says was colored by it. He says, further, that he does not know that it would have the same effect upon the macaroni that it would have upon the wool.

Now, the defense, the claimant, says that the coloring matter in the material was a mere trace, was of an inconsiderable amount, and it says that it came in this way, that in their vats they put material

that contained harmless coloring matter for some trade—the Porto Rico trade, I think—and that sometimes, without washing the teeth of the vat, and cleaning out the vat entirely, they proceeded to put into the vat the material for the macaroni, a part of which we have in this case, and that a trace of the coloring matter that was in the previous batch remained in the vat, but not sufficient to be more than a mere trace.

Now, there is no issue in this case under section 7, subsection fifth, of the Food and Drugs Act of June 30, 1906, as it is not charged or claimed by the Government that there is any added .poisonous or deleterious ingredient which may be injurious to health in the macaroni in this case.

The mere presence of a small amount, a trace, of harmless coloring matter, found by a chemist in food the natural color of which is not changed by such matter, when combined with the label in this case, is not a false or misleading statement, design, or device of anything in or about said food within the act.

The provisions in the act with regard to color are exclusive, and amount to a legislative declaration that if the color be harmless, the article genuine, and the color not to conceal inferiority or damage, nothing special need be on the label.

Now then, gentlemen, your first question is whether, in fact, this article did contain coloring matter, anything more than a mere trace. I have told you what the Government says and what the claimant says. The burden is on the Government to satisfy you, by a fair preponderance of evidence in the case. If the Government fails to satisfy you, by a fair preponderance of evidence in the case, that there was coloring matter, more than a mere trace, then it fails on this proposition, and, of course, if there was no coloring matter there need not be anything on the label about it, and it would be unnecessary for you to come to the next question.

I say "preponderance of evidence." It is the duty of the Government to satisfy you, by a preponderance of the evidence; and I mean by that, gentlemen, any evidence that tips the scale in your mind. You come into this court, gentlemen, with your minds absolutely all in balance. You are to try the question of fact. Now, anything that tips the scale in your mind is called the preponderance of evidence. And let me say, gentlemen, these questions are very serious questions. The rights of the parties, the rights of the Government, and the rights of the claimant, are involved here; and the court has the same right to look to you for a perfectly fair passing upon each question of fact that you have to look to the court for the same judicial qualities. The jury, in other words, are as distinctly a judicial body as the court, and it is the duty of each one of you to take each question in its natural way, precisely as you would take any question in your own town, submitted to you by good neighbors, and pass upon it fairly and fully.

Now, if you come to the conclusion that the Government has met the burden of showing that there was a considerable amount of coloring matter in the material—that is, more than a trace—then you will come to the question of whether or not the Government is right in its contention that the words "Artificially colored", printed on the label, were printed "in an inconspicuous manner, which said state-

ment, design, and device was false and misleading, in that by reason of said inconspicuous appearance of said words a purchaser would thereby be led to believe that said food did not then and there contain artificial coloring matter."

Now, the label is before you. The issue upon that question is, Did the label—*does* the label—tend to mislead a reasonably intelligent man into believing that the goods were of a natural color, when in fact they were of an artificial color? Here the burden, too, is upon the Government. They produce the label; they say that the words "Artificially colored" are put upon the label in so inconspicuous a manner that they tend not to disclose, but to deceive; that is, that they are purposely put upon it in so indefined and inconspicuous a way that they do not attract attention, and that the effect of it is that it deceives a purchaser, an ordinarily intelligent man, naturally, into believing that the label is not upon goods which are naturally colored.

Now, the claimant says, on the other hand, that the words "Artificially colored" are in the ordinary place that you would look for them; that they are printed precisely like the other printing upon the label, as to which there is no pretense that there is any question of concealment; that they are printed in letters precisely like the letters in which the words "Guaranteed by manufacturer serial number thirty eight hundred and eighty" are printed; that they are printed in a clear type; and that, if anybody looks at the label as he would look at any label to read it, he would read the words "Artificially colored" precisely as readily as he would read the other printing upon the label; and that the words are printed precisely as a reasonable man would expect them to be printed.

Now, gentlemen, the question is for you. Has the Government satisfied you, by a preponderance of evidence, that those words are printed upon there in such a way as to have the effect upon a reasonably intelligent man of deceiving him into believing that the label signifies that the box contains goods of the natural color, instead of being artificially colored? The burden is upon the Government. If the Government fails, by a preponderance of evidence, to induce the belief in your mind that that label tends to deceive a reasonably intelligent man into believing that the goods are of the natural color, when in fact they are not, then you will find for the Government [claimant?]. If they have failed in that, then they have failed in that contention, and your verdict should be, in that respect, for the claimant.

They have one further contention, as I have said. They claim that the label itself bears a certain design and device, that is to say, "pictures and scenes portrayed upon each of said packages in similitude and likeness to pictures and scenery of a certain foreign country, to wit, Italy"; that said "design and device was false and misleading, in that it would lead a purchaser to believe that said food was of foreign origin, whereas, in truth and in fact, said food was not of foreign origin."

Now, the question for you to pass upon in that is a very simple, plain question of fact: Did the label tend to mislead a reasonably intelligent person into believing that the goods sold under the label were of foreign origin? It is not a question of whether one person

might possibly be misled by what he sees upon the label, but it is a question of the reasonable signification that the label in that respect would bear, as to whether the material is of foreign origin.

Here let me say that when a case is well tried by faithful and earnest and zealous counsel, as this has been, the court sometimes lets in evidence which does not assist the jury any on the whole in coming to a conclusion. I have thought it best, in this regard, to allow to come before the jury certain boxes upon which labels were pasted, because the labels were pasted upon them, and as a part of what Mr. Greenleaf calls "the setting of the case." But, so far as the testimony is concerned, you are to look to the labels and not to the boxes. It is a question of the construction of the label. The statute does not require the place of manufacture to be stated on the label, if the label is not false or misleading in this respect. The claimant, as I have already told you, in regard to the boxes, has a right to use such words as have been referred to to indicate the shape or style on its boxes, if there is nothing there used which tends to deceive, and you must consider the label without reference to the boxes; that is, I mean by that, you have nothing to do with the boxes, as to whether they tend to deceive or not; it is the label which you are considering, and to which I confine your attention in that regard, and not the boxes.

The statute clearly does not require or permit the Deparment to require that the place where an article is manufactured shall appear on the label.

The statute clearly does not require or permit the Department to require that the name of the manufacturer of the article should appear on the label.

The statute is drawn in such a way as to expressly permit the omission of the name of the manufacturer and of the place of manufacture.

The issue, then, is left upon the label, clearly and distinctly. Does the label tend to mislead a reasonably intelligent person into believing that the goods sold under it were of foreign origin? Let us look at the label then.

Now, the Government says that that label represents, and is intended to convey to the mind of a purchaser, a reasonably intelligent man, that it is a foreign thing that he is looking at, and to get into his mind that that is a foreign product which is to be sold under that label. They say that there is something about the hills, the scene portrayed there, that indicates something about Italy, the Bay of Naples, and something about Italy; that there is something in the form of the trees that indicates an Italian tree, a Lombardy poplar, or some Italian tree; that there is something about the form and appearance of the peasantry, the boys and the girl, that indicates Italian peasantry; and that there is something, on the whole, as you look at the label, that clearly indicates and is intended to indicate to the purchaser, that that label represents a foreign label, and that it deceives a person buying the goods into thinking that he is buying goods of foreign origin, and not of domestic origin. Has the Government met the burden of inducing the belief in your mind that that is so?

Now, the claimant says that not only is it not so, but that it is much more than true that the Government has not met the contention of showing that this label indicates a foreign product, because the claimant says that the label clearly indicates a domestic product, and the claimant's counsel points to certain labels. Now, the claimant says that it is generally true of foreign labels, labels that are clearly intended to represent goods that are a foreign product, that they have a volcanic hill, a peaked hill, with smoke issuing from it, and that the hills represented here in the label brought before you are flattened, and that they are distinctly different hills; that the difference is so conspicuous that any man must see at a glance that it is a different scene, that they are different hills—in other words, that it is an American view that is represented, that the hills represent what you would naturally expect in an American hill, and that the wheat field is represented as showing sheaves such as appear in America, and as do not appear in Italy.

The claimant says further, that the label contains upon it what is not found, at least generally, in foreign labels; that it is not at all a foreign label so far as the guaranty of the manufacturer is concerned; and that the words "Mosca Brand" clearly are no designation by Italian words of an Italian brand, indicating that it is a brand made in Italy; that the English word "Brand" is used, whereas in the Italian labels Italian words are used; and that there is nothing in the label in question brought before you which tends to deceive or would be likely to deceive the average intelligent man into thinking that he was buying under that label a foreign product.

Now, here the burden is upon the Government. Have they, on the whole, induced the belief in your minds that this label is calculated to deceive a reasonably intelligent man into believing that that label signifies a foreign product? If you find by a preponderance of evidence that it is, then you find for the Government; if you fail to find by a preponderance of evidence that it is such, you find for the claimant.

Now, gentlemen, I think that I have given you as clearly as I can the questions of fact, which are very simple and very clear. The case has been tried with great clearness and ability, as I said. In many cases the court allows, sometimes more than it ought to, things to come into a case that do not assist the jury any in coming to their conclusions; and so it is the duty of the court to direct the attention of the jury, and direct it as clearly as it can, to the issues which are to be determined, which I have tried to do in this case. Now, gentlemen, the case has been well tried, and there is no reason why you should not agree very promptly upon the questions before you.

The verdict is in the form of questions to be answered by the jury The questions are as follows:

1. Is the label such as to mislead a reasonably intelligent man into believing that the goods to be sold under it did not contain artificial coloring matter, when in fact they did?

2. Did the 175 boxes of macaroni in this case contain a substantial amount of coloring matter?

3. Is the label misleading in that the picture and scenes thereon are such a statement, design, and device as would lead a reasonably

intelligent purchaser to believe that the goods sold under it were of foreign origin?

Under each of these questions is the word "Answer." The jury will direct their attention to each question and decide whether the question shall be answered by "Yes" or "No." The foreman is to write the word "Yes" or "No," in accordance with what the jury shall find, after each question, and sign the verdict at the place indicated at the bottom of the paper.

The officer may attend the jury. The counsel will see to it that all exhibits go to the jury room.

UNITED STATES v. C. F. BLANKE TEA & COFFEE CO.

(District Court, E.D. Missouri, Jan. 10, 1913)

N.J. No. 2493

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of not guilty.

DYER, *District Judge* (charge to the jury). This inquiry, in my opinion, is limited to a very narrow compass.

What appears upon these boxes or cartons appears in this information, and the information charges in each count substantially the same thing. I will read from the information what appears upon these boxes or cartons:

> One Pound Blanke's Kafeka. The original malted grain coffee. A Godsend for the Sick and Convalescent. A Nourishing and Health Giving Bread in Liquid Form. Manufactured by C. F. Blanke & Co., St. Louis, U.S.A.
>
> Blanke's Kafeka is the nearest approach to coffee ever put on the market. It has all the merits without any objectionable features. It makes a pleasant, healthful beverage, strengthens without stimulating, satisfies without shattering the nerves. Especially recommended for children.
>
> One Pound Blanke's Kafeka. The original malter grain coffee. Nutritious, Palatable, Wholesome. A Health Food as well as a Table Beverage. Aids Digestion and makes Rich Healthy Blood. Manufactured by C. F. Blanke & Co., St. Louis, U.S.A.

Then follow the directions upon each as to how to use it.

The information then charges that the statements I have just read, and which were contained upon said package and label, were false and misleading, and that the

> said product was then and there labeled and branded so as to deceive and mislead the purchaser thereof in this: that said product is so labeled as to lead the purchaser thereof to believe that said product was composed wholly of grains and cereals and was a substitute for coffee, whereas in truth and in fact said product contained and consisted of about ten percent (10%) of a low grade of coffee, including a considerable amount of coffee chaff and other refuse, and was not composed wholly of grains or cereals, but was a mixture of cereals, low grade coffee and coffee screenings.

That charge brings this case, as I have said, into very narrow limits. I am not going to comment upon the testimony given by the witnesses in this case. It is sufficient to say that the Government has introduced witnesses who have testified that the contents of these packages contained coffee and caffein.

Upon the other hand, the defense shows by its own testimony that there is no coffee or caffein in these packages. It has introduced here as witnesses the president and vice president of this defendant company. It has also introduced the miller, or the man who has charge of making this preparation.

You have heard the testimony of the Government's witnesses, saying that coffee is contained in these packages, and you have heard the testimony of the defendant's witnesses saying there is no coffee contained in the packages. If you find from the evidence in the case that, as charged in this information, coffee was used in this product, then it is misbranded within the meaning of the Food and Drugs Act. If you find upon the other hand, that there was no coffee and that coffee was not used in this product, then there is no misbranding of this article by the defendant company.

So at last the case is narrowed down to the question: Was there coffee used in this product, or was there not coffee used in this product? If there was, as I have said, then this is a misbranding of the article contained in the packages. If there was no coffee in it, then it is not a misbranding of the article. In my judgment, that is all that is inquired into. You are not asked to go into the question of whether this is a good, bad, or indifferent product. There is no charge of that kind. The charge is that in the branding of this article, the customer purchasing it would be misled or deceived by what appears upon the box or carton; that is, as is charged in this information, the purchaser would think it was wholly of cereal and not of coffee, and that it was a substitute, the nearest to coffee, that could be made.

It is for you to say which side of this testimony you will take as being true. If the Government's witnesses are right, and you believe their testimony beyond any reasonable doubt in the matter, then your verdict should be a verdict of guilty against this corporation. If, upon the other hand, you believe the statements made by the defendant and its employees, then your verdict should be not guilty, under this information.

This information, gentlemen, contains two counts and is a criminal information; that is to say, it charges a specific offense which is and must be considered criminal in its character. The burden of proof in this case, as in all cases of like character, rests upon the Government, and that burden does not shift during the entire trial. It is still upon the Government to prove to your satisfaction, beyond any reasonable doubt, what is alleged in this information to be true, to wit, that coffee was contained in these packages.

The defendant is presumed to be innocent and that presumption in this case, as in all cases of a criminal character, is to be maintained throughout the entire trial and until it is overcome by evidence that satisfies you beyond a reasonable doubt that the defendant is guilty. A reasonable doubt is such a doubt as would arise from all the testimony in the case, and such a doubt as would influence a man of ordinary business capacity in determining important issues.

If you are satisfied beyond any reasonable doubt that this defendant sent out these pacakges with the label on it that has been read in evidence, when in truth and in fact the product contained

coffee, then, as I have said, your verdict will be in favor of the Government and a verdict of guilty against the defendant. If you are not satisfied beyond a reasonable doubt that this is true, then it is your duty to give the defendant the benefit of the doubt and return a verdict of not guilty.

That is all I can see in this case, gentlemen, and you may take the case, together with the indictment. The clerk has prepared a form of verdict which you may sign. If you find the defendant not guilty, insert the word "not" before the word "guilty" as contained in this form.

UNITED STATES v. F. B. WASHBURN & CO.

(District Court, D. Massachusetts, Jan. 10, 1913)

N.J. No. 3275

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.[58]

The following charge was delivered to the jury:

Dodge, *District Judge:* Mr. Foreman and Gentlemen: The Government charges against this defendant two offenses under the Pure Food Law. The first offense, as charged, was the offense of adulteration. Afterward an amendment was filed, and the other charge of misbranding added. You will be asked for a verdict on those two charges separately. You will be asked when you come in what your verdict is on the first count, charging adulteration—"Do you find the defendant guilty or not guilty on the first count?" That will mean adulteration. You will remember that the first count is the charge of adulteration; the second count is the charge of misbranding, and after you have given your verdict on the first count you will be asked, "How say you as to the second count? Is the defendant guilty or not guilty?" And that will be, Do you find him guilty or not of misbranding?

As long as the charges are presented in that order by the Government, I will deal with them in that order. I will say first as to both these charges that the burden is upon the Government to prove to you that the defendant is guilty beyond a reasonable doubt. You must find the evidence such as to satisfy your minds beyond a reasonable doubt of the defendants' guilt of the charge before you can find them guilty of either charge. You will consider the two charges separately, and you will ask yourselves whether or not you are satisfied beyond a reasonable doubt by the evidence you have listened to that the defendant is guilty of this charge, whichever it is that you are considering at the time. As you know, gentlemen, a reasonable doubt means such a doubt as reasonable men, making a proper exercise of their reason, allow to affect their decision upon the important affairs of their own lives. It does not mean a mere fanciful, imaginary, or frivolous doubt, of course. But if as to either of these charges the evidence leaves your minds still affected

[58] Reversed in part, affirmed in part, *F. B. Washburn & Co.* v. *United States,* p. 654, *post,*

by a reasonable doubt as to the defendant's guilt, you are to give the defendant the benefit of that doubt.

Take now the charge of adulteration. Are you satisfied beyond a reasonable doubt that these so-called macaroons which the defendant admits having shipped in interstate commerce under the label which has been repeatedly read to you in this case, and in the container or box which you have seen, were adulterated in that a substance, to wit, glucose, had been mixed and packed with them so as to reduce, or lower, or injuriously affect their quality or strength? That is the question for you on the charge of adulteration. Now, in considering that charge I think you may leave out the question whether they are properly called macaroons or not, and consider that they are macaroons notwithstanding that they have cocoanut in them. The Government has not charged that they are adulterated because a substance, to wit, cocoanut, has been mixed with them; it charges that they are adulterated because a substance, to wit, glucose, has been mixed with them so as to reduce, or lower, or injuriously affect their quality or strength. It is admitted that glucose was mixed with them, that glucose is an ingredient in them. Are you satisfied beyond a reasonable doubt that the admixture of glucose is such as to reduce, or lower, or injuriously affect their quality or strength?

Now, the Government's claim upon that question is this, that these so-called macaroons ought to be made of cocoanut, or almond, whichever it is, white of egg and sugar and nothing else, and that any admixture of glucose reduces, or lowers, or injuriously affects their quality or strength, and you have heard the Government's evidence on that question. According to the witnesses for the Government, these cakes should have been composed of almond, or cocoanut, and sugar and white of egg; there should not have been any glucose in them at all. On the other hand, you have heard the defendant's evidence, which tends to show that using glucose with the sugar not only does not reduce, or lower, or injuriously affect their quality or strength, but in some respects it improves it.

The Government's witnesses have told you that glucose is not as sweet as sugar; I don't understand that there is any dispute on that point; glucose is only three-fifths as sweet as sugar. The defendant's evidence is, however, that notwithstanding that fact there is such a compensating advantage over the loss in sweetness that on the whole it cannot be said that mixing glucose in the composition of these cakes reduces, or lowers, or injuriously affects their quality or strength.

Now, that is the problem for you under the charge of adulteration. Are you or are you not satisfied on the whole evidence, and satisfied beyond a reasonable doubt, that the admitted admixture of glucose in this case was such as to reduce, or lower, or injuriously affect their quality or strength? If you are, but not otherwise, your verdict will be "guilty" on the charge of adulteration. If you are not, your verdict will be "not guilty."

I pass now to the charge of misbranding. The defendant admits that he shipped these cakes, or whatever we call them, labeled as you have seen, in that container, and in interstate commerce. Now, they were misbranded, under the Food and Drugs Act, sometimes called the Pure Food Law, if they were labeled so as to deceive or mislead the

purchaser. If they were not labeled so as to deceive or mislead the purchaser, they were not misbranded within the meaning of the act. Has the Government convinced you beyond a reasonable doubt in this case that the label which you have seen here, taken in connection with the goods which it covered, deceived or misled the purchaser? That is the question under the charge of misbranding.

The Government claims, in the first place, that the purchaser was deceived or misled because the cakes in the box were not composed of almond, but of cocoanut. The Government further claims that the purchaser was deceived or misled by the label, because the cakes contained glucose instead of sugar. The Government's contention is that the label "Macaroons" means cakes composed not of cocoanut but of almonds, and cakes mixed with sugar and not with any glucose in them.

Mr. GARLAND. Will Your Honor pardon me? The charge is, misled in a certain particular; that is, that the article was not macaroons, and, of course, my argument was that the label would tend to mislead. My contention is that it is not necessary to prove that it did mislead anybody, but that it would have that tendency. That, I thought, was what the law meant.

The COURT. Don't you charge them with misbranding under the act?

Mr. GARLAND. Yes, sir.

The COURT. And is not the definition of the act of misbranding if it be labeled so as to deceive or mislead the purchaser?

Mr. GARLAND. "So as to;" I understand that meant, so as to have that tendency. Of course, we haven't proved here that it did in fact mislead anybody.

The COURT. There is no definite purchaser shown in this case, so when I say that you must prove that the label was such as to deceive or mislead the purchaser, I mean, of course, purchasers generally; isn't that correct?

Mr. GARLAND. It would have that tendency; when they buy the box they would expect to find something different in it from what, in fact, they find. That is our position.

The COURT. Does that differ from what I have instructed the jury?

Mr. GARLAND. I understood you to use it in the past tense, as though it was necessary that the Government show that in fact it had deceived or misled somebody.

The COURT (to the jury). The Government must show beyond a reasonable doubt that the label was such as to deceive or mislead the purchaser. That, I think, must be a correct statement of the law. Now, gentlemen, you will consider the two respects in which it is contended by the Government that this label was such as to deceive or mislead the purchaser, and if you are satisfied beyond a reasonable doubt that the label was such as to deceive the purchaser in either or both those respects, you will find the defendant guilty, and unless you are so satisfied, you will find them not guilty.

Take the first claim, that "macaroon" means cakes made of almonds only. You have heard what the Government witnesses said about that. They were asked how they made macaroons, and they told you, and they said, some of them at least, that they did

not know of any other kind of macaroons, or never heard of their being made in any other way. On the other hand, you have heard what the defendant's witnesses have said. You have heard what the books introduced in evidence by the Government witnesses, or, at least, some of them spoke of, the recipes that are contained in those books. It is contended by the defendant that there is more than one kind of macaroons, that cakes made of almonds are not the only kind of macaroons, that there are cocoanut macaroons, pecan macaroons, and I don't know how many other kinds besides.

Now, gentlemen, the question will be for you. You have heard the evidence on both sides. Are you satisfied beyond a reasonable doubt that "macaroon" means one kind of cake only and that composed of almonds, or are you not so satisfied? Are you inclined to agree, on the other hand, with the defendant's witnesses that there may be more than one kind of macaroons, and that one of those kinds may be composed of cocoanut?

You are there dealing, gentlemen, with a question of common acceptation, common understanding. This act, of course, was passed to apply in interstate commerce. It was passed to apply to the public of this country; and when for the purposes of a question like this under the act you are called upon to determine the meaning of a label, the meaning referred to, the meaning which you must determine, is that which is commonly accepted by the public. It would not do to say that the makers of macaroons or the dealers in macaroons have a meaning for the term and that that must be the meaning which you are to take. If you restrict it to dealers or makers, it must be a common acceptation by the public, including consumers, purchasers, as well. Now, when I instruct you, therefore, that you are to consider whether you are satisfied beyond a reasonable doubt that the word "macaroon" means this or that, you must understand that I mean, What does it mean in common acceptation in this country by the general public, not one class of the public only but the public generally? What is the commonly accepted meaning of the term? If a purchaser gets goods which are properly described by the label according to the commonly accepted meaning of the label, he is not cheated. If, however, he gets something palmed off on him under the label which is different from what the label means in common acceptation among the public, then he is cheated. Now, you are to say, dealing with the meaning of this term, what is its commonly accepted meaning? Well, gentlemen, if you find that according to the commonly accepted meaning the label of a "macaroon" means almond cakes only, if you are satisfied of that beyond a reasonable doubt, that, as I have told you, will require a verdict of "guilty." If, however, you are not so satisfied, the Government has another claim under this charge of misbranding. It says, whether cocoanut cakes can properly be described as macaroons or not, at any rate there was glucose instead of sugar in these cakes, and therefore they can not be macaroons according to the common understanding of the term. Upon that question, gentlemen, you must take the evidence on both sides. You have heard the Government evidence, the evidence of their chemists and of the makers of macaroons whom they have called. You have heard what is contained in the box produced by the Government experts. On the other hand, you have the defendant's evidence as to the practice of manufacturers and dealers

as to the length of time during which they have used glucose in the composition of macaroons, or of cocoanut macaroons at least, as to the advantages of using it, and you have heard the evidence tending to show that almond paste, of which I think nearly all the witnesses agree that macaroons when made of almonds are composed, often itself contains glucose. Now, you will take all that into consideration and say whether or not you are satisfied beyond a reasonable doubt that goods labeled "macaroons" are misbranded, according to the common acceptation of the term, if there is glucose in them instead of sugar. You must decide, gentlemen, from the evidence what is the meaning of the term "macaroons", commonly understood by the public in the United States, at the time of the commission of the alleged offense by the defendant, including dealers, consumers, and, in fact, all the public. If you find that the word "macaroon" means a small cake composed of ground almonds, sugar, and whites of egg, then you will be justified in finding that the product shipped by the defendant was misbranded within the meaning of the Food and Drugs Act, if you find that the word "macaroon" means that and means nothing else. If you find, gentlemen, that the word "macaroon", as commonly understood in the United States by the public, means a small cake principally composed of ground almonds, sugar, and whites of egg, you will be justified in finding that the label, "I-X-L Macaroons", used on the packages shipped by the defendant, would have a tendency to deceive or mislead a purchaser, and you will be justified in finding the defendant guilty under the count charging misbranding, if you find that the word "macaroons", as commonly understood, has that meaning and no other.

The mere fact, gentlemen, if you find it to be the case, that the defendant has used the label in question for a number of years and before the passage of the Food and Drugs Act would not legalize the use of such label if you find it to be misleading to a purchaser.

Now, gentlemen, I think that is all I have to say to you on the two questions which you are to pass on. The question of adulteration, as I have told you, turns on the question of the reducing, or lowering, or injuriously affecting the quality or strength of the goods. The question of misbranding turns on what you find to be the commonly accepted meaning of the word "macaroon." The question of wholesomeness or unwholesomeness does not enter into this case at all. Nobody claims here that glucose is unwholesome.

The question whether sugar or glucose costs the most does not enter into this case at all, except so far as you may be inclined to think that the question of expense affects the testimony of some witness or other in the case. If you think that the question of cheapness raises an interest on the part of any witness so as to be likely to affect his testimony which he gives you, of course you would be justified in taking that into account in deciding how far you believe his testimony.

Is there anything further that counsel desire to ask me? Are the officers ready? Now, gentlemen, you will retire and consider your verdict under these instructions I have given you, and I will send the exhibits and the papers to your room.

The jury thereupon retired and, after due deliberation, returned into court with its verdict of guilty on both counts of the information.

UNITED STATES v. C. F. BLANKE TEA & COFFEE CO.

(District Court, E.D. Missouri, Jan. 11, 1913)

N.J. No. 2797

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of not guilty, by direction of the court.

The United States Attorney filed an information against the C. F. Blanke Tea & Coffee Co., alleging shipment from the State of Missouri into the State of Louisiana, of a quantity of coffee which was alleged to have been misbranded. The product was labeled: "Blanke's Mojav Coffee. The name Blanke is synonymous with good drinking coffee. A special blend of good drinking coffee put up ground, whole, or pulverized sold in fancy two-pound cans to give the consumer a set of handsome cans to retain for household use. Blanke's Mojav Roasted Coffee. Put up by the most complete coffee plant in the world. C. F. Blanke Tea & Coffee Co. Promoters of Good Goods. St. Louis, U. S. A."

Examination of a sample of the product by the Bureau of Chemistry indicated that it was a high-grade Santos, probably grading about a No. 2. Neither Mocha nor Java coffee was used in the product. It appeared that the product was all of one crop and not a blend as stated on the label. Misbranding of the product was alleged in the information for the reason that the labels thereon as above set forth created the impression and led the purchaser to believe that the product was a mixture of Mocha and Java coffee; that the word "Mojav" which appeared in large and conspicuous type upon the labels was compounded from the words "Mocha" and "Java" and led the purchaser to believe that the product was a mixture of Mocha and Java coffees, which are coffees of well-known grade and quality, when in truth and in fact it was another and different grade of coffee known as Santos and contained neither Mocha nor Java coffee; and it was further misbranded in that the labels upon the cans were false and misleading, and the product was so branded as to deceive and mislead the purchaser into the belief that it was Mocha and Java coffee, when in truth and in fact, it was composed almost entirely of Santos coffee which is another and different grade of coffee; and the product was further misbranded in that it was an imitation of and offered for sale under the distinctive name of another article.

The case having come on for trial before the court and a jury, the following charge was delivered to the jury:

DYER, *District Judge.* I am asked at the conclusion to give you a peremptory instruction.

This Pure Food Act, as it is popularly known, is one of the most important acts that has found its way upon the statutes, and where people violate it they should be punished, because the act itself is most admirable. But from all the testimony that has been offered in this case the court is not of the opinion that the Government has made out a case that calls for even consideration by the jury as to the guilt of this defendant.

The court, therefore, upon the whole case as made, gives you a peremptory instruction to find for the defendant, and one of your number will sign the verdict.

UNITED STATES v. DUNHAM MANUFACTURING CO.

(District Court, E.D. New York, Jan. 17, 1913)

N.J. No. 2413

Information charging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

VEEDER, *District Judge* (charge to the jury). I think you have gathered from the evidence and the arguments that the actual issue raised is a very simple one. I shall submit it to you in a very few words. The defendant corporation is charged with the offense of adulteration and misbranding an article of food in interstate shipment. The information contains four counts. You will remember that there were two shipments in evidence, one known as the Dannenhauer shipment, the other as the Dickinson shipment. Both were from New York to Camden, N.J. The defendant has admitted the interstate shipment, and the question before you is whether it is guilty of the offense prescribed in the act. You will probably find no reason to distinguish between the two shipments. Under each shipment there is an allegation of the offense of adulteration, and under each an allegation of misbranding. The first and third counts relate to adulteration, and the second and fourth relate to misbranding. That will probably suffice so far as the various counts in the information are concerned.

This indictment is based upon a salutary law known as the Food and Drugs Act. It is a rather extensive act, and covers a great variety of circumstances. But the general purpose of the act is to prevent the sale under misleading terms of foods and drugs. There are a great many specific provisions with which in this case you have nothing to do, and I shall now point out the material provisions.

The first and third counts relate to adulteration. The act provides:

> That the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this act, is hereby prohibited; and any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State of Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded foods or drugs, or export or offer to export the same to any foreign country,

is guilty of an offense.

Now this case relates to an article of food, and the act goes on to say:

> That for the purposes of this act an article shall be deemed to be adulterated:
> In the case of food:
> If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

You will observe that it is unnecessary to resort to a dictionary meaning of the term adulteration, because the act specifically prescribes what is meant by adulterated. The first and third counts are based on the second subdivision, which says: "If any substance has been substituted wholly or in part for the article." That, for the purposes of this case, is the definition of what adulteration is; and if you find beyond a reasonable doubt from this evidence that in these two shipments any substance was substituted wholly or in part for the article, then the defendant is guilty under these two counts.

With respect to the second and fourth counts, relating to misbranding, the phraseology of the statute is somewhat different.

Section 8 provides:

> That the term "misbranded," as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false and misleading in any particular—

it is unnecessary to read you what follows in that paragraph—and then it proceeds: "That for the purpose of this act an article shall also be deemed to be misbranded" in certain specific particulars, and one of them is in the case of food "if it be labeled or branded so as to deceive or mislead the purchaser."

You will observe how this differs from the section regarding adulteration. It specifies what should be deemed adulteration. But with reference to misbranding the statute says that it shall apply to all drugs or articles of food, the package or label of which shall bear any statement, or device, regarding the article or ingredients or substances contained therein, which shall be false or misleading in any particular; and then, after that broad phraseology, the statute goes on to specify that for the purposes of this act an article shall *also*—that is, in addition to what has gone before—be deemed to be misbranded in several particulars which follow. The only one that is material to this case is: If it be labeled or branded so as to mislead or deceive the purchaser. If you find beyond a reasonable doubt that this article of food was misbranded as defined in that statute then the defendant is guilty.

Now that is really all there is of this case. You have heard the evidence. There is little or no contest about the facts. It was testified by an officer of the defendant corporation that this cocoanut was imported in bulk; then the cover was taken off and it was shredded and mixed with sugar and glycerin. That is the finished product which has been exhibited to you. There has been some suggestion here that the term "shredded cocoanut" would signify to the purchaser that sugar and glycerin entered into its composition. Does that appeal to your judgment? You are to determine what the label means, and whether there is or is not an infraction of this statute.

Does shredded cocoanut indicate anything more to your mind than cocoanut that has been shredded—that is, torn into shreds? Is there anything about the designation to indicate that anything else entered into its composition? The process of manufacture and the ingredients have been stated. The Government's chemist has testified that while there is a small percentage of sugar in cocoanut in its natural state, and slight traces of glycerin; but that the sugar appearing in the Dannenhauer shipment was 24.90 percent and in the Dickinson shipment was 29.17 percent; and that the glycerin in the former was 1.79 percent and in the latter was 2.35 percent.

You will bear in mind that the first and third counts relate to adulteration, and the second and fourth to misbranding. If you find the defendant guilty on all counts, your verdict will be a general verdict of guilty; if you find the defendant not guilty on all counts you will so specify.

UNITED STATES v. LIBBY, McNEILL & LIBBY

(District Court, E.D. Virginia, Jan. 17, 1913)

N.J. No. 2938

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.[59]

WADDELL, *District Judge* (charge to the jury). This is an information filed by the district attorney against Libby, McNeill & Libby, a corporation. The first count charges that, in violation of the act of Congress, known as the "Food and Drugs Act", the defendant shipped in interstate commerce fifteen cases of an article of food, known as "condensed milk", which it is alleged is adulterated within the meaning of the said act of Congress, in that a certain substance, to wit, cane sugar, had been substituted in part for said article.

The second count charges that the same shipment is misbranded within the meaning of the said act of Congress, because the labels on the packages containing the said article of food are alleged to be false and misleading, in that the statement "Condensed Skimmed Milk" borne thereon is false and misleading on the ground that the product is not wholly condensed skimmed milk, but is sweetened condensed milk, containing about 42.17 percent of cane sugar.

The court charges you that if you believe from the evidence beyond a reasonable doubt that the defendant company on or about the 3d day of May, 1912, at the city of Portsmouth, in this district, delivered to the Seaboard Air Line Railway, a corporation common carrier engaged in interstate commerce, fifteen cases of an article known as "condensed skimmed milk" for shipment to Savannah, Georgia, and that such a product was labeled and sold as a condensed skimmed milk, but that it contained 42.17 percent of cane sugar, and that said sugar is not a component part of condensed skimmed milk, then you are further charged that the substitution of the cane sugar

[59] Affirmed, *Libby, McNeill & Libby* v. *United States*, p. 540, *post*.

in part for the said product is in violation of section 7, paragraph two of said act of Congress, and therefore constitutes adulteration within the meaning of the said act.

You are further charged that if you believe from the evidence beyond a reasonable doubt that the said product was delivered as aforesaid, for shipment to another State, and that the label or brand on said product is false or misleading in any particular, then you are further charged that the product is misbranded within the meaning of the Food and Drugs Act, and you should find the defendant guilty.

You are further charged that it is not necessary for the Government to prove that the substitute substance, if you believe a substance has been substituted, in material part, for the milk, is deleterious or poisonous, or injurious to health; it is sufficient within the meaning of the law if any substance not a component part of the original substance has been substituted. If such substance was substituted, then the article was adulterated, and you should so find.

LEXINGTON MILL & ELEVATOR CO. v. UNITED STATES
(Two cases)

(Circuit Court of Appeals, Eighth Circuit, Jan. 23, 1913)

202 Fed. 615; N.J. No. 2549

Appeal from and in error to the District Court for the Western District of Missouri. Appeal dismissed and judgment reversed on writ of error.[60]

Before SANBORN, Circuit Judge, and MUNGER and MARSHALL, District Judges.

MARSHALL, *District Judge.* The Lexington Mill and Elevator Company is a corporation of the State of Nebraska and is engaged in the manufacture of flour at Lexington, Nebr. On April 1, 1910, it shipped from Lexington to B. O. Terry at Castle, Mo., 625 sacks of flour manufactured by it. On April 9, 1910, a libel was filed by the United States under the provisions of section 10 of the Food and Drugs Act (34 Stat. 768), and a warrant of seizure issued, by virtue of which the flour was seized under the claim that it was adulterated and misbranded in violation of the provisions of that act. The Lexington Mill & Elevator Company appeared as claimant. It averred that it had sold the flour under a guaranty that it was not adulterated within the meaning of the Food and Drugs Act, and that pursuant to that guaranty it had furnished to the purchaser other flour in lieu of that seized, and had become the owner of the flour in litigation. It was permitted to answer the libel, and the case was then tried to a court and jury with the result that the United States had a verdict that the flour was adulterated and misbranded. From the judgment of condemnation rendered on this verdict the claimant

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[60] Reversing *United States* v. *625 Sacks of Flour,* p. 129, *ante.* Affirmed, *United States* v. *Lexington Mill & Elevator Co.,* p. 577, *post.*

prosecutes an appeal and a writ of error. A motion is made to dismiss the appeal, and this must be sustained.

The act under which this libel was filed provides in section 10 for the process of libel for condemnation and that:

> The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand a trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States.

This did not change the essential character of the action or make it other than an action at law. As a matter of procedure it has to conform "as near as may be to proceedings in admiralty"; but a trial by jury at the demand of either party is provided, and a review of the facts so tried by appeal was not expressly granted. The question as to the proper method of review was decided in this court in the case of *United States* v. *779 Cases of Molasses*, 174 Fed. 325; 98 C.C.A. 197. The Supreme Court of the United States has had occasion to pass on the principle involved in cases arising under the act of July 17, 1862, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," which provided that the proceedings against the property seized shall be in rem and "shall conform as nearly as may be to proceedings in admiralty or in revenue cases." That court held that a writ of error was the only method of review.

The appeal in No. 3534 will be dismissed and jurisdiction will be taken of the writ of error in No. 3533.

Before a consideration of the questions arising on the writ of error a more complete statement of the facts is necessary. The claimant in the manufacture of the flour seized uses the Alsop patented process. A complete description of this process may be found in the opinion of this court in *Naylor* v. *Alsop Process Co.*, 168 Fed. 911, 94 C.C.A. 315. It is sufficient for the present purpose to say that by it nitrogen peroxide gas is formed by electric discharges. This gas mixed with air is brought into contact with the freshly milled flour, with the result of bleaching it. The method is this: In a small chamber one electrode is fixed; the other is given a reciprocating motion so as to alternately touch and separate from the fixed electrode. A current of high potential is used. The circuit is completed by the contact. Separation of the electrodes results in an arc. The inert nitrogen of the air is oxidized and nitrogen peroxide gas formed. This gas diluted by mixture with air is conveyed to a box or agitator, through which the flour is permitted to fall, and the bleaching is at once effected. The chemical reaction seems to be as follows: The nitrogen peroxide gas, coming in contact with the moisture of the flour, splits and forms nitric and nitrous acids, both oxidizing agents, but the nitric acid the more powerful. The nitric acid certainly and the nitrous acid probably unite with the coloring matter of the flour and bleach it. Nitrites are formed by the union of the nitrous acid with the bases in the flour and nitrates by the union of the nitric acid with those bases. The nitrates may be disregarded as noninjurious; the nitrites are claimed to be poisonous. The flour seized was subjected to the Griess-Ilsovay test, an extremely delicate test for the detection of the presence of nitrites, and was shown to

contain nitrites or material reacting as nitrites to the amount of three parts per million. The misbranding is predicated on this. The sacks containing the flour were labeled "L 48, Lexington cream XXXXX, fancy patent. This flour is made of first quality hard wheat." In fact, the flour was milled from Turkey red wheat. This wheat replanted from year to year gradually degenerates and becomes mixed with a wheat of a yellow color, called locally "yellow berry." This admixture with yellow berry deteriorates the quality of the wheat. The wheat in question contained this yellow berry to the extent of from 15 to 25 percent of its total quantity. Both Turkey red and yellow berry are hard wheats. This wheat graded as No. 2, and this was the best grade of wheat grown or milled in Nebraska or neighboring States. In other sections of the country wheat grading as No. 1 is grown. There can be milled from the same wheat flour of different grades. That flour which contains the entire flour content of the berry is called "straight flour"; patent flour excludes a part of the flour content; that part of the berry nearest the bran coat containing the greater part of the oil and coloring matter. Clear flour is the residue of the flour content of the wheat after taking out the patent flour. The result is that patent flour is whiter than straight and straight is whiter than clear flour.

The jury found separate verdicts: (1) that the flour seized was adulterated; and (2) that it was misbranded. The court charged the jury:

> It is clear that it was intended by Congress to prohibit the adding to the food of any quantity of the prohibited substance. The fact that poisonous substances are to be found in the bodies of human beings, in the air, in potable water, and in articles of food such as ham, bacon, fruits, certain vegetables, and other articles, does not justify the adding of the same or other poisonous substances to articles of food, such as flour, because the statute condemns the adding of poisonous substances. Therefore the court charges you that the Government need not prove that this flour or foodstuffs made by the use of it would injure the health of any consumer. It is the character, not the quantity, of the added substance, if any, which is to determine this case.

This was excepted to and was assigned as error. There was evidence tending to prove that flour containing the percentage of nitrites found in the seized flour might be injurious to health when used as a food for a considerable period, but this was disputed, and the converse supported by substantial testimony. This was the most stubbornly contested issue in the case, and that it was an issue was recognized by the Government at all stages of the trial.

The part of the statute material to a consideration of the correctness of this instruction is found in section 7 of the act, which reads:

> SEC. 7. That for the purposes of this act an article shall be deemed to be adulterated: * * *
>
> In the case of food:
>
> First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.
>
> Second. If any substance has been substituted wholly or in part for the article.
>
> Third. If any valuable constituent of the article has been wholly or in part abstracted.
>
> Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.
>
> Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health * * *.

The instruction complained of referred to the charge in the libel under the fifth subdivision just quoted. The trial judge decided that if the added substance was qualitatively poisonous, although in fact added in such minute quantity as to be noninjurious to health, that it still fell under the ban of the statute; and the distinction is sought to be drawn between substances admittedly poisonous when administered in considerable quantities but which serve some beneficial purpose when administered in small amounts, and those substances which it is claimed never can benefit and which in large doses must injure. The distinction is refined. To apply it must presuppose that science has exhausted the entire field of investigation as to the effect upon the human body of these various substances; that nothing remains to be learned. Otherwise the court would be required to solemnly adjudge today that a certain substance is qualitatively poisonous because it can never serve a useful purpose in the human system only to have this conclusion made absurd by some new discovery. There is no warrant in the statute for such a strained construction The object of the law was evidently (1) to insure to the purchaser that the article purchased was what is purported to be; and (2) to safeguard the public health by prohibiting the inclusion of any foreign ingredient deleterious to health. *Hall-Baker Grain Co.* v. *United States* (C.C.A.), 198 Fed. 614. The statute is to be read in the light of these objects, and the words "injurious to health" must be given their natural meaning. It will be observed that this paragraph of the statute does not end with the words "added deleterious ingredient"; but, as a precaution against the idea emobdied in the instruction complained of, it says "which may render such article injurious to health." Without these latter words it might, with more force, be argued that deleterious and beneficient ingredients are to be divided into two general classes independent of their particular effect in the actual quantities administered, but the possibility of injury to health due to the added ingredient and in the quantity in which it is added is plainly made an essential element of the prohibition. The investigation does not stop with the consideration of the poisonous nature of the added substance. It is added to the article of food, and the statute only prohibits it if it may render such article—the article of food—injurious to health.

In *French Silver Dragée Co.* v. *United States*, 179 Fed. 824, 103 C.C.A. 316, this question was considered by the Court of Appeals of the Second Circuit. In that case adulteration was charged in confectionery by the addition of silver. The article in question was made of sugar and thinly coated with pure silver. The statute declares that confectionery shall be deemed to be adulterated "if it contains terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt or spiritous liquor or compound or narcotic drug." The element or injury to health is not expressed as a qualification of mineral substance. Silver is admittedly a mineral substance, and the act of the defendant was within the letter of the prohibition, but the court, construing the statute in the light of the evils it was intended to remedy, the objects sought to be accomplished, held that there was implied in this clause relating to confectionery the very limitation expressed in the paragraph relating to

food, and, as there was no proof that the coating of silver might render the article injurious to health, it did not fall within the ban of the statute. It was there said:

> Stated in another way, we think that the history of the act, the objects to be accomplished by it, and the language of all its provisions, require that it should be so interpreted that in the case of confectionery, as in the case of foods and drugs, the Government should establish with respect to products not specifically named that they either deceive or are calculated to deceive the public or are detrimental to health.

In *Friend* v. *Matt*, 68 J.P. 589, there was under consideration, section 3 of 38–39 Victoria, c. 63, which reads:

> No person shall mix, color, stain, or powder or alter, or permit another person to mix, color, stain or powder any article of food or any ingredient or material so as to render the article injurious to health.

In that case the respondent was charged with selling preserved peas, the color of which had been retained by the addition of sulphate of copper. It was contended that, as sulphate of copper in substantial quantity was injurious to health, the peas so treated with it were within the statute even if the treated peas were not injurious to health. This view prevailed in the trial court, but the judgment was reversed on appeal; Lord Alverstone, Chief Justice, saying:

> I have no doubt that, in order to convict under section 3, the article of food must be shown to be injurious to health by the addition of some ingredient.

The instruction complained of eliminated a consideration of any possible injurious effect from the use of the flour as an article of food, and was erroneous. We are not unmindful of the contention that the evidence conclusively shows that flour subjected to the bleaching process is injurious to health in some degree, even if its injurious effect is so slight as to be incapable of observation, and that hence the instruction we have found to be error was error without prejudice. This contention is founded upon expert testimony as to the result from the taking of nitrites into the human system. It is said that nitrites taken into the human body act upon the coloring matter of the red corpuscles of the blood so as to change the hemoglobin of the blood into methemoglobin. In the language of one of the chief chemical experts of the Government this effect is thus described:

> In the blood stream there are red corpuscles, invisible to the naked eye, which contain a red coloring substance known as hemoglobin, when not combined with oxygen, and when combined with oxygen forming a dissociable compound, oxyhemoglobin. In respiration, the hemoglobin contained in the red corpuscles of the venous blood is brought into the lungs, where it having an affinity for the oxygen, which is one of the gaseous constituents of the air, combines with the oxygen to form oxyhemoglobin. This oxyhemoglobin contained in the red blood corpuscles is then conveyed, through the arterial system, to the various parts of the body, and of the terminals of the arterial system, passing through a mass of tissue, it gives up its oxygen, to oxidize the tissues, or materials that may be in solution there, to form carbon dioxide, and to form water, and this oxyhemoglobin is thereby reduced to the condition of hemoglobin which is returned by the venous system to the lungs, to be again oxygenated. That is where the hemoglobin will again combine with oxygen to form oxyhemoglobin, and a given quantity of hemoglobin may serve to carry a given quantity of oxygen to the system. Now, however, if any of this hemoglobin is converted into methemoglobin, which is a compound of oxygen with

hemoglobin, in which the oxygen is more firmly combined than in the case of oxyhemoglobin, although the quantity of oxygen is the same, the oxygen is so firmly attached—combined with the hemoglobin—that the vital processes are not sufficiently strong to separate the oxygen from the hemoglobin, nor to use the oxygen to oxidize the tissue and tissue material, to sustain life, and, consequently, it passes through the circulation to the arterial system and the venous system, and continues this cycle until, finally, it is destroyed by the liver. Therefore, a certain quantity of the hemoglobin is rendered inefficient. It no longer functionates as a carrier of oxygen to the system, serves, or acts, as a foreign body in the blood circulation, and, therefore, must be removed. As I have said before, an extra strain is placed upon the liver, in order to remove it, and an extra strain is placed upon the red blood marrow, in adults, to regenerate the corpuscles, and to replace the corpuscles of the hemoglobin that have been rendered inactive by the action of nitrite, and the formation of methemoglobin.

It is also said that the continued presence of nitrites in the system does not develop any tolerance on the part of the body or means of neutralizing its normal action. On the other hand, it was proved that no injurious effect had ever been observed from the use of bleached flour, although such flour had been largely used; that nitrites in some or greater amounts are frequently present in potable water, bacon, ham, fruits, and certain vegetables, and even in the saliva of both adults and children, and no evil result has been detected; that urea usually present in saliva is, when taken into the stomach, a neutralizer of nitrites, and is a method by which nature averts harm from minute quantities of nitrites so constantly taken into the system. In this conflict of evidence it was essentially a matter for the jury to find the fact under proper instructions. Expert testimony is but evidence. In case of dispute the controversy cannot be settled by the judicial knowledge of the court. *U.S.* v. *McGlue*, 1 Curtis, 1–9, Fed. Cas. No. 15679; *U.S.* v. *Molloy* (C.C.), 31 Fed. 19. It cannot be held that the evidence was so conclusive in favor of the Government as to warrant the court in withdrawing this issue from the jury.

The Government also claimed that the seized flour was adulterated within the first and fourth subdivisions of section 7 before quoted, in that a substance, viz, nitrites or nitrite reacting material, had been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength, and that it had been thereby colored in a manner whereby damage or inferiority was concealed. The claimant requested a peremptory instruction in its favor on the issues so tendered by the libel, and assigns the refusal to so instruct as error.

The mixture referred to in the first subdivision must be held to include a chemical compound as well as a mechanical mixture. While this does not accord with the scientific definition of a mixture, yet in common acceptation mixtures and compounds are not discriminated. The evil intended to be remedied by the statute is not limited to a mechanical mixture, but is just as potent when the chemical union results from the two substances with the deleterious effect intended to be prevented by the act. Similarly, the word "colored" must be held to include any artificially produced change in the natural color of the substance "in a manner whereby damage or inferiority is concealed", even if the change is, as in this case, a removing of color. This is the evident intent of the statute. The act is essentially remedial, and its evident purpose is not to be defeated by any narrowness of construction. *Johnson* v. *Southern*

Pacific Co., 196 U.S. 1, 25 Sup. Ct. 158, 49 L.Ed. 363. There was evidence that bleached flour did not improve with age in the manner characteristic of unbleached flour, nor did it, as the claimant contended, suddenly take on the condition of properly aged flour which had not been subjected to the bleaching process. That in dough made from bleached flour the gluten never attained the toughness found in dough from unbleached and properly aged flour, and that this toughness was a valuable property in the making of bread. In other words, that as an ultimate result of the mixing of the flour with nitrogen peroxide gas the bread-making quality had been injuriously affected. We are not concerned with the opposing testimony. It was for the jury to determine the fact, and the court did not err in refusing to peremptorily instruct for the claimant so far as the claim of adulteration was based on the first subdivision before quoted.

The claim of adulteration under the fourth subdivision presents a different question. There is evidence that flour made from new wheat is darker in color than the flour made from wheat which has gone through an incipient fermentation or sweating process in the stack, and second, through a similar process after threshing. This involves time; also, that freshly milled flour is darker than it subsequently becomes when kept for a certain period of time. That clear flour is darker than straight flour and straight flour is darker than patent flour; that color is to some extent an index of the quality of the flour, and as such influences the ordinary purchaser; that all grades of bleached flour are whiter than unbleached. In this way the index of color becomes unreliable and a purchaser may take the bleached straight for unbleached patent flour. With the evidence on which the inferiority of the bleached flour is claimed, this, it is contended, brings the case within the fourth subdivision of section 7. Opposed to this, it appears: That color is at best an uncertain index of quality, and that dealers in flour use other means to ascertain quality. That the color of bleached flour is distinct from that of unbleached flour; the dead white of the bleached is contrasted with the cream white of the unbleached. That bleaching of flour does not obliterate the differences in appearance of different grades of bleached flour. That, while patent flour obtains a higher price in the market than straight flour, this is not due to any superiority in patent flour from a nutritious standpoint, but is due to the fact that bread baked from it is whiter in appearance, and hence more pleasing to the eye. This esthetic result can be obtained by a certain process of conditioning the wheat and milling the flour. Was it the intention of the statute that this process should have a monopoly? Whiteness in flour is a desirable end in and of itself. Its connection with flour of any particular grade is purely incidental. We are not persuaded that by the bleaching process flour is so colored as to conceal inferiority, or that by it flour is adulterated within the intent of subdivision four of section 7 of this act.

The court submitted to the jury the charge contained in the libel that this flour was misbranded, and in effect instructed the jury that they should find for the Government if the flour was not a patent flour or was not made from first quality hard wheat. This was excepted to and is assigned as error. The contention of the plaintiff in

error, as presented to the trial court by various requests for instructions, is that no evidence was introduced tending to prove that the seized flour was not a patent flour, and that the issue tendered by the libel as to the quality of the wheat only went to the question whether it was hard or soft wheat, and that there was no evidence that the wheat was soft. It will serve no useful purpose to review at length the evidence. It suffices to say that it appears that the seized flour contains 90 percent of the flour content of the wheat; that there is no fixed standard as to the percentage of the flour content which may be properly termed patent flour. When the process first originated, a relatively low percentage was called patent flour; as improvements were made in the methods of manufacture, a higher percentage was customarily so labeled. Different mills adopt different standards, varying in accordance with the efficiency of their methods of manufacture. The quality of the wheat milled also enters into the question. The better the wheat the higher the percentage of the flour content that may properly be classed as patent flour. The case of the Government rests entirely on the evidence of some millers that in their opinion no greater percentage than 85 percent can be properly classed as patent flour. This evidence is based upon the experience of those witnesses with different machinery and wheat, and is not predicated upon the claimant's methods of manufacture. There is a concurrence of the witnesses that the term " patent flour " does not connote any fixed or maximum percentage of the flour content of the berry. In other words, by " patent flour " is meant flour containing less than the total of the flour content of the wheat. Giving those words that signification, there was no evidence of falsity, and the claimant was entitled to have that issue withdrawn from the jury by a peremptory instruction in its favor.

It was charged in the amended libel that the seized flour was misbranded in that it was labeled as made of the first quality of hard wheat, whereas, in truth it was made in whole or in part of soft wheat. This charge was denied in the answer. The evidence adduced in its support is that the flour was milled from No. 2 Turkey red wheat and was not the first quality, but that no soft wheat entered into its composition. The trial court, in substance, instructed the jury that if the wheat was not of the first quality the charge of misbranding was sustained. Fairly construed, the libel tendered the issue of soft wheat as distinguished from hard wheat. The pleader assumed that it was incumbent upon him to specify the particular in which the branding was false. If it be permissible to so specify and failing to support the specification, to prove falsity in another particular within the general averment of falsity, then the specification serves but to draw the attention of the defendant from the actual point of controversy and to mislead. It was error to submit the charge of misbranding to the jury.

Errors are assigned on various rulings in the admission of testimony; but as the pages of the record which presented the testimony objected to are not stated in the brief of the plaintiff in error, as required by rule 24 of this court, we deem it unnecessary to consider them. *Hoge* v. *Magnes*, 85 Fed. 355–358, 29 C.C.A. 564.

The constitutionality of the Food and Drugs Act is attacked by the plaintiff in error and was exhaustively argued. The point of

the attack is that the statute as construed by the trial court applied to food products in fact entirely innocuous and which could not possibly be injurious to health nor deceptive. As we have not so interpreted the statute, it is not necessary to express any opinion as to the validity of a statute excluding from interstate commerce harmless food products which are offered for sale without deception.

The judgment below must be reversed, and the case remanded for a new trial, and it is so ordered.

PHILADELPHIA PICKLING CO. v. UNITED STATES

(Circuit Court of Appeals, Third Circuit, Jan. 31, 1913)

202 Fed. 150; N.J. No. 2456

Error to the District Court for the District of New Jersey. Judgment affirmed.[61]

Before GRAY, BUFFINGTON, and MCPHERSON, Circuit Judges.

MCPHERSON, *Circuit Judge.* The Philadelphia Pickling Company was convicted under section 2 of the Food and Drugs Act of 1906, the indictment charging a shipment of adulterated tomato paste from the company's place of business in New Jersey to its place of business in Pennsylvania. Other facts will appear in a few moments; but it seems advisable to consider in advance the general question: Does the act apply where the owner has shipped to himself for some other business purpose than sale? The trial judge directed the verdict, but no complaint is made of this, if his construction of the act was correct.

The statute imposes penalties in three sections, but we are concerned only with sections 2 and 10. The latter section provides for condemnation, and permits an offending article to be seized, if it—

> is being transported from one State, Territory, District, or insular possession to another for sale; or, having been transported, remains unloaded, unsold, or in original unbroken packages, or if it be sold or offered for sale in the District of Columbia or the Territories, or insular possessions of the United States, or if it be imported from a foreign country for sale, or if it is intended for export to a foreign country.

This section speaks repeatedly of sale, and the courts have had several occasions to consider what Congress meant by the language quoted. In *United States* v. *65 Casks* (D.C.), 170 Fed. 449, it appeared that the casks in question (which were insufficiently marked) contained a liquid that had been manufactured and shipped by the owner's agent in Michigan to the owner himself in West Virginia for the primary purpose of being bottled and properly labeled there. It was not to be sold until this had been done, and the district court held inter alia (pp. 445, 446) that Congress—

> did not * * * have power to restrict one from manufacturing in one State such product and removing it from that State to another for the purpose of personal use and not sale, or for use in connection with the manufacture of other articles to be legally branded when so manufactured.

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[61] Affirming *United States* v. *Philadelphia Pickling Co.*, p. 414, *ante.*

The court of appeals affirmed the judgment in a brief opinion (175 Fed. 1022, 99 C.C.A. 667), which is silent concerning the power of Congress, and merely gives the following reason for affirmance:

> No attempt to avoid the law, either directly, indirectly, or by subterfuge, has been shown; it appearing that the manufacturer had simply transferred from one point to another the product he was manufacturing for the purpose of completing the same for the market. Under the circumstances disclosed in this case, having in mind the object of Congress in enacting the law involved, we do not think the liquid extract proceeded against should be forfeited. Reaching this conclusion, we do not find it necessary to consider other questions discussed by counsel and referred to in the opinion of the court below.

In *United States* v. *46 Packages* (D.C.), 183 Fed. 642, it was held that a libel in rem under section 10 was defective because it failed to aver that the articles seized were transported "for sale". The foregoing cases are referred to in *Hipolite Egg Co.* v. *United States*, 220 U.S. 45, 31 Sup. Ct. 364, 55 L.Ed. 364, and although they are not definitely disapproved they are certainly not accepted as correct. At the best, they are noticed with a word or two of comment, and of course they must yield if they clash with the decision or the opinion of the Supreme Court. One of the points decided in the *Hipolite case* is that section 10 permits the condemnation of adulterated food, although it has not been transported for sale directly, but is intended solely for use as raw material in the manufacture of another product. This is clear, for the Court on page 52 of 220 U.S., on page 365 of 31 Sup. Ct. (55 L.Ed. 364), states the first contention of the egg company to be that:

> Section 10 of the Food and Drugs Act does not apply to an article of food which has not been shipped for sale, but which has been shipped solely for use as raw material in the manufacture of some other product.

And this contention is declared (p. 55 of 220 U.S., on page 366 of 31 Sup. Ct. [55 L.Ed. 364]) to be "untenable."

But the reasoning that supports this declaration goes further, we think, than the precise point decided. We may perhaps venture to give an outline of the argument: Congress has taken away from adulterated food the right to be transported in interstate commerce, whatever the object of such transportation may be. The act has two clearly separate objects (220 U.S. 54, 31 U.S. 364, 55 L.Ed. 364): First, to keep adulterated articles completely out of the channels of interstate commerce; and, second, if they do enter such channels, to sanction their condemnation while being transported, or even after they have reached their destination, as long as they remain unloaded, unsold, or in original unbroken packages. These objects of the act are not changed or qualified by the purpose of the owner. He may, or may not, intend to sell. If he so intend, perhaps he may also intend that the articles shall first undergo a further process of manufacture; but, even if the latter intention be present, he would still be transporting for sale. Therefore, even if the "condition" [contention?] be accepted that section 10 does not allow condemnation unless such articles are transported for sale, nevertheless the facts of the case then being considered showed that a "sale" was intended. Not directly, it is true, but only one step removed; for the eggs were intended to be used in making cakes for the market, and were therefore to be sold as a part of the cake. The court points out that all articles, compound or single, not intended for consumption by the producer,

are designed for sale, and because they are so designed it is the concern of the law to have them pure.

One of the egg company's arguments—that a producer in one State is not interested in an article shipped from another State, if such article be not intended for sale or consumption until it is manufactured into something else—is said to be "peculiar." The court declares that both the producer and the consumer are interested in having an article pure, no matter whence it may come, and that the law seeks to protect such interest both by the personal penalties of section 2 and by the seizure and condemnation under section 10.

This is in outline the court's reply to the egg company's first position; but we think the attitude of that tribunal appears even more clearly in the discussion of the company's second position, which was:

> That at the time of the seizure the eggs had passed into the general mass of property in the State, and out of the field covered by interstate commerce.

The containers had been stored at the company's bakery among other supplies, but the original packages had not been broken. It was held that Congress might pursue the packages into the bakery and might seize them there. The offending articles had not escaped, although they had reached their destination, and had already become part of a larger collection of supplies. The act had forbidden the transportation of adulterated food, and not only had made the shipper subject to penalties, but had made even the goods themselves so far culpable as to be liable to seizure in rem:

> It is clearly the purpose of the statute that they shall not be stealthily put into interstate commerce, and be stealthily taken out again upon arriving at their destination, and be given asylum in the mass of property of the State. Certainly not, when they are yet in the condition in which they were transported to the State, or, to use the words of the statute, while they remain "in the original, unbroken packages." In that condition they carry their own identification as contraband of law. Whether they might be pursued beyond the original package, we are not called upon to say. That for the statute pursues them, and, we think, legally pursues them, and to demonstrate this but little discussion is necessary.

And one characteristic of adulterated food is thus insisted upon, with the legal consequences that flow therefrom:

> We are dealing, it must be remembered, with illicit articles—articles which the law seeks to keep out of commerce, because they are debased by adulteration, and which law punishes them (if we may so express ourselves) and the shipper of them. There is no denial that such is the purpose of the law, and the only limitation of the power to execute such purpose which is urged is that the articles must be apprehended in transit or before they have become a part of the general mass of property of the State. In other words, the contention attempts to apply to articles of illegitimate commerce the rule which marks the line between the exercise of Federal power and State power over articles of legitimate commerce. The contention misses the question in the case. There is here no conflict of national and State jurisdictions over property legally articles of trade. The question here is whether articles which are outlaws of commerce may be seized wherever found, and it certainly will not be contended that they are outside of the jurisdiction of the National Government when they are within the borders of a State. The question in the case therefore is: What power has Congress over such articles? Can they escape the consequences of their illegal transportation by being mingled at the place of destination with other property? To give them such immunity would defeat, in many cases, the provision for their confiscation, and their confiscation or destruction is the especial concern of the law. The power to do so is certainly appropriate to the right to bar them from interstate commerce, and completes

its purpose, which is not to prevent merely the physical movement of adulterated articles, but the use of them, or rather to prevent trade in them between the States by denying to them the facilities of interstate commerce. And appropriate means to that end, which we have seen is legitimate, are the seizure and condemnation of the articles at their point of destination in the original, unbroken packages.

We have examined this case at such length, because it seems to us that, if our understanding of the court's reasoning be correct, the decision of the present controversy is inevitably foreshadowed. It is true that this is a prosecution under section 2, and not a seizure under section 10; but the difference (if important) is in favor of section 2, for its meaning is not restricted by the words "for sale", and is therefore even broader than the language of section 10. One of the chief objects of the act is declared in section 2, namely, to forbid "*the introduction* into any State or Territory, etc., of any article of food * * * which is adulterated"; and, while the section does not attempt to punish criminally every method of "introduction", it does punish the method here in question—"any person who shall *ship or deliver for shipment* from any State or Territory", etc., "shall be guilty of a misdemeanor", etc., and the breadth of the prohibition justifies us at least in refusing to narrow the ordinary meaning of the words that define the crime. Of course the shipment must be in the way of "commerce." Such a limitation is constitutionally necessary; but, if the limitation be assumed, no reason is perceived why "shipment" should be construed to mean "shipment for sale." Its ordinary meaning in this connection covers any shipment for any purpose in the course of commerce, and we accept this as the intended scope of the word. And the correctness of such construction seems more probable when we observe that the next penal clause of section 2 should apparently be construed in a similar manner. This clause applies to any person "who shall receive in any State or Territory", etc., "and, having so received, shall deliver in original unbroken packages * * * or offer to deliver, to any person any such article so adulterated"—the delivery being punished, whether it be "for pay *or otherwise*." In other words, to receive and deliver offending articles in the course of commerce is indictable, whatever the business purpose may be.

The Court of Appeals of the Second Circuit, in *United States* v. *300 Cans*, 189 Fed. 352, 111 C.C.A. 83, has also ruled that, since the Hipolite decision at all events, a libel for condemnation need no longer aver that the articles were transported for sale—the food there in question having been shipped from Nebraska by the owner to himself in New York, and remaining unsold in original unbroken packages.

The facts of the present dispute are these: The defendant has two places of business, one in New Jersey and one in Pennsylvania. The adulterated tomato paste in question was at the New Jersey house, and was shipped to Philadelphia in order to be examined and tested in that city. The test was necessary, because a customer in London had sent an order, and the paste, unless it could meet the English standard, would not fill the customer's requirements. It was not to be sold or used for food in Philadelphia, and it was not so sold or used; but, having failed to meet the English test, it was immediately destroyed, without attempt to use or sell. The test was not made in

New Jersey, because facilities for making it there were lacking. The sale would have been completed in Philadelphia, and the shipment for export would have been made from that city, if the paste had met the English test; and in that event the paste (although it might have been adulterated according to the United States standard) would not have been subject to seizure by this Government, if it had been "prepared or packed according to the specifications or directions of the foreign purchaser", etc. (See proviso to section 2.) That an ultimate sale was a possibility, when the shipment was made in New Jersey, is not a decisive consideration; for the sale was never made, and, of course, the goods were never prepared or packed for export. But the English order does have this bearing; it explains why the interstate movement took place, and shows that the reason was a trade or business reason, and therefore that the movement was in the course of commerce.

In our opinion it was interstate commerce for the owner to ship the goods from New Jersey to Pennsylvania for a business purpose such as examination and test; and as the goods were adulterated such a shipment was unlawful.

The judgment is affirmed.

UNITED STATES v. HUYLER'S

(Police Court, District of Columbia, Feb. 12, 1913)

N.J. No. 3343

Information, in two counts, alleging violation of sections 1 and 2 of the Food and Drugs Act. Verdict of guilty in one count; verdict of not guilty in other count.

MULLOWNEY, *Judge* (charge to jury). Gentlemen of the jury, this defendant is charged, in the information here under the act of Congress—

Mr. BOYESEN. If Your Honor please, I have some requests for charges. May I make them after you charge? I should prefer to, because you may charge them, and then I shall not have to make them.

The COURT (continuing). In two counts. In the first count this defendant corporation is charged with selling this article of food—that is to say, a certain quantity of maple sugar—which said food was adulterated in that it had been mixed and packed with another substance, to wit, cane sugar, which reduced and lowered its quality and strength.

In the second count of the information, gentlemen, the defendant corporation is charged with selling this quantity of maple sugar, which was a food, misbranded, in that it was an imitation of and was offered for sale and was sold under the distinctive name of another article of food, to wit, maple sugar.

Now, gentlemen, each of these counts you will take and consider as separate cases, and it is your province, after you have investigated and gone over the evidence, to bring in a verdict either of not guilty or guilty as to both counts, or you can treat them as separate

and bring in a verdict of not guilty as to one and guilty as to the other, or vice versa.

The act of Congress, gentlemen, reads:

The term "food," as used herein, shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound.

There is no controversy in this case, gentlemen, but what this product, this article, was sold by this defendant corporation. But the questions that you are to determine, gentlemen, are, first, was it adulterated in that it had been mixed and packed with another substance, to wit, cane sugar, which reduced and lowered its quality and strength? and second, was it sold in imitation of and offered for sale and sold under the distinctive name of another article of food?

Considering the first count of the information, gentlemen, the Government claims here that this inspector, passing along the street, saw a sign in the window labeled "Maple sugar". A short time after that he went into this store and asked an employee of this corporation for maple sugar; that he was sold the article in question, here in evidence, and received it as maple sugar; that he then and there asked for what he termed a bill of sale and was handed this receipt which is in evidence and which you gentlemen have seen.

Now, then, if you believe that to be a fact, from the evidence, gentlemen, and it turns out that the article which he received was not maple sugar but was an article containing partly cane sugar and partly maple sugar, and you believe from the evidence that the addition of this cane sugar injuriously affected the quality and strength of the article demanded by this purchaser—this inspector—and received by him from this defendant corporation, and you believe such to be the fact beyond any reasonable doubt after you have considered all the evidence in the case, it would be your duty to convict this defendant.

But the defendant claims that they had no such sign in the window as the inspector swears to. That is their claim. They also claim that when a demand was made by this inspector for maple sugar he did not ask for maple sugar, but he asked for maple-sugar candy, and that when it was handed to him it was handed to him as maple-sugar candy and not as maple sugar.

If you believe that to be a fact, gentlemen—and this inspector received this article believing at the time, from the statements made by these people, that he was not receiving maple sugar but he was receiving maple-sugar candy, a preparation made up by this defendant corporation and sold to him as candy—then, gentlemen, if you believe that to be the fact—that it was not an article mixed and packed with this cane sugar, which reduced and lowered its quality and strength—and if you have a reasonable doubt of that, gentlemen, after you have heard all the facts in the case and considered it, it would be your duty to give it the benefit of it and acquit the defendant on the first count of the information.

* * * * * * *

The COURT. Gentlemen, after you have considered all the evidence offered by the Government, then you are to take into consideration the evidence offered by this defendant; and, if that raises a reason-

able doubt in your mind, then you are to give the defendant the benefit of it and acquit it, and not in regard to the evidence offered by the Government alone.

Mr. BOYESEN. That is to say, our evidence does not require to raise anything more than a reasonable doubt.

The COURT. That is it. The Government must prove their case beyond a reasonable doubt.

In regard to the second count of the information, gentlemen, the claim of the Government is that this inspector, at the time he received the article, received it as maple sugar, and received this receipt, which he termed a bill of sale, and that he made a demand for maple sugar and received this package as maple sugar, and received this bill marked "Maple sugar cakes."

The defendant, though, claims, gentlemen, that that was received by him in connection with the statements of the employees; that is, that he did not demand maple sugar, but he demanded maple-sugar candy. Now, then, you will have the right, therefore, in considering whether this article was an imitation of the distinctive name, "Maple sugar", to take this label and to take these statements of these clerks that it was sold to him as maple-sugar candy. Or, in other words, I charge you, gentlemen, that you ought not to take this receipt alone, because it was not put on and wrapped with the package, but it was received by this prosecuting witness or the inspector, when he made the demand for it; therefore I charge you to take into consideration, in determining this evidence, the statements of the clerks that they sold it to him as maple-sugar candy. So that, then, if you take the consideration of those statements of the clerk and this label or receipt with the statement that it was sold as maple-sugar candy, and you have a reasonable doubt of it, you are to give this defendant the benefit of it and acquit it.

Now, gentlemen, this defendant corporation comes into this court with the presumption of innocence, and it is your duty to give it the benefit of it, and it is entitled to have this case proven to you beyond all reasonable doubt after you have considered all the evidence in the case, and, as I have stated to you, if you have a reasonable doubt, it is your duty to give it the benefit of it, and you should acquit.

Is there anything else you gentlemen wish?

Mr. SMITH. We have no requests.

Mr. BOYESEN. I want first to except to so much of Your Honor's charge as intimates that there might, under any circumstances, be a branding through the delivery to the Government's inspector of a bill as a wholly and separate and distinct transaction from the delivery and payment for the product, and to request Your Honor to charge that it affirmatively appears as a matter of law that there was no branding of the package of goods in question whatever, and that, there having been no branding, there could be no misbranding.

The COURT. All right; you can take an exception to that.

Mr. BOYESEN. I except.

I will ask Your Honor to charge the jury that upon the first count of the information, charging adulteration, there is no ingredient contained in the defendant's product prohibited by the Food and Drugs Act. That is to say, there was no terra alba, barytes, talc, or

any other prohibited ingredient, and that the confectioner, as a matter of right and as a matter of law, has the right to make confectionery according to his own formula, unless the prohibited ingredients are contained.

The COURT. I shall refuse that as not germane to the case. There is no testimony here in regard to it. There is no ingredient of that kind in it.

Mr. BOYESEN. It has been stated that in this product, which is in question here, there are two ingredients—maple sugar and cane sugar.

The COURT. Yes.

Mr. BOYESEN. And I requested Your Honor to charge this jury that a formula calling for cane sugar and maple sugar for confectionery is perfectly legal for confectionery.

The COURT. Well, I will let you have an exception to that. There is no proof in regard to the matter to sustain that prayer.

Mr. BOYESEN. I will ask Your Honor to charge that it is permissible, in the ordinary trade, in confectionery, so far as anything appears in the evidence to the contrary, to compound an article consisting of maple sugar and cane sugar and to sell the same as confectionery. That is in line with the notice of judgment No. 1803, to which I called Your Honor's attention.

The COURT. I think I have covered that. I think I told the jury in my charge if they believed from this evidence that if when he came in there he demanded maple-sugar candy and received it as such it was not a violation at all, therefore it was not an article sold in imitation of another article, nor was it sold as an article which reduced or lowered its strength or quality. I think I told the jury that.

Mr. BOYESEN. I am speaking now of the make-up of the article.

The COURT. You may have an exception.

Mr. BOYESEN. I will ask Your Honor to charge that the jury is entitled, on the question of guilt or innocence of the defendant, to consider that the defendant is a manufacturer of confectionery only and beverages, and not of foods; that it has not advertised in any manner that it sells anything except confectionery and beverages, and that should be taken into consideration by them upon the question of whether any reasonable member of the public should be deceived under the circumstances, and further to take into consideration the fact that the size of the cake was not the usual size in which maple sugar is put up.

The COURT. I will give you an exception.

Mr. BOYESEN. I ask Your Honor to charge the jury as a matter of law that the article in question here was not sold under the distinctive name of another article.

The COURT. I will give you an exception.

Mr. BOYESEN. I will ask Your Honor to charge that if any violation of the law was made under the second count by the defendant the transaction was complete when the goods were delivered, and payment therefor was received, and that they are not entitled to take into consideration in any manner the fact that the Government inspector thereafter, when the transaction was complete, asked for a

receipted bill and that they are not entitled to take into consideration anything written upon the face of that bill.

The COURT. You may have an exception to that.

Mr. BOYESEN. I will ask Your Honor to instruct the jury that they are to draw no inference whatever, favorable or unfavorable, to the defendant, from Your Honor's refusal to charge as requested.

The COURT. Yes.

Gentlemen, you are to take no consideration of the refusal or granting of any of these prayers of counsel or any statements made by the court in regard to the offer of prayers.

Mr. BOYESEN. Those that are granted they are to consider, of course, Your Honor.

The COURT. Oh, yes.

Take the case, gentlemen.

UNITED STATES v. GERMAN AMERICAN SPECIALTY CO.

(District Court, S.D. New York, Feb. 14, 1913)

N.J. No. 2465

Information charging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

MARTIN, *District Judge* (charge to the jury). This indictment rests upon a provision of what is called the Pure Food Act, which was passed and approved by the Federal Government on June 30, 1906, and which prohibits a substituting of any article wholly or in part for the article as designated in its trade-marking. That is the meaning of the statute upon which this indictment rests.

The indictment says that this defendant company manufactured a certain article of food which article of food bore no label, and was shipped and sold as being an article of food known as egg for custard, which said article shipped as aforesaid was adulterated, in that a certain substance other than egg for custard, to wit, skim milk, had been substituted. So in order to convict this defendant, it must come under clause second—if any substance has been substituted wholly or in part for the article, as being a misdemeanor under the statute.

There is a clause before that, as to reducing the strength of any article by having something else in it, but that does not apply to this indictment.

So the question for you to say is whether the defendant has willingly and willfully substituted an article under the wrong designation, and brought itself within this statute. That is a question of fact for you to dispose of.

As to the degree of culpability, that is for the court, if you find it guilty at all.

This defendant is entitled to the same rights that you and I should have, if we were charged with a crime, and that is that we are not to be convicted unless the evidence establishes beyond a reasonable doubt the charge alleged against us.

Take the case.

UNITED STATES v. SCULLY ET AL.

(District Court, N.D. Illinois, Feb. 18, 1913)

N.J. No. 2471

Information against Daniel B. Scully and Maurice H. Scully, copartners, doing business as the D. B. Scully Syrup Co., Chicago, Ill., alleging sale by said defendants on April 1, 1910, under a written guaranty given before the time of said sale and delivery, of a quantity of a product known as "Loverin's Sorghum," which was alleged to have been misbranded in violation of the Food and Drugs Act. The said guaranty was as follows:

FOOD GUARANTY

The undersigned D. B. Scully Syrup Company of Chicago, State of Illinois, United States of America, does hereby warrant and guarantee unto Loverin & Browne Co., a corporation, having office at Chicago, Illinois, that any and all articles of food or drugs, as defined by the Act of Congress approved June 30, 1906, entitled "An Act for preventing the manufacture, sale or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines and liquors, and for regulating traffic therein, and for other purposes," which the undersigned has sold since October 1st, 1906, or shall at any time hereafter prepare, manufacture for, sell or deliver to said Loverin & Browne Co., will comply with all the provisions of said act of Congress and are not and shall not be in any manner adulterated or misbranded within the meaning of said Act.

It is expressly understood that this shall be a continuing guaranty until notice of revocation be given in writing and notice of acceptance of the guaranty is hereby waived.

Dated at Chicago this 31st day of December, 1906.

D. B. SCULLY SYRUP CO. Seal
M. H. SCULLY Seal

It was alleged in the information that said guaranty had not been revoked at the time of said sale and delivery, but was then in full force and effect; and that, without having changed the product in any particular, save repacking, the purchaser thereof shipped quantities of the same from the State of Illinois into the Territory of New Mexico in violation of the Food and Drugs Act. The product was labeled: "1 Gal. Loverin's Sorghum Loverin & Browne Co., Chicago, Ill."

Jury trial. Verdict of not guilty by direction of the court.

A. B. ANDERSON, *District Judge* (directing verdict). I might explain to you gentlemen here that this is an act of Congress, and Congress has no right to legislate on this pure-food question except so far as it affects interstate commerce. We all understand that. And, now, there isn't any showing here at all, passing by some other questions, that the Scully Syrup Company, defendant, had anything whatever to do with the shipment. The evidence showed that the Scully Syrup Company made this for Loverin & Browne Company and that Loverin & Browne Company shipped it, so that they have got the wrong defendant here. The Government undertakes to claim that by reason of the statute which provides that the dealer shall be immune when the manufacture guarantees to him that the article is not misbranded—that in that case the dealer is out, Loverin &

Browne Company, and that the other people are in. That does not relieve the Government of the responsibility of proving some connection with the shipment by the Scully Syrup Company. And in the next place, the guaranty set forth is no guaranty at all. The guaranty is no guaranty at all under the statute. It isn't anything in the world but a promise that in the future—made 6 years ago—they will not violate the law. Let the record show a verdict of not guilty.

UNITED STATES v. SCUDDER SYRUP CO.

(District Court, N.D. Illinois, Feb. 18, 1913)

N.J. No. 2473

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

A. B. Anderson, *District Judge* (charge to the jury). This is a criminal case, and you are the judges of the weight of the evidence and the credibility of the witnesses. You are the exclusive judges of all the facts. You are bound by the law as given to you by the court.

The Government has charged that the defendant shipped in interstate commerce a box or case labeled: "Two Doz. Purity Quarts Scudder's Canada Syrup, Imported only by Scudder Maple Syrup Company, Chicago, Illinois, Full Measure."

Now the Government has established that that case was shipped in interstate commerce—as it was—and that the case was labeled as set forth in the information. You are not bound by any expression of opinion, and you are the exclusive judges of the facts and the evidence, to wit, of the testimony and credibility of witnesses. Now the Government, subject to that, has shown here that the defendant did ship a case labeled as I have stated. The Government also has shown, and there is no dispute about it, that three of these cans did not contain a full quart. In this case the defendant is presumed to be innocent—and that presumption stays with the defendant throughout the trial—and it is a perfect defense, until the Government overcomes it beyond all reasonable doubt. Reasonable doubt is just what the word "reasonable" means, which is, as the term implies, a *reasonable* doubt. It is not a captious or capricious doubt. It is not a doubt suggested by the ingenuity of counsel or by your own ingenuity, but it is as the term implies, a reasonable doubt, which is engendered by the evidence or the want of evidence. You, as reasonable men, understand what that means. You are the judges, as I said, of the weight of the evidence and the credibility of the witnesses. In determining what weight you shall give to any testimony of any witness, you have a right to take his knowledge, or want of knowledge, into consideration, about the thing about which he testifies—his appearance and manner and bearing on the stand, and particularly his interest, or want of interest, in the result of the suit. These are the general principles by which you are to determine questions of this kind.

Now, gentlemen, the question for you to determine is this: Whether or not this label was false, and of course that must mean it was specifically false. If the case or box contained 24 cans, each of which contained specifically a quart, then of course the defendant is not guilty. The evidence here shows cans will hold a quart.

Now, gentlemen of the jury, the evidence of the defendant here is that this has to be put in here heated, and that it necessarily shrinks some. I instruct you that this is no defense. If they represent on the case—as they did in this case, that 2 dozen purity quarts are contained therein, it means quarts of a gallon—they represent by that label that there was in each of these cans a full quart, and that means at the time, of course, that it was shipped, and if it has to be put in hot, and after that shrinks, then the defendant ought to put in enough so there would still be a quart.

Now that this matter is before you, you will determine whether or not there has been a violation of this statute. You are simply to determine this one question—whether or not these defendants did ship these in interstate commerce when it was misbranded. Now the fact that the Government is on one side and a citizen on the other has nothing to do with this case. The Government, when it comes to a lawsuit, is just exactly in the same position as any other litigant. If you have any reasonable doubt as to whether or not there has been a specific violation here, it is your duty to find the defendant not guilty.

If you find for the Government, the form of your verdict will be: We, the jury, find the defendant guilty; signed by your foreman. If you find for the defendant, the form of your verdict will be: We, the jury, find the defendant not guilty; also signed by your foreman, and return to the court.

UNITED STATES v. HUDSON MANUFACTURING CO.

(District Court, N.D. Illinois, Feb. 21, 1913)

N.J. No. 2468

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

The United States attorney filed an information against the Hudson Manufacturing Co., a corporation, alleging shipment by said company, from the State of Illinois into the State of Texas, of a quantity of so-called vanilla extract which was adulterated and misbranded. The product was labeled: "Prime Vanilla Extract, made from the extractive matter of prime vanilla beans, sweetened with cane sugar, aged in wood, made by the Hudson Mfg. Co., Chicago, U.S.A."

Adulteration of the product was alleged in the information for the reason that an imitation of vanilla extract containing vanillin and artificial coloring matter in solution had been mixed with the product so as to reduce, lower, and injuriously affect its quality and strength; and further for the reason that an imitation of vanilla extract containing vanillin and artificial coloring matter in solution had been

substituted in part for the product; and further for the reason that the product was artificially colored in a manner whereby inferiority was concealed, in that the artificial coloring matter aforesaid gave to the imitation vanilla extract the color of genuine vanilla extract. Misbranding was alleged for the reason that the product was an imitation of another article of food, to wit, pure vanilla extract, in that said product contained vanillin and alcohol artificially colored; and for the further reason that said product was offered for sale under the distinctive name of another article of food, to wit, pure vanilla extract. Misbranding was alleged for the further reason that the product was labeled as set forth above, which said statement in the label was false and misleading, in that it represented to the purchaser that the product was a genuine vanilla extract conforming to the commercial standard for such an article of food, to wit, a flavoring extract prepared from vanilla bean with or without sugar or glycerin and containing 100 cc the soluble matters from not less than 10 grams of the vanilla bean, whereas, in truth and in fact, it contained not to exceed 2 grams of the vanilla bean in 100 cc thereof.

A. B. ANDERSON, *District Judge* (charge to the jury). This is a criminal case, and you are the judges of the weight of the evidence and the credibility of the witnesses. You are the exclusive judges of all the facts. You are bound by the law as given to you by the court.

The defendant is presumed to be innocent until it is proved guilty by the Government's evidence beyond all reasonable doubt. Reasonable doubt, as I said yesterday, is just what the word "reasonable" means, which is, as the term implies, a *reasonable* doubt. It is not a captious or capricious doubt. It is not a doubt suggested by the ingenuity of counsel or by your own ingenuity, but it is, as the term implies, a reasonable doubt, which is engendered by the evidence or the want of evidence. You, as reasonable men, understand what that means. You are the judges, as I said, of the weight of the evidence and the credibility of the witnesses. In determining what weight you shall give to any testimony of any witness, you have a right to take his knowledge, or want of knowledge, into consideration, about the thing about which he testifies—his appearance and manner and bearing on the stand, and particularly his interest, or want of interest, in the result of the suit. These are the general principles by which you are to determine questions of this kind.

Now, gentlemen, there is just one question for you to determine—one question of fact—and that is whether or not the Government has established, according to the standards that the evidence has disclosed to you, that there was added vanillin to this product which was branded as the testimony shows. Now, that this barrel, or half-barrel, of stuff that was sent to Texas contained more vanillin than is ordinarily contained in a pure extract of vanilla, there is no dispute; the witnesses on both sides agree as to that. The question is whether or not it was added in the form of vanillin—what is called the synthetic product or artificial product—as is claimed by the Government, or whether or not this increased vanillin was due to the use of two and a half times, practically, of the amount of vanilla beans

which is ordinarily used in the production of the extract of vanilla. That is the question for you to decide. Now it may be that this vanillin was there by reason of either one of these two theories. Either the manufacturer, the defendant here, manufactured this from the ordinary amount of vanilla beans, or less; that is to say, 1 pound, or 13 ounces I believe it is, to about a gallon of the dissolved fluid which is partly alcohol and partly water, and the added amount of vanillin that was in this product was put in there, as it is averred in the information, by the defendant—and in which case the article was adulterated within the law and misbranded within the law—or it was manufactured as claimed by the defendant, that is to say, it was made by using two and a half times as much vanilla beans as is ordinarily used, or is necessary to be used, or it is proper to be used, under the standards which have been testified to here.

Now, gentlemen of the jury, you are practical men, and when you go into the jury box you do not lose or set aside your practical knowledge of affairs, nor you are not to lose sight of the motives which ordinarily influence men in their acts, and when you come to decide which way this thing was, it is for you to determine which way it happened. You will take into consideration the fact, as shown by the evidence, that this was a commercial article. It was manufactured for the market and sold in the market. And, of course, you know that one of the principal facts or circumstances surrounding the manufacture of an article is the cost of it. If, as appears in evidence, this is manufactured as claimed by the defendant, it cost two and a half times as much to make it as if it were made according to the standards which have been testified to here. On the other hand, if it was made as claimed by the Government, it was made much cheaper than the standards testified to here. You will take those things into consideration.

It has been said here that the witnesses for the Government, the expert chemists, admitted that they did not know and could not tell whether or not it is artificial vanillin added. How can you tell if they can't tell? That is the very thing you are here for. These witnesses spoke as chemists. They stated it as chemists. They could only state it was there; that they found it; that they could not say from the fact it was there how it got there. But you are to take the facts that are there, coupled with the explanation on both sides as to how it might have got there, and determine yourself what the actual fact is.

If you find that this extract was made by adding what is called here artificial vanillin, then your verdict should be guilty: We, the jury, find the defendant guilty as charged. If you find the facts to be that this was made by using two and a half times the amount of vanilla beans ordinarily used in making this standard vanilla extract, notwithstanding the fact that it cost two and a half times as much—if you find that is the way it was done, then your verdict should be: We, the jury, find the defendant not guilty. In either event your verdict should be signed by the foreman and returned into court.

DADE v. UNITED STATES

(Court of Appeals, District of Columbia, Feb. 25, 1913)

40 App. D.C. 94; N.J. No. 2516

Error to the Police Court of the District of Columbia. Judgment affirmed.

The United States attorney filed in the police court an information against Charles G. Dade, Washington, D.C., alleging the sale by said defendant, in violation of the Food and Drugs Act, of a quantity of milk which was adulterated. The product bore no label. Adulteration of the product was alleged in the information for the reason that it consisted "in whole and in part of a filthy, decomposed and putrid animal and vegetable substance." The case having come on for trial before the court, without the intervention of a jury, a finding of guilty was made by the court. Defendant thereupon, by his attorney, moved for a new trial, and said motion was overruled, without comment, by the court. Thereafter defendant sued out a writ of error to the Court of Appeals of the District of Columbia to set aside the judgment rendered, and sentence pronounced by said police court, and the case having come on for a hearing before said Court of Appeals, the judgment of the police court was affirmed by the Court of Appeals, as will more fully appear from the following opinion:

VAN ORSDEL, *Judge*. This case is here in error to the Police Court of the District of Columbia. Plaintiff in error was convicted of violating the following provision of the Pure Food and Drugs Act:

> SEC. 7. That for the purposes of this act, an article shall be deemed to be adulterated: * * *
> In the case of food: * * *
> Sixth. If it consist in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter. [34 Stat. 770.]

The information charged him with unlawfully offering for sale and selling adulterated milk, "in that it did consist in whole and in part of a filthy, decomposed and putrid animal and vegetable substance."

The facts established by the evidence are that on February 27, 1911, a pint bottle of milk was purchased from one of the defendant's wagons and taken to the laboratory of the Bacteriological Bureau of the Health Department, where it was analyzed and found to contain 4,500,000 bacteria on ordinary agar, 37° C., grown 24 hours, and 89,400,000 bacteria per cubic centimeter on ordinary agar, 25° C., grown 48 hours. It contained 83,000 bacteria per cubic centimeter of the colon group. It showed gas fermentation in one ten-thousandths of a cubic centimeter, approximately 15 drops, and one streptococcus to one ten-thousandths of a cubic centimeter.

It appears that the bacterium known as *B. coli*, or colon bacillus, originates in and is a normal constituent of the colon in all warm-blooded animals, is discharged in the excreta, and found in milk as the result of fecal contamination. When present in milk, it always occurs from either direct or indirect fecal deposits therein; directly

from carelessness in permitting particles of feces to get into the milk during the process of extracting the milk from the cow or in handling it afterwards; indirectly, from dust, vegetation, water, and air, where the bacillus is found—originally derived, however, from animal feces. The evidence discloses the study of the science to be that colon bacillus is a vegetable formation originating in animal intestines, and nowhere else. It is not found in air, dust, water, or vegetation under conditions indicating different origin or its original derivation from the substance with which it is thus associated. Under favorable conditions colon bacillus will multiply and develop in milk with great rapidity. The present analysis in the light of the evidence reveals the presence of the colon bacillus to have resulted from a direct deposit of feces in the milk, due to uncleanly methods of handling the milk.

It appears that the streptococcus is associated frequently with the colon bacillus in the colon of warm-blooded animals and is discharged in the excreta. It is also found in diseased processes of animals—in boils on human beings or in abscesses in animals and in diseased tissues and intestines. While milk may be perfectly sterile in the udder of a healthy cow, streptococci may be found in milk taken from a diseased udder. It, however, may be regarded as strongly conclusive that where colon bacilli and streptococci are found together in large numbers and under the circumstances here shown, they originate directly from fecal matter. They are not found in milk as it flows from a healthy animal. Their presence in milk, originally pure, indicates contamination from an outside source—as to colon bacillus, always fecal contamination; and usually the same as to streptococcus. Streptococcus may also come from a diseased condition of the cow or from persons handling the milk, but its presence was not so accounted for in this case.

It also appears that the growth of bacteria invariably results in the chemical and natural decomposition of the substance in which they grow. Milk is an animal substance, and bacteria are a vegetable formation in the milk. The bacteria develop and die in rapid succession, causing natural decomposition. Colon bacilli and streptococci destroy the sugar in milk, which is broken up into various acids and gases, thus causing chemical decomposition. For example, sour milk is described as decomposed milk, and may be caused by the action of bacteria. The decomposition of milk sugar into lactic acid is a chemical process that causes milk to sour.

This case was not prosecuted upon the assumption that bacteria, as living vegetable organisms, are in themselves either filthy, decomposed, or putrid; but upon the theory, as fully sustained by the evidence, that the bacteria constantly develop and die, causing filthy vegetable decomposition; that the colon bacilli and streptococci found in the milk establish the presence of fecal matter; that streptococci, especially, are a menace to health; that whether the streptococci came into the milk through fecal deposit, from a diseased condition of the cow, or of those handling the milk, the vice is the same, and that these two groups of bacteria, especially, cause decomposition of the milk.

The Pure Food and Drugs Act is a police regulation enacted to conserve the public health. It will be construed liberally to meet

the evils intended to be embraced within its provisions. *United States* v. *Corbett*, 215 U.S. 233; *District of Columbia* v. *Gardiner*, 39 App. D.C. 389; *Galt* v. *United States*, 39 App. D.C. 470. We are not unmindful of the rule that police regulations to be valid must be reasonable, necessary, and not unduly oppressive. The law-making power, in their enactment, takes into consideration the public sentiment of the community as a measure of the degree of regulation to which private property shall be subjected for the public good, and nowhere do the courts so completely reflect the side of public opinion as in deciding cases involving the exercise of the police power. Measures looking to the public welfare are no longer tested by the strict letter of the Constitution. Doubtless, many modern expressions of the legislative will, in the exercise of its police power, would have been held unconstitutional if enacted at an earlier period. But public opinion, keeping pace with an advancing civilization, is the progressive factor which calls for an enlarged invasion of private rights for the public good, and which prompts courts to give greater elasticity to constitutional limitations. In flexibility of construction lies the possibility of progress and the vitality of the Constitution. Therefore, some of the technical distinctions cited to be applied by counsel for plaintiff in error in construing the act before us may be disposed of by the suggestion that the food offered for sale in a filthy, decomposed, and putrid condition, caused either from an inherent condition, or external substance; or "consisting of" or containing filthy, decomposed, or putrid matter; or containing a foreign substance, neither filthy, decomposed, nor putrid in itself, but which causes the food from contact with it to decompose or become filthy or putrid, will be held to come within the act. It is beyond dispute that the milk, when taken from the wagon of plaintiff in error in the condition in which it was being sold to his customers, was both filthy and decomposed.

It is urged that since it is impossible to produce milk entirely free from bacteria, the statute imposes a duty impossible of performance, and cannot, therefore, be applied to milk; or, if possible of performance, it could only be complied with at so great a cost as to result in the destruction and confiscation of the business. It is not clear from the evidence that the enforcement of the act will produce this result. The present case does not present this difficulty, except in theory; since the contamination was so great as to place it within the statute beyond the domain of speculation. Not only did the milk in question contain bacteria of the colon group, but, as incident thereto, fecal matter, all of which, it appears, may be eliminated by the adoption of cleanly methods in handling the milk. In fact, it appears that samples from the dairy of plaintiff in error have been analyzed, which were free from bacteria of the colon group. One witness testified that he "has encountered milk, samples of raw milk and samples of pasteurized milk, free from bacteria of the colon; has seen samples of defendant's that did not contain them, milk sold as raw milk and analyzed on that assumption."

We are not dealing with a regulation relating to milk alone, but with an act generally regulating the sale of food products. Milk is a food product; and, if found to be impure, it will be held to be "adulterated" within the provisions of the act. There is evidence

that it is impossible to produce raw milk which does not contain bacteria; that a limited number of bacteria in milk are practically harmless, and also that certain kinds of bacteria are, in fact, harmless. It is unnecessry to decide whether, under such circumstances, milk would be held to come within the act, since in the present case, adulteration is clearly established. The dividing line between pure and impure or adulterated food is in each instance a question of fact; but, because of the scientific distinctions involved, and the impossibility of producing raw milk entirely free from bacteria, it may be much more difficult of ascertainment in the case of milk than of other food products. Owing to the great difficulty which may be encountered in justly enforcing the law, in the absence of a fixed standard defining what is marketably pure and impure milk, in a case where the adulteration consists alone in the presence of comparatively small numbers of so-called harmless bacteria, it may well be that Congress should give attention to this subject, as has been done in many of the States, and establish a fixed standard for marketable milk, whereby milk found to contain a greater number of bacteria than that fixed by the act should come within the condemnation of the law. With the fact scientifically demonstrated that contaminated milk is a dominating factor in the propagation of tuberculosis, typhoid fever, scarlet fever, diphtheria, infantile diarrhea, and other diseases, the subject, in importance, is one of the first magnitude.

The judgment is affirmed with costs, and it is so ordered.

UNITED STATES v. SWEET VALLEY WINE CO.

(District Court, N.D. Ohio, W.D. Feb. 26, 1913)

208 Fed. 85; N.J. No. 3271

Indictment alleging violation of section 2 of the Food and Drugs Act. Demurrer to indictment overruled.

KILLITS, *District Judge* (overruling demurrer). The defendant is indicted on four counts for misbranding under the act of June 30, 1906 (ch. 3915, 34 Stat. 768), commonly called the Pure Food Act.

Under the first count the defendant is charged with shipping an article of food branded as follows: "Select Riesling Wine, Special Vintage, Serial 124." It is charged that under section 8 of said act this article was misbranded so as to deceive and mislead the purchaser, in that it purported to be Riesling wine of select quality, whereas in fact it was a compound of wine and a fermented solution of commercial dextrose, otherwise known as starch sugar.

Under the second and third counts it was charged that defendant's shipments purported to be Rhine wines of the character known as Hochheimer and Diedesheimer, respectively, whereas the article in each instance was merely an Ohio manufactured product, and a mixture of wine and a fermented solution of commercial dextrose. The character of alleged misbranding in the second count is typical of both the second and third counts. On the neck of the bottle was a label containing these words "Hochheimer Typo, Ohio Serial No. 124, Guaranteed", etc. On the box containing the bottles were the

words: "Hochheimer Typo Wine." That the bottle itself was in the design and form of the bottles containing genuine Hochheimer wine, and contained as part of the label a picture representing a German village.

As to the fourth count, the charge is simply that the defendant shipped wine bottled with a label designating the same as "Typo-Niersteiner Wine, Ohio Serial No. 124, Guaranteed", etc., whereas in fact the article therein contained was a mixture of wine or of grape juice and a fermented solution of fermented dextrose, otherwise known as starch sugar.

To these counts a demurrer has been interposed, on the grounds of: (1) The alleged unconstitutionality of the act; (2) that section 8 thereof, under which this prosecution is attempted, is void for want of definiteness in fixing legal standards for the various wines enumerated in said counts; (3) for a failure of the indictment to aver that wines alleged to have been shipped are not normally composed of a mixture of wine and commercial dextrose, and for failure to allege in either of said counts what ingredients or constituents go to compose the normal wines of the various kinds mentioned in said counts; (4) for a failure to allege that other explanatory statements did not appear on the labels which might inform the purchaser of the exact nature of said wines; (5) for a failure to allege that the various wines therein mentioned and shipped by defendant were foods within the meaning of the act of Congress; (6) that the alleged picture of a German village should be more particularly described, and that the allegation that the picture is a representation of a German village is a mere conclusion; (7) for failure to allege that wines designated as Hochheimer Typo Wines and Diedesheimer Typo Wine, respectively, are not identical with Hochheimer wines and Diedesheimer wines, respectively.

The constitutionality of this act is so generally conceded and so well established that the demurrer on that ground has not been seriously pressed to our consideration, and will not be further entertained.

Section 6 of the act says:

> The term "food," as used herein, shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound.

Applying that language and the principle that, unless compelled otherwise, we must take words in an indictment at their ordinary and usual meaning, we find no merit in the contention that this indictment should aver that the wine in question was a food within the purview of the act.

Nor will we spend much time in considering the other grounds of demurrer, save that which insists that section 8 of the act is void for not establishing a standard for the various wines enumerated in the counts of this indictment. The other grounds are not urged upon our consideration in argument, and doubtless have been abandoned; at any rate they do not appeal to us as having much force.

Respecting the second ground of the demurrer, the argument as stated in the brief of counsel is as follows:

> Our second ground of demurrer goes to all the five counts of the indictment, and it is that the said act of Congress is void as applied to this particular case

because it fails to fix standards for the various wines enumerated in said counts. We do not contend by this ground of demurrer that the said act of Congress is unconstitutional as applied to other cases, but what we maintain is that it is void for uncertainty and indefiniteness as applied to this case.

And to that point are cited a number of cases in which the proposition is urged that a penal act is void for uncertainty in which the offense depends, "not on any standard erected by the law which may be known in advance, but on one erected by a jury, and especially so as that standard must be as variable and uncertain as the views of the different juries may suggest, and as to which nothing can be known until after the commission of the crime." *Louisville & Nashville Rd. Co.* v. *Commonwealth*, 99 Ky. 132, 35 S.W. 129, 33 L.R.A. 209, 59 Am. St. Rep. 457. This citation is typical of other authorities depended upon by counsel for defendant. They are cases in which the question of what is a just and reasonable rate or toll of compensation for the transportation of passengers or freight is left open to determination by the various tribunals before which the case comes by the statute which makes an undue charge an offense.

Again we say that the words used both in the statute and in this indictment must be given their ordinary and common meaning in the absence of something to demand a special definition. The word "wine" is, by general acceptance and standard definition, understood to mean the fermented juice of the undried grape. The contention of the defendant would make it practically impossible for Congress to pass an act to correct the evils at which this statute is aimed, for the reason that it would be necessary not only to amplify the act with very particular and minute definition of standards but to be constantly amending it and supplementing it as new devices and compounds were placed upon the market. All that can be done, granting that Congress has the right to strike at the evils in question, is to pass a statute in general terms, using words of ordinary acceptance.

But we are referred to section 5796, General Code of Ohio, for a definition of the word "wine," and it is insisted that under the allegations of this indictment the defendant is within that definition. Perhaps we may grant that defendant is protected against the operation of the Pure Food Act respecting misbranding if it complies with the law of Ohio defining what wine is, and that immunity may possibly favor defendant without reference to Food Inspection Decision 120 of the Department of Agriculture, respecting the labeling of Ohio and Missouri wines, but the trouble is that, accepting the description of the indictment as true, defendant's product is not within the terms of the Ohio code definition, which reads:

> The term "wine" means the fermented juice of undried grapes. The addition of pure white or crystallized sugar to perfect the wine, or using ingredients necessary solely to clarify and refine it which are not injurious to health, shall not be adulterations. Such wines shall contain at least seventy-five per cent. of pure grape juice, and shall not contain artificial flavoring. [Sec. 5796, General Code of Ohio.]

Defendant's article of food alleged to be misbranded is not shown to be the fermented juice of undried grapes to which had been added "pure white or crystallized sugar" to perfect it, but it is described as wine ("the fermented juice of undried grapes") to which has been added "a fermented solution of commercial dextrose, otherwise

known as starch sugar." It cannot be claimed seriously that there is no difference between adding to the fermented juice of undried grapes "pure white or crystallized sugar", which seems to mean sugar in its commercially dry state, and making a compound of pure wine and a fermented solution of commercial dextrose, or even a fermented solution of commercial sugar. The latter not only involves an additional element not found in the statute in the form of the water used for the solution but brings into the compound that fermentation which may be peculiar to the dextrose or sugar solutions.

If we were forced to a construction of the Ohio statute, we see substance in the insistence that it provides only for cane or beet sugar of the accepted saccharine content as the perfecting addition rather than dextrose, which is not only but little over half the saccharine efficiency of sugar, bulk for bulk, but contains, in the commercial form at least, a large proportion of dextrin, which cannot be said to be in any sense an equivalent of sugar or within the scope of any reasonable construction of the Ohio statute. In view of the very prevalent impression, 20 years ago, when the act was passed, that glucose or dextrose was not altogether wholesome, a doubt which is not yet altogether dispelled, it is not likely that the legislature contemplated its use under the terms "pure white or crystallized sugar."

The demurrer is overruled, and defendant will plead to the indictment March 15 next.

DR. J. L. STEPHENS CO. v. UNITED STATES

(Circuit Court of Appeals, Sixth Circuit, Mar. 13, 1913)

N.J. No. 2511

Error to the District Court for the Southern District of Ohio. Judgment affirmed.[62]

Before WARRINGTON and DENISON, Circuit Judges, and COCHRAN, District Judge.

By the COURT: This is a proceeding on writ of error to set aside a judgment rendered and sentence pronounced upon an information. The information contained two counts, and was based on the Pure Food and Drugs Act of June 30, 1906. The plaintiff in error, hereafter called defendant, is an Ohio corporation doing business and having its principal office at Lebanon, Ohio. It there maintains a sanatorium, where persons addicted to the drug and liquor habits are treated; and patients are also treated away from the institution through correspondence. According to an agreed statement of facts, the defendant shipped two boxes of medicine by railway from Lebanon, Ohio, to Washington, D.C.; one shipment was made December 19, 1908, and the other October 22, 1909; each box contained 18 bottles of the medicine, and all the bottles contained alcohol as one of the ingredients, and some contained as another ingredient morphine in varying and diminishing quantities. The bottles were

[62]Affirming *United States* v. *Dr. J. L. Stephens Co.*, p. 305, ante.

labeled "Maplewood Sanatorium. Ledger M. 45. 3,609. Directions: Take half a tablespoon four times a day and as directed." The president of defendant, who was also its medical director, has charge of the patients at the sanatorium, and also of those who are treated at a distance through correspondence. He is a graduate of Columbia University, New York City, and has had a long and varied experience; indeed, he is a specialist in the treatment of patients addicted to drug and liquor habits. In the agreed statement of facts this appears:

> It is a recognized fact by the medical profession generally that in the treatment of diseases, especially the drug habit, it is an important, and in most cases a vital, factor that the patient should not know the composition of the medicines given in such treatment.

This agreed fact is offered as a defense to the charge that the medicine in question was mislabeled and misbranded, because correct labeling and branding would defeat the object of the treatment. The defendant has no proprietary medicines and does not offer or sell any medicines to the general public. In every case where a patient applies for treatment, either at the sanatorium or at the patient's home, a history of the case is obtained from the patient, a diagnosis in each instance is made, and a prescription prepared by the medical director to meet the needs of the particular case.

The cause was submitted upon the agreed statement of facts alluded to, and each party asked for a directed verdict. The case was fully considered by the trial judge, who directed a verdict in favor of the Government and sentenced the defendant to a fine of $50 and costs of prosecution. Among the questions determined was whether it was necessary to allege that the two boxes or packages containing the bottles of medicine were misbranded, the information having simply charged that each of the bottles contained in such packages was misbranded. The Court held that the word "package", as used in the act, "means the package which passes into the possession of the public, of the real consumer; and that the words, 'original unbroken package', relate * * * to the package in the form in which it is received by the vendee or consignee."

Another question determined was:

> * * * whether the Pure Food and Drugs Act deals with articles other than those which are the subject of bargain and sale. It is urged that the medicine or prescription is a mere incident of the services rendered, and that it is not therefore to be treated as an article of commerce.

Upon this question the court held:

> As was said in the *Hipolite Egg Company case*, 220 U.S. 45, the object of the law is to keep adulterated and misbranded articles out of the channels of interstate commerce, and it is immaterial whether the medicine or prescription which was furnished by the defendant company was the mere incident of the employment, or its primary object. It is enough to know that the medicine or prescription was sent through the channels of interstate commerce and misbranded, within the terms of the act.

Still another question was determined:

> Is a reputable, regularly licensed, practicing physician, residing in Ohio, who prescribes for a person beyond the limits of the State and transmits to such person through the channels of interstate commerce the medicine prescribed, subject to the penalties of the law, if the medicine so prescribed and so passing through the channels of interstate commerce, contains morphine—the bottle, box, container, or package inclosing the medicine so prescribed and to be taken by the patient not being so labeled as to show the presence of the drug?

We do not find it necessary to pass upon the last question stated. The medical director did not in his individual capacity prescribe or furnish the medicine for the persons served in this case. His acts were performed for the corporation, and in legal contemplation by it (*State* v. *Laylin*, 73 O.S., 90, 100). We agree with Judge Sater in his conclusions upon the other two questions, and so must affirm the judgment.

McDERMOTT ET AL. v. WISCONSIN

Grady v. Same

(Supreme Court of the United States, Apr. 7, 1913)

228 U.S. 115

Error to the Supreme Court of the State of Wisconsin. Judgment reversed and cases remanded.[63]

Mr. Justice Day delivered the opinion of the court.

The plaintiffs in error, George McDermott and T. H. Grady, were severally convicted in the Circuit Court of Dane County, in the State of Wisconsin, upon complaints made against them by an assistant dairy and food commissioner of that State for the violation of a statute of Wisconsin relating to the sale of certain articles and for the protection of the public health. The convictions were affirmed by the decision of the Supreme Court of Wisconsin, 143 Wis. 18.

The complaint against McDermott charged that on March 2, 1908, at Oregon, in Dane County, he

> did unlawfully have in his possession with intent to sell, and did offer and expose for sale, and did sell, a certain article, product, compound and mixture composed of more than seventy-five percent glucose and less than twenty-five percent of cane syrup, said cane syrup being then and there mixed with said glucose, and that the can containing said compound and mixture was then and there unlawfully branded and labeled "Karo Corn Syrup" and was then and there further unlawfully branded and labeled "10% Cane Syrup, 90% Corn syrup," contrary to the statute in such case made and provided.

As to Grady, the complaint was similar to that against McDermott except that the label designated the mixture as "Karo Corn Syrup with Cane Flavor" and added "Corn Syrup, 85%." The statute of Wisconsin for the violation of which plaintiffs in error were convicted is found in Laws of Wisconsin for 1907, section 4601, at page 646, being chapter 557, and the pertinent parts of it are as follows:

> Section 1. * * * No person, * * * by himself * * * or agent * * * shall sell, offer or expose for sale or have in his possession with intent to sell any syrup, maple syrup, sugar-cane syrup, sugar syrup, refiners' syrup, sorghum syrup or molasses, mixed with glucose, unless the barrel, cask, keg, can, pail or other original container, containing the same be distinctly branded or labeled so as to plainly show the true name of each and all of the ingredients composing such mixture, as follows:
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[63] Not arising under the Food and Drugs Act, June 30, 1906. *McDermott et al* v. *State*, 143 Wis. 18, 126 N.W. 888, reversed and remanded.

Third. In case such mixture shall contain glucose in a proportion exceeding 75 percent by weight, it shall be labeled and sold as "Glucose flavored with Maple Syrup," "Glucose flavored with Sugar-cane Syrup," * * * "Glucose flavored with Refiners' Syrup" * * * as the case may be. The labels * * * shall bear the name and address of the manufacturer or dealer. * * * In all mixtures in which glucose is used in the proportion of more than 75 per cent. by weight, the name of the syrup or molasses which is mixed with the glucose for flavoring purposes and the words showing that said syrup or molasses is used as a flavoring, as provided in this section, shall be printed on the label of each container of such mixture. * * * The mixtures or syrups designated in this section shall have no other designation or brand than herein required that represents or is the name of any article which contains a saccharine substance; * * * nor shall any of the aforesaid glucose, syrups, molasses or mixtures contain any substance injurious to health, nor any other article or substance otherwise prohibited by law in articles of food.

The facts are that the plaintiffs in error were retail merchants in Oregon, Dane County, Wis.; that before the filing of the complaints against them each had bought for himself and for resale as such merchant from wholesale grocers in Chicago and had received by rail from that city twelve half-gallon tin cans or pails of the articles designated in the complaints, each shipment being made in wooden boxes containing the cans, and that when the goods were received at their stores the respective plaintiffs in error took the cans from the boxes, placed them on the shelves for sale at retail, and destroyed the boxes in which the goods were shipped to them, as was customary in such cases. From their nature, the articles thus canned and offered to be sold, instead of being labeled as they were, if labeled in accordance with the State law, would have been branded with the words "Glucose flavored with Refiner's Syrup", and, as the statute provides that the mixtures or syrups offered for sale shall have upon them no designation or brand which represents or contains the name of a saccharine substance other than that required by the State law, the labels upon the cans must be removed, if the State authority is recognized.

Plaintiffs in error contend that the cans were labeled in accordance with the Food and Drugs Act passed by Congress June 30, 1906, 34 Stat. 768, ch. 3915, and that that fact is evidenced by the decision of the Secretaries of the Treasury, Agriculture, and Commerce and Labor made under the claimed authority of that act, which is as follows:

WASHINGTON, D. C., *February 13, 1908.*

We have each given careful consideration to the labeling, under the Pure Food Law, of the thick, viscous syrup obtained by the incomplete hyrolysis of the starch of corn, and composed essentially of dextrose, maltose, and dextrin. In our opinion it is lawful to label this syrup as corn syrup, and if to the corn syrup there is added a small percentage of refiner's syrup, a product of cane, the mixture in our judgment is not misbranded if labeled "corn syrup with cane flavor."

GEORGE B. CORTELYOU, *Secretary of the Treasury.*
JAMES WILSON, *Secretary of Agriculture.*
OSCAR S. STRAUS, *Secretary of Commerce and Labor.*

And it is insisted that the Federal Food and Drugs Act passed under the authority of the Constitution has taken possession of this field of regulation and that the State act is a wrongful interference with the exclusive power of Congress over interstate commerce, in which, it appears, the goods in question were shipped. The case presents, among other questions, the constitutional question whether

the State act in permitting the sale of this article only when labeled according to the State law is open to the objection just indicated.

That Congress has ample power in this connection is no longer open to question. That body has the right not only to pass laws which shall regulate legitimate commerce among the States and with foreign nations, but has full power to keep the channels of such commerce free from the transportation of illicit or harmful articles, to make such as are injurious to the public health outlaws of such commerce, and to bar them from the facilities and privileges thereof. Congress may itself determine the means appropriate to this purpose, and so long as they do no violence to other provisions of the Constitution it is itself the judge of the means to be employed in exercising the powers conferred upon it in this respect. *McCulloch* v. *Maryland*, 4 Wheat. 316, 421; *Lottery Case*, 188 U.S. 321, 355; *Hipolite Egg Co.* v. *United States*, 220 U.S. 45; *Hoke* v. *United States*, 227 U.S. 308.

The Food and Drugs Act was passed by Congress under its authority to exclude from interstate commerce impure and adulterated food and drugs and to prevent the facilities of such commerce being used to enable such articles to be transported throughout the country from their place of manufacture to the people who consume and use them, and it is in the light of the purpose and of the power exerted in its passage by the Congress that this act must be considered and construed. *Hipolite Egg Co.* v. *United States*, *supra.*

Section 2 of the act provides that—

> the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia * * * of any article of food or drugs which is adulterated or misbranded, within the meaning of this act, is hereby prohibited; and any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia * * * any such article so adulterated or misbranded within the meaning of this act, * * * shall be guilty of a misdemeanor, and for such offense be fined, etc.

The article of food or drugs, the shipment or delivery for shipment in interstate commerce of which is prohibited and punished, is such as is *adulterated or misbranded within the meaning of the act.* What it is to adulterate or misbrand food or drugs within the meaning of the act requires a consideration of its other provisions, wherein such adulteration or misbranding is defined.

According to the terms of section 7 drugs are "adulterated" where, if they are sold under a name recognized in the United States Pharmacopœia and differ from the standard of strength therein laid down, the standard of strength, etc., is not plainly stated upon the bottle, box, or other container; and food is "adulterated" where it contains an added poisonous or other added deleterious ingredient which may render it injurious, except that, where directions are printed on the covering or the package for the necessary removal of such preservative, the provisions of the act shall apply only when the food is ready for consumption. Turning to section 8, we find that the term "misbranded", as used in the statute, shall apply to all drugs or articles of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein, which is false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, etc., in which it was manufactured; and in

the case of drugs it is provided that, if the contents of the package as originally put up shall have been removed in whole or in part and other contents placed in such package, or, if the package fail to bear a statement on the label as required, the drugs shall be deemed misbranded; and as to food, if it shall be labeled or branded so as to deceive or mislead a purchaser or purport to be a foreign product when not so, or, if the contents of the package as originally put up shall have been removed in whole or in part and other contents placed in such package, or, if the package fail to bear a statement on the label as required, or, if in package form and the contents are stated in terms of weight or measure and they are not plainly and correctly stated on the outside of the package, or, if the package containing it or its label contain any design or device regarding the ingredients or the substances contained therein which are false or misleading in character, the food shall be deemed misbranded. That the word " package " or its equivalent expression, as used by Congress in sections 7 and 8 in defining what shall constitute adulteration and what shall constitute misbranding within the meaning of the act, clearly refers to the immediate container of the article which is intended for consumption by the public, there can be no question. And it is sufficient, for the decision of these cases, that we consider the extent of the word package as thus used only, and we therefore have no occasion, and do not attempt, to decide what Congress included in the term " original unbroken package " as used in the second and tenth sections and " unbroken package " in the third section. Within the limitations of its right to regulate interstate commerce, Congress manifestly is aiming at the contents of the package as it shall reach the consumer, for whose protection the act was primarily passed, and it is the branding upon the package which contains the article intended for consumption itself which is the subject matter of regulation. Limiting the requirements of the act as to adulteration and misbranding simply to the outside wrapping or box containing the packages intended to be purchased by the consumer, so that the importer, by removing and destroying such covering, could prevent the operation of the law on the imported article yet unsold, would render the act nugatory and its provisions wholly inadequate to accomplish the purposes for which it was passed.

The object of the statute is to prevent the misuse of the facilities of interstate commerce in conveying to and placing before the consumer misbranded and adulterated articles of medicine or food, and in order that its protection may be afforded to those who are intended to receive its benefits the brands regulated must be upon the packages intended to reach the purchaser. This is the only practical or sensible construction of the act, and, for the reasons we have stated, we think the requirements of the act as so construed clearly within the powers of Congress over the facilities of interstate commerce, and such has been the construction generally placed upon the act by the Federal courts. *In re Wilson*, 168 Fed. 566; *Nave-McCord Mercantile Co.* v. *United States*, 182 Fed. 46; *United States* v. *American Druggists' Syndicate*, 186 Fed. 387; *United States* v. *10 Barrels of Vinegar*, 186 Fed. 399; *Von Bremen* v. *United States*, 192 Fed. 904; *United States* v. *75 Boxes of Alleged Pepper*, 198 Fed. 934.

While these regulations are within the power of Congress, it by no means follows that the State is not permitted to make regulations,

with a view to the protection of its people against fraud or imposition by impure food or drugs. This subject was fully considered by this court in *Savage* v. *Jones*, 225 U.S. 501, in which the power of the State to make regulations concerning the same subject matter, reasonable in their terms and not in conflict with the acts of Congress, was recognized and stated, and certain regulations of the State of Indiana were held not to be inconsistent with the Food and Drugs Act of Congress. While this is true, it is equally well settled that the State may not, under the guise of exercising its police power or otherwise, impose burdens upon or discriminate against interstate commerce, nor may it enact legislation in conflict with the statutes of Congress passed for the regulation of the subject, and if it does, to the extent that the State law interferes with or frustrates the operation of the acts of Congress, its provisions must yield to the superior Federal power given to Congress by the Constitution. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426; *Northern Pacific Ry. Co.* v. *Washington*, 222 U.S. 370; *Southern Ry. Co.* v. *Reid*, 222 U.S. 424; *Second Employers' Liability Cases*, 223 U.S. 1; *Savage* v. *Jones*, *supra*, 533.

Having in view the interpretation we have given the Food and Drugs Act and applying the doctrine just stated to the instant cases, how does the matter stand? When delivered for shipment and when received through the channels of interstate commerce the cans in question bore brands or labels which were supposed to comply with the requirements of the act of Congress. Whether the Secretaries had the power under the Food and Drugs Act to make the regulation set out above is not now before us. It is enough for the present purpose to say that so far as this record discloses, it was undertaken in good faith to label the articles in compliance with the act of Congress, and, if they were not so labeled, by section 2 provision is made for the enforcement of the act by criminal prosecution and by section 10 by proceedings in rem. Whether the labels complied with the Federal law was not for the State to determine. This was a matter provided for by the act of Congress and to be determined as therein indicated by proper proceedings in the Federal courts.

The label upon the unsold article is in the one case the evidence of the shipper that he has complied with the act of Congress, while in the other, by its misleading and false character, it furnishes the proof upon which the Federal authorities depend to reach and punish the shipper and to condemn the goods. If truly labeled within the meaning of the act his goods are immune from seizure by Federal authority; if the label is false or misleading within the terms of the law the goods may be seized and condemned. In other words the label is the means of vindication or the basis of punishment in determining the character of the interstate shipment dealt with by Congress. While in this situation, the goods being unsold, as a condition of their legitimate sale within the State, and also of their being in the possession of the importer for the purpose of sale and of being exposed and offered for sale by him, the Wisconsin statute provides that they shall bear the label required by the State law and none other (which represents a saccharine substance, as do the labels in these cases). In other words, it is essential to a legal exercise of possession of and traffic in such goods under the State law that labels

which presumably meet with the requirements of the Federal law and for the determination of the correctness of which Congress has provided effectual means, shall be removed from the packages before the first sale by the importer. In this connection it might be noted that as a practical matter, at least, the first time the opportunity of inspection by the Federal authorities arises in cases like the present is when the goods, after having been manufactured, put up in package form and boxed in one State and having been transported in interstate commerce, arrive at their destination, are delivered to the consignee, unboxed, and placed by him upon the shelves of his store for sale. Conceding to the State the authority to make regulations consistent with the Federal law for the further protection of its citizens against impure and misbranded food and drugs, we think to permit such regulation as is embodied in this statute is to permit a State to discredit and burden legitimate Federal regulations of interstate commerce, to destroy rights arising out of the Federal statute which have accrued both to the Government and the shipper, and to impair the effect of a Federal law which has been enacted under the constitutional power of Congress over the subject.

To require the removal or destruction before the goods are sold of the evidence which Congress has by the Food and Drugs Act, as we shall see, provided may be examined to determine the compliance or noncompliance with the regulations of the Federal law, is beyond the power of the State. The Wisconsin act which permits the sale of articles subject to the regulations of interstate commerce only upon condition that they contain the exclusive labels required by the statute is an act in excess of its legitimate power.

It is insisted, however, that, since at the time when the State act undertook to regulate the branding of these goods, namely, when in the possession of the plaintiffs in error and held upon their shelves for sale, the cans had been removed from the boxes in which they were shipped in interstate commerce, they had therefore passed beyond the jurisdiction of Congress, and their regulation was exclusively a matter for State legislation. This assertion is based upon the original package doctrine as it is said to have been laid down in the former decisions of this court. The term "original package" had its origin in *Brown* v. *Maryland*, 12 Wheat. 419, in which this court had to consider the extent of the protection given under Federal authority to articles imported into this country from abroad for sale, and it was there held that (p. 441):

> When the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution.

That doctrine has been many times applied in the decisions of this court in defining the line of demarcation which shall separate the Federal from the State authority where the sovereign power of the Nation or State is involved in dealing with property. And where it has been found necessary to decide the boundary of Federal authority it has been generally held that, where goods prepared and packed for shipment in interstate commerce are transported in such com-

merce and delivered to the consignee and the package by him separated into its component parts, the power of Federal regulation has ceased and that of the State may be asserted. Some of the cases in which this doctrine has been considered will be found in the margin.[64]

In the view, however, which we take of this case it is unnecessary to enter upon any extended consideration of the nature and scope of the principles involved in determining what is an original package. For, as we have said, keeping within its constitutional limitations of authority, Congress may determine for itself the character of the means necessary to make its purpose effectual in preventing the shipment in interstate commerce of articles of a harmful character, and to this end may provide the means of inspection, examination, and seizure necessary to enforce the prohibitions of the act, and when section 2 has been violated, the Federal authority, in enforcing either section 2 or section 10, may follow the adulterated or misbranded article at least to the shelf of the importer.

Congress having made adulterated and misbranded articles contraband of interstate commerce, in the manner we have already pointed out, provides in section 10 of the act that such articles may be proceeded against and seized for confiscation and condemnation while being transported from one State, Territory, District, or insular possession to another for sale, or, having been transported, remaining, "unloaded, unsold, or in original unbroken packages", and the subsequent provisions of the section regulate the disposition of the articles seized. To make the provisions of the act effectual, Congress has provided not only for the seizure of the goods while being actually transported in interstate commerce, but has also provided for such seizure after such transportation and while the goods remain "unloaded, unsold, or in original unbroken packages." The opportunity for inspection en route may be very inadequate. The real opportunity of Government inspection may only arise when, as in the present case, the goods as packed have been removed from the outside box in which they were shipped and remain, as the act provides, "unsold." It is enough, by the terms of the act, if the articles are *unsold*, whether in original packages or not. Bearing in mind the authority of Congress to make efficient regulations to keep impure or misbranded articles out of the channels of interstate commerce, we think the provisions of section 10 are clearly within its power. Indeed it seems evident that they are measures essential to the accomplishment of the purpose of the act.

The doctrine of original packages had its origin in the opinion of Chief Justice Marshall in *Brown* v. *Maryland*, already referred to. It was intended to protect the importer in the right to sell the imported goods which was the real object and purpose of importation. To determine the time when an article passes out of interstate into State jurisdiction for the purpose of taxation is entirely different from deciding when an article which has violated a Federal prohibition becomes immune. The doctrine was not intended to limit

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[64] *Leisy* v. *Hardin*, 135 U.S. 100; *Rhodes* v. *Iowa*, 170 U.S. 412, 424; *Schollenberger* v. *Pennsylvania*, 171 U.S. 1, 19 *et seq.*; *May* v. *New Orleans*, 178 U.S. 496; *Austin* v. *Tennessee*, 179 U.S. 343; *American Steel & Wire Co.* v. *Speed*, 192 U.S. 500, 519 *et seq.*; *Cook* v. *Marshal County*, 196 U.S. 261; *Heyman* v. *Southern Ry. Co.*, 203 U.S. 270, 276; *Savage* v. *Jones*, 225 U.S. 501, 520; *Purity Extract Co.* v. *Lynch*, 226 U.S. 192, 200.

the right of Congress, now asserted, to keep the channels of interstate commerce free from the carriage of injurious or fraudulently branded articles and to choose appropriate means to that end. The legislative means provided in the Federal law for its own enforcement may not be thwarted by State legislation having a direct effect to impair the effectual exercise of such means.

For the reasons stated, the statute of Wisconsin, in forbidding all labels other than the one it prescribed, is invalid, and it follows that the judgments of the State court affirming the convictions of the plaintiffs in error for selling the articles in question without the exclusive brand required by the State, must be reversed, and the cases are remanded to the State court for further proceedings not inconsistent with this opinion.

UNITED STATES v. WELLS

(District Court, W.D. Tennessee, Apr. 21, 1913)

N.J. No. 3306

Informations charging violations of section 2 of the Food and Drugs Act. Demurrers to informations sustained.

McCall, *District Judge.* This case is before me upon a demurrer to the information, wherein J. Lindsay Wells is charged with a violation of the Pure Food and Drugs Act.

There are two grounds of demurrer:

First. The said information fails to allege and state that the information therein contained had been sworn to or the facts made upon oath before a United States Commissioner, and, in fact, no affidavit had been made or examination had before a proper officer, previous to the filing of said information, touching the matters and things in said information set out.

Second. Said information is not issued in compliance with Article 4 of the Amendments of the Constitution of the United States.

The record shows that on February 15, 1913, the Honorable Casey Todd, United States District Attorney, filed with the clerk of this court an information, setting out certain acts of J. Lindsay Wells, which are alleged to be a violation of the statutes made and provided in such cases. Upon the filing of said information and on the same day there was issued by the clerk a capias out of this court for the arrest of J. Lindsay Wells, commanding that he be brought before this court on the fourth Monday of May 1913, to answer the charges in said information. Also, on the same day, there was issued a summons for said J. Lindsay Wells to appear and answer said information. Said summons and capias were executed as commanded by the United States marshal and returned and filed in court on February 17, 1913, on which date said Wells appeared before A. G. Mathews, United States Commissioner, and gave bond for his appearance at the May term of the court to further answer said information.

The demurrer raises the question as to the validity of the information and the proceedings thereunder.

There was no affidavit or other paper tending to support the statement contained in the information other than the information itself, signed by the United States district attorney, Hon. Casey Todd.

There is no question that offenses of this character may be prosecuted upon information and without an indictment. The question is, Is the proceeding by the information in conformity with law?

In the case of *United States* v. *Morgan*, 222 U.S. 274, the Supreme Court, in passing upon the question as to whether or not it was necessary to give notice to the accused of the purpose of the Government to indict him for a violation of the Pure Food and Drugs Act, held that such notice was not necessary, and, among other things, said:

> A further answer is, that as to this and every other offense the Fourth Amendment furnishes the citizen the nearest practicable safeguard against malicious accusations. He cannot be tried on an information unless it is supported by the oath of someone having knowledge of the facts showing the existence of probable cause.

The last sentence in the excerpt may possibly be held to be dictum in that case, but it gives expression to the views of the Supreme Court touching the proper construction of the Fourth Amendment to the Constitution of the United States, in cases prosecuted upon information.

There is nothing in the case at bar that indicates that the information filed by the district attorney is supported "by the oath of someone having knowledge of the facts showing the existence of probable cause." Indeed, it is conceded by the Government that no such affidavit or statement was made by anyone and presented with the information when application was made, either for the summons or capias for the defendant.

It is insisted by the Government that the information filed, signed by the district attorney, is itself made under oath, since the district attorney is a sworn officer of the Government, and it was not necessary for him to further have verified it.

I do not think this contention is in keeping with the language above quoted from the case of *United States* v. *Morgan*. For to so hold would be to say that the information is self-supporting and made no support by the oath of someone having knowledge of the facts, showing the existence of probable cause.

This view is also sustained by Judge Ray, in the case of *United States* v. *Baumert et al.*, 179 Fed. 735.

In addition, it seems to me that the proceeding in this case is irregular and unauthorized by law.

As has been seen, the district attorney prepared his information, filed it with the clerk of the United States district court, which official thereupon issued the capias and summons for the defendant. The cases to which my attention has been called impress me with the idea that before a summons or capias is issued in cases of this character, wherein the defendant is charged with a crime upon a conviction for which he may be fined and imprisoned, that the information should be presented to the judge, supported by the oath of someone having knowledge of the facts, showing the existence of probable cause. This evidence may be oral or by affidavits. Upon the hearing of which, the court may or may not cause the arrest of the accused and have him brought before the court to answer the charge,

just as he may believe that the evidence does or does not show probable cause. In other words, before a citizen is arrested, there should be facts sworn to and presented to the court, showing the existence of a probable cause for such arrest. See *United States* v. *Baumert*, *supra*, and authorities there cited.

I think the demurrer in this case should be sustained, and the information quashed and the defendant discharged.

An order will be entered accordingly.

A like order will be entered in No. 192, *United States* v. *J. Lindsay Wells*.

UNITED STATES v. WRIGHT ET AL.

(District Court, W.D. Missouri, May 5, 1913)

N.J. No. 2828

Information charging violation of section 2 of the Food and Drugs Act. Jury trial. Demurrer to evidence, sustained.

The United States attorney filed an information against E. H. Wright, George D. Wright, and T. W. Buckner alleging shipment from the State of Missouri into the State of Indiana of a quantity of so-called "Wright's Condensed Smoke," which was alleged to have been misbranded. The product was labeled: "Wright's Condensed Smoke A Liquid Smoke made by distilling wood for smoking all kinds of meats. No. 541. Guaranteed by E. H. Wright Co. under the Food and Drugs Act, June 30, 1906. It will preserve the meat for any length of time, keeping it solid and sweet and free from mold, skippers, flies and all other insects. It imparts a true Hickory Smoke flavor to meats, that can be obtained in no other way, making the meat perfectly wholesome and palateable. One bottle will smoke 250 to 300 pounds of meat. Price 75 cts. per Bottle. Every bottle guaranteed to be perfectly satisfactory or money refunded. Get the genuine Wright's Condensed Smoke Manufactured only by The E. H. Wright Co. Limited, Kansas City, Mo."

Misbranding of the product was alleged in the information for the reason that the label upon each of the bottles containing the product, wherein it was stated that the product was a liquid smoke made by distilling wood for smoking all kinds of meats, was false and misleading in that the product was not a condensed liquid smoke as stated on the labels, but, in truth and in fact, was crude pyroligneous acid. Misbranding was alleged for the further reason that the labels upon the bottles, wherein it was stated that the product was a liquid smoke made by distilling wood for smoking all kinds of meats, deceived and misled the purchaser into the belief that the product was a liquid smoke made by distilling the wood for smoking all kinds of meats, whereas, in truth and in fact, it was not a liquid smoke but a crude pyroligneous acid.

The case having come on for trial before the court and a jury, the defendants entered pleas of not guilty, and at the close of the Government's case, after argument of a demurrer interposed by

defendants, the said demurrer to the evidence was sustained, as will more fully appear from the following opinion by the court:

VAN VALKENBURG, *District Judge.* I have been following this very closely, and I have read all of the citations suggested that I was not already familiar with. Now, I think this label itself, within the spirit and purview of this act, reads the Government out of court, and that, combined with what has been added in the way of testimony, but emphasizes that conclusion.

In the first place, it is clearly established from the Government's standpoint that there is no such thing as a condensed smoke, or liquid smoke; there is nothing but smoke, which cannot be reduced to any such form as is stated here. Secondly, the defendant in this case has not been putting off his article as and for some other recognized article of commerce. If he has been representing that he has a thing here that will do what some other thing will do, that is an entirely different consideration; whether it will or not, we do not know, at least we do not know in this case, and that is immaterial to this particular form of charge. It is not charged that there is being perpetrated a cheat or fraud in the sense that he is putting off a worthless article or deleterious article, but simply that he is putting off on the public an article which is represented to be a specific article of commerce, which it is not. Smoke is not an article of commerce in the sense we are speaking of here, a commodity that can be bottled and confined and sent off as you can do with this product; but, anyway, "Wright's Condensed Smoke, Liquid Smoke", now what is it? Why, it is made by distilling wood for smoking all kinds of meats, and that is exactly what this stuff is, according to the evidence. Of course you say this is not smoke, because smoke is not made by distillation; it is made by imperfect combustion; but this, on the face of it, is not something that would mislead the public into believing that it was identical with smoke. There is no one in the world, whether he be a technical man or a layman, who would be deceived into thinking this is smoke that goes up the chimney; everybody knows it is not that. They are addressing themselves to a specific commercial object, and that is the curing of meat, and they represent here that this is a liquid which is made from distilling wood, which, as you might say, is a fanciful or descriptive name referring to the object.

They use the term in a way no one can misunderstand. They use the technical term of "smoking" meat, and they tell you how to pour it over the meat, and by that means cure it, in a way that does not deceive anybody; they know it is a liquid. Now, whether its effects are deleterious we do not know, and that has nothing to do with the question. Everybody who buys it knows that it is a liquid he is getting, and that there is no such thing as smoke in a liquid or condensed form which can be put up in bottles or cartons and carried around. The label goes on to say that it will preserve meat and impart a true hickory smoke flavor to the meat, and everything you get from this label merely goes to the effect that they have produced a liquid in a specified way, which is true.

The Government, in trying to show that this is not smoke produced by combustion, has shown that it is produced in exactly the

same kind of way that is stated on that label. The fact is that they have produced something here which they say has something of the flavor and properties similar to the curative properties of smoke; they get it out of wood, and they get it by distillation, and it turns out to be a substance like, if not exactly identical with, pyroligneous acid. Well, nobody could be deceived into thinking it was specifically what the indictment charges they are being deceived with. It is a thing which is produced in such a manner from the art and methods employed in it, that the application of the term "smoke" to it seems to me to be apt or applicable instead of deceptive, and it does not deceive in the sense this statute implies.

No one can be more in sympathy and harmony with the Food and Drugs Act than I am, and for that reason I deprecate any effort to place a strained or unreasonable construction upon its terms, which cannot help but bring it into disrepute and disrespect with the public. I am not saying this in criticism of the Department or of the district attorney. No doubt there is a point of view that perhaps can be taken in the sense in which this prosecution is leveled, but in its practical application, which is the application the courts in their last analysis must place upon it, it is not a prosecution which aims at the particular thing that this law, at least as construed, was aimed to affect in the sale of drugs and food.

The Supreme Court in the *Johnson Remedy case* says that the law cannot be extended to include mere misrepresentations, or rather a mere question of whether the label properly indicates the effectiveness of the article. And in the *Bleached Flour case*, the court said that it could not be extended to include adulterations only to such an extent that there was enough to be clearly provable as deleterious to health. Those two features have been eliminated from this act, and if they are to be restored, or either of them, it rests with Congress, and the courts cannot get around those points and extend the operative effect of this act by interpretations of the branding. If that is the intention of the Department, it must fail so far as this court is concerned. The term "misbranding" will not take the place of adulteration in some respects or of utility or effectiveness in others. It is for Congress to remedy the law if it is defective.

And, furthermore, in cases which are supposed to be cases of misbranding because of producing deception, it must be of such a substantial nature that the court, if it permitted it to go to the jury, and the jury should find a verdict sustaining the charge, could permit such verdict to stand. In this case I do not feel that I could do so, and the demurrer to the evidence is sustained.

UNITED STATES v. GOODMAN

(District Court, E.D. New York, May 9, 1913)

N.J. No. 2844

Information alleging violation of section 2 of the Food and Drugs Act. Demurrer to information sustained.

VEEDER, *District Judge.* This is a demurrer to an information under the Food and Drugs Act. The article of food in question was

labeled by the defendant "Cordial Non-Alcohol Rock & Rey." It is alleged that it was in fact a syrup containing sugar, commercial glucose, and artificial coloring matter. The supporting affidavit shows that it contained, in addition, prune juice.

The information charges the defendant, in one count, with adulteration, and in three other counts with misbranding.

With respect to adulteration the allegation is that the defendant's food product contained substances—that is, sugar, commercial glucose, and artificial coloring matter—"which had been substituted in part for the said article." But the ingredients of the "said article" which is thus alleged to have been debased by an admixture of the substances mentioned are not alleged, and they are certainly not within common knowledge. Adulteration is a relative term, and unless the relation is disclosed no offense is set up.

The second, third, and fourth counts charge misbranding—that the label was false and misleading in representing the article to be (a) a compound of rock candy and rye whisky, (b) a cordial, (c) a cordial containing rock candy and rye whisky, whereas it was syrup containing sugar, commercial glucose, and artificial coloring matter.

The designation "Cordial Non-Alcoholic Rock & Rey" is an arbitrary and fanciful one, calculated at once to put a purchaser upon inquiry as to the ingredients. But the word non-alcoholic clearly indicates that the product does not contain whisky and that it is not a cordial, the essential ingredient of which is alcohol. Since the act does not require that the ingredients of such a product shall be stated, I am of the opinion that the information fails to set up a case of misbranding.

The demurrer is sustained.

UNITED STATES *v.* WEEKS

(District Court, S.D. New York, May 13, 1913)

N.J. No. 2848

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.[65]

The United States attorney filed an information against Oscar J. Weeks, alleging shipment from the State of New York into the State of Missouri, of a quantity of a product called "Creamthick," which was misbranded. The product was labeled: "Creamthick—Serial No. 2049—Manufactured by O. J. Weeks & Co., New York, N.Y. It is guaranteed to contain no gelatine, gum arabic, egg albumen, or similar article."

Misbranding of the product was alleged in the information for the reason that the statement on the label, "It is guaranteed to contain no gelatine, gum arabic, egg albumen, or similar article", regarding the ingredients and substances contained in the product, was false and misleading, and the label was calculated to mislead and deceive

[65]Affirmed, *Weeks* v. *United States*, p. 613, *post*.

the purchaser thereof, in that the product did contain as one of its ingredients an article similar to gum arabic, to wit, Indian gum.

The case having come on for trial before the court and a jury, the following charge was delivered to the jury by the court:

HAND, *District Judge*. The charge against this defendant is the violation of the Pure Food and Drugs Act. That act provides that if any part of the label on goods sent in interstate commerce is misleading, the crime has been committed.

The jurisdiction of this court to determine that depends on the fact that the Government has charge of interstate commerce. I do not recall whether any of you gentlemen have had any such case or not, but to such of you as have not it may be necessary to explain just why we are all here. Congress has attempted by this law to keep people from sending from one State to another food about which there are misstatements of fact—in this case, on the can.

The defendant is not charged with having adulterated this substance, so you need not concern yourselves about that. I remember, last night, one of the jurors wanted to know whether there was anything deleterious or injurious in this. The Government concedes that there is not. And I think I told him, and I tell you now, that that has nothing to do with the matter, because we are concerned not only with prevention of those things getting into food which are injurious, but we are also concerned with having people know what they get from the outside of the package. I think that will commend itself to your good sense and judgment, that when we buy something as a food, a man shall not be allowed to mislead us about it, and if he makes any statement about what is inside of the package, and it turns out to be untrue, he cannot come to me and say, "Well, it is true that I did not sell what I said I would sell you, but it did not do you any harm; you are just as well off as though you had what I sold you." You would answer him by saying, "That may all be very true, but it is not relevant; I am entitled to know what I am getting, and I am entitled to rely on what you tell me I am getting, and if you have not given me what you told me I was getting, I have a grievance against you." And it is that grievance which Congress has sought to prevent—within the limits of the power of Congress, which means interstate commerce, and it is on that charge that this defendant is before the court. So it is of no consequence in the case whether you find rice flour is innocuous, or the gum chadya which you eat.

Now, there is a very limited statement here which is the only thing that this case turns on. This defendant has invented a name of his own for this substance, and he is entitled to use it—an artificial name—no one challenges it. And you see that there is a good deal of printed matter on the outside of the can here. You can take it and read it if you like, but it will not help you in deciding the case, excepting in so far as it may color and throw light upon the particular phrase, which is the phrase which the Government challenges in this case. I am going to speak of that in a moment. But it is perfectly proper for you to take this and read the whole of it if you like, in an effort to understand what the words which the Government has singled out really mean.

Now, gentlemen, you have in this case to deal with something that we in court have very constantly to deal with, and that is the meaning of language. I suppose all of you, although none of you are learned in law, know how ambiguous language is. A great diplomatist once said that words were designed to conceal ideas. And sometimes it almost seems as though they were. At least, they can be made to conceal ideas. But that is not the purpose, and that is not what they do between man and man. They are meant to convey ideas, and the only way that you can get the meaning of words is not by taking them and reading them from a dictionary. Lawyers very often come to me when I construe a statute, and bring to me a dictionary to use, and I find that it does not help me a bit. I do not care so much what the dictionary says. What I try to do when I am finding out what words mean, and particularly written words, is to exercise a certain process of imagination in the matter. I try to put myself in the position of the man that used the words. What did he think those words would mean to the people to whom he used them? When I try to do that, the next thing I have to do is to say, Who did he think would read those words? What other words did he think these men would read alongside of them? What was the class of people whom he knew was going to see what he wrote? And then I try to construct in my own mind, not by any artificial rule, but by general common sense, so far as I have it, to reconstruct what the meaning would be to the man who reads them. That is what you must do in this case.

These words were not to be read by chemists, gentlemen; they were not to be read by botanists; they were not to be read by people who dealt in nice distinctions; they were not to be read by lawyers; they were to be read by bakers and confectioners, plain men accustomed to use language—not with the nice accuracy of a trained expert, but as ordinary men do. And so when you come to find out what this meant, I apprehend that you won't understand that the people who read this were people who would dissect all the language bit by bit.

The language which is criticised here by the Government is that which is a part of this printed matter below the line "Creamthick", which I show you now. It goes down in three paragraphs of some length. You are entitled, in order to determine the words in question, to take the whole of them, and say what the sentiment of those words was; what the plain men, when they read this, would understand the man meant who put it on. He first says that this substance is smooth enough for cream, and is meant to take the place of whole eggs in ice cream, or egg whites in ice cream, and so forth; that it entirely replaces gelatine. Then comes the words, "It is guaranteed to be a pure food preparation, to contain no gelatine or egg albumen or similar article."

Now, if he had stopped at the words "Or similar article", the Government would not have objected to it here, because it does not contain gelatine, albumen, or egg albumen. But he went farther than that. He said, it contained nothing of the sort. That is one interpretation—one possible interpretation of the language, and it would be important, if it rested with me, which it does not, to determine the meaning of these words.

Supposing he had said, "It is guaranteed to contain no gelatine, egg albumen, or anything of the sort." Now, did that mean that

it might contain this gum chadya? That is the whole case in a nutshell.

Did it, to the ordinary baker and confectioner, include gum chadya? We know now that this gum arabic and gum chadya have certain different properties; a chemist will tell you that they are different. I should say that they have actually different properties so far as water absorption is concerned, because this gum chadya is a much greater water absorber, though not any more than gelatine, and gelatine is used next to gum arabic in this label. But it is true, nevertheless, that it has a water absorption very much greater than gum arabic. But when he said, gelatine, gum arabic, or egg albumen, would anyone think, who would read those words, that he would put in another kind of gum, a water absorbing gum, which will act better toward making the ice cream hold up in a solid block underneath than gum arabic?

I take it that we must assume that he supposed that the bakers might think that the gelatine and gum arabic and egg albumen were things which were used in substances of this sort. It would be a reasonable inference to suppose that he must have thought so, if he indicated as one of the merits of this preparation that it did not have any of them. When he grouped those three together, and then said this had not anything of the sort, did he lead anyone to suppose that it did not include something like this gum? That is the whole case. That, gentlemen, is the question of fact, the meaning of the language, and the character of the substance, which is entirely in your hands. You are the final arbiters of that fact. In this case it is the meaning of the language itself.

You must find—I think I have told you this in other cases in this term—that question of fact against the defendant beyond a reasonable doubt. That is to say, if you have any doubt on the subject which is not purely a fictitious one, you must bring in a verdict of not guilty. If it seems to you quite clear that the ordinary people, plain men in the trade who used and read those words would think that it did not have any of the gum, gelatinous gum, then the defendant is guilty, but if when he said that it did not contain gum arabic, that did not include that kind of gum, then your verdict must be in favor of the defendant.

In other words, to convict you must find that this gum was similar to gum arabic in the minds of men who would buy this stuff; that they would read gum arabic and this gum chadya as similar. If you can determine that, it is of no earthly consequence whether there is a chemical difference or not.

Now, gentlemen, there is one question in the case that I want to take up and disabuse your minds of, because I must say that I made an error on it yesterday, and I am going to try to impress upon you what I say now, so that by no chance will it injure the defendant. I permitted yesterday proof of a prior conviction of this defendant under the Pure Food Law. That was a mistake on my part. There are some cases where conviction involves moral turpitude on the part of the witness, which we allow in to impeach his general credibility. That is rather a ponderous way of saying that we allow proof that he had been convicted of immoral acts, so the jury may consider whether he is worthy of belief. But this conviction was a prior con-

viction under the Pure Food Law, and was not such a conviction as that. The reason is, a very good common-sense one, because it does not necessarily involve any immoral act on the part of the defendant. A man may be convicted under this act for carelessness in branding, which does not involve his knowledge that he was misleading anyone. And so it would be very unfair to the defendant if you should consider that conviction against him. You have no right to consider it in weighing his testimony, and you under no circumstances would have any right to reason in this way: "Because he has been convicted once of violating this act, therefore it is likely he would do the same thing again." In the first place, it has no logical bearing on the facts of the case. You know all the facts here. All you have to do now is, independently and of your own will, to make up your minds about the meaning of that language. So I lay that question out of the case.

There are some questions which I have been asked to charge you, and I will go over them now, gentlemen, and perhaps I will think I have not covered some of them.

I will charge you that in order to find the defendant guilty, you must find that this product contained gum chadya, and that the gum chadya was similar to the gum arabic—I have already told you that—I mean, find it similar in the sense in which that word is used on the label. You must find the label to be misleading. I think I have covered that word. And, that it was calculated to mislead and deceive the purchaser. It is true that some evidence was introduced to the effect that he never had misled a purchaser, but that insofar as purchasers never may have found out that gum chadya was here, such evidence was not very important.

Mr. Carlin suggests to me that I tell you that the test is not between this gum and gum arabic as put into the mouth but as it is put into the stomach in ice cream, or the other article mentioned on the label. I think that is true. No one expects this gum to be eaten as gum—it is mixed up here with flour, and then the whole substance is added to milk and made into ice cream.

UNITED STATES v. 36 BOTTLES OF LONDON DRY GIN
(Two cases)

(District Court, E.D. Pennsylvania, May 15, 1913)

205 Fed. 111; N.J. No. 2820

Libel under section 10 of the Food and Drugs Acts. Jury trial. Verdict for claimant. Motions for new trial denied.[66]

The United States Attorney filed a libel for the seizure and condemnation of three cases each containing 12 quart bottles of gin, alleging that the product had been transported from the State of New York into the State of Pennsylvania and remained unsold in the original unbroken packages. The product was labeled: "Sir Robert Burnett & Co. Celebrated Trade Mark London Dry Gin Distilled

[66] Reversed, *Unted States* v. *36 Bottles of London Dry Gn*, p. 570, *post*.

in New York, as at Vauxhall Distillery, London, in glass stoppered bottles which will entirely prevent any possibility of discoloration or loss from evaporation. By this arrangement corkscrews are entirely superseded. Direction.—The stopper is taken out by pressing the thumb first on one side and then on the other." (Blown in bottle) "Sir Robt. Burnett & Co. London Dry Gin."

Misbranding was alleged for the reason that it was labeled and branded so as to purport to be a foreign product when not so, in that each of the bottles bore a label in substance and character as set forth above by virtue of which said label and brand the article purported to be a foreign product, to wit, a product of London, in the Kingdom of Great Britain, whereas, in truth and in fact, the said article of food was not a product of London, in the Kingdom of Great Britain, but had been produced in the city of New York, in the State of New York, in the United States of America.

Claimant filed its demurrer and exceptions to the libel, which were overruled, without prejudice, as will more fully appear in the following opinion by the court:

McPherson, *Circuit Judge*. With nothing whatever before me except the libel and the claimant's objections (whether they are named exceptions or demurrers is of slight importance), I do not think I should decide now that this libel is either sufficient or insufficient. The district court in Michigan (*United States* v. *Schurman*, 177 Fed., 581) evidently had affidavits before it showing certain facts which influenced the decision; the ruling does not rest upon the mere language of the libel.

The objections are overruled, but without prejudice, etc.

Claimant's answer to the libel was filed, and an amended libel was filed in which it was charged that the product was further misbranded in that it was labeled and branded so as to deceive and mislead the purchaser thereof and to purport to be a foreign product when not so, in that the principal label thereon, as hereinabove set forth, was in resemblance and similitude as to arrangement and design to a label and brand which had heretofore been widely used and was well known to the trade in connection with and as theretofore borne upon a genuine imported gin, the product of, and represented to be the product of London, England, which resemblance and similitude as aforesaid was calculated to deceive and mislead the purchaser of the said article into believing that said article was the product of London, England, and by virtue of which said resemblance and similitude the said article purported to be a foreign product, to wit, a product of London, England, whereas it was not a product of London, England, but was a product of the United States of America.

J. B. McPherson, *Circuit Judge* (charge to the jury). My instructions to you will be very brief, because I think you will probably have seen for yourselves, from the discussion to which you have listened, that this is a comparatively narrow question. Indeed, I may leave out the adverb and say that it is a narrow question. The Government's case depends entirely, I may say—certainly it depends essentially—upon the sense in which the word "London" is used

upon this label. The label that is complained of speaks of "London Dry Gin." It also adds—I forget the precise phrase—"Distilled in New York," I think, "as in Vauxhall, London." But the Government's complaint is essentially based upon the use of the word "London" in the phrase "London Dry Gin"; for evidently if there was no such word upon the label, the Government would have no case. If the label simply said "Dry Gin," there would, of course, be no case here.

Now this proceeding has been brought under the Pure Food Law, to which reference has been made, and it is not the ordinary civil suit, neither is it the ordinary criminal suit. It occupies a place between those two proceedings. It is a suit to enforce a penalty, and it was begun on the part of the United States by seizing the property that is, in effect, before you now. Two seizures were made, but the cases are being tried together. Each of them concerns three dozen bottles of this gin. The attempt is made by the Government to forfeit that property, that is, to take it away from the claimants, this company which is defending the suit, and to destroy it, or to take some other means of disposing of it; at all events, to forfeit and take it away from the claimants. Now that is a remedy which is severe. It is an unusual remedy to be invoked. The ordinary suit is a proceeding with which you are entirely familiar, where two citizens meet each other in court to dispose of a difficulty between them and which is settled according to the ordinary methods of procedure. There the plaintiff is only obliged to make out his case by the fair weight of the evidence, and, if he offers evidence which is better than his opponent's, even if it is only slightly better than his opponent's, he is entitled to his verdict. That is what we mean, as you know, by the fair weight of the evidence, or preponderance of the evidence. That is the rule in a civil suit. Now if a man is charged with a crime, a much more severe burden is imposed upon the Government in that case; for the Government is always the complainant in a criminal suit. The Government is there obliged to make out its case by evidence that is much stronger; that is, evidence beyond a reasonable doubt. I need not dwell upon that. You have often, no doubt, in your experience in courts, been instructed with regard to that matter. Now the case we are trying comes between these two kinds of cases. It is much more severe than the first remedy and it is not as severe as the second, because there is nobody here charged with a crime and no punishment can be inflicted upon any person in consequence of the verdict. But the result of the verdict, if in favor of the United States, would be to take this property away from the owner and, therefore, the remedy is a severe remedy, and, as I think, the rule with regard to the burden upon the Government is also heavier than if it were an ordinary suit between individuals. I think the Government is bound to offer evidence that is—what language shall I use? Clear and satisfactory has sometimes been said; clear and convincing is another way in which it has been put. I am aware that I am not giving you very definite ideas upon the subject, but the nature of the subject is such that I cannot give you definite and positive ideas. I must use general terms to describe it, and I do not know that I can do better than to say that the Government must offer better evidence than just the mere weight, if you were weighing, if you were deciding

between parties. It must be stronger and better evidence than that and I have already said, and I say it again, that it must be clear and satisfactory, or clear and convincing, and with that I shall leave it. If the evidence is not, in your judgment, of that character, then the Government has failed to offer the kind of evidence which the law lays upon it, requires it to offer, and your verdict would have to be in favor of the defendant.

Now, that brings me to what I desire to say with respect to the charge itself. The Government puts the charge in two different ways. The evidence is substantially the same as to each, but they rest upon different provisions in the statute and they do differ, in my judgment, in a certain degree. One of the charges which the Government lays before you in each of these cases is based upon the provision of section 8, which refers to "any food product which is falsely branded as to the State, Territory or country in which it is manufactured or produced", and the Government has, in part of its written charge, declared that this article was falsely branded with regard to the country where it was produced. Now that charge may be made out by evidence which shows that the label does not tell the truth with regard to the country where the article was produced. It makes no difference whether that failure to tell the truth was the result of design or was merely unintentional or accidental. The act of Congress has chosen to punish the failure to tell the truth on that subject and, therefore, if this label does not tell the truth with regard to the country in which this gin was produced, then the Government has made out its case under this particular portion of the statute.

Now, as I have said, the case of the United States rests essentially upon the use of this word "London" in connection with the words "Dry Gin." What, then, does "London Dry Gin" mean? This is a question of fact which I intend to submit to you. Does it mean a particular kind of gin, entirely irrespective of the place where the gin was manufactured, or does it mean gin that was made in London? You have heard in argument various suggestions upon one side or the other about that; for example, Saratoga potatoes. Nobody supposes that that means potatoes made in Saratoga. French fried potatoes, if I may continue the use of that vegetable—nobody supposes they are fried in France; and so one might go on. On the other hand, there are words that have a geographical meaning and have no other. I will not give any examples of them, for fear I might not get one that was exactly right, but, as you know perfectly well, there are such words, pure geographical words, that have that meaning and have no other. Now the Government says that this word "London" in this phrase "London Dry Gin", means, geographically, that the gin was produced in London and was not produced anywhere else. On the other hand, the case of the defendant is that this word has come to have, in the course of usage, a meaning which is not geographical but refers to the qualities and the kind of article which has been produced here before you. Now what is the fact? I submit it to you for your determination. If this word in this phrase "London Dry Gin" has come to have a meaning in reference to the kind of article and does not refer to the place where it was made, then the Government's case entirely disappears and your verdict would have to be in favor of the defendant. I shall not go over the evidence.

It would be superfluous, as it has been discussed and you only heard it yesterday. As you will recall, there is evidence on both sides of that question, and you must take the evidence and decide for yourselves what the fact is as to that subject.

Now, that is the first charge that is presented here by the Government. The second differs essentially in this respect: The Government charges that this label was framed for the purpose of deceiving and misleading the purchaser. Now you see that introduces an element we have not in the first charge, namely, the intention of the person that made the gin, the distiller of the gin. What is the fact in that regard? The evidence that has been offered here upon one side or the other—I mean with reference to the other branch of the case—has some bearing upon this branch also and, in addition to that, there is evidence that has a bearing only upon this branch of the case, namely, the evidence offered by the defendant with regard to what took place before the Secretary of Agriculture and before one of the agents of that department in New York. That, in my judgment, bears upon the question of intention and I submit it to the jury, for their determination, to be weighed by them in that regard. Taking all the evidence, then, upon the subject—and I think all the evidence in the case bears upon the second branch of it, namely, the intention to deceive; the character of the label itself, the type in which it is printed, the communications and proceedings before and with the Department of Agriculture, and all the other evidence in the case upon the subject—decide whether or not the second branch of the Government's charge has been made out, namely, that this label was adopted and has been used for the purpose of deceiving and misleading the purchaser.

Now that is the case before you which is to be made out by the Government on one or both of those charges, by the quality of evidence to which I have referred; and, in order that we may know with definiteness just what your conclusions may be, I shall ask the jury to answer these questions as part of their verdict, no matter whether they find in favor of the United States or find in favor of the defendant. The questions are so framed that you can answer them either yes or no. There are only three of them, and they are brief.

The first question is: Is there a distinct kind of gin known as London Dry Gin? The answer to that will be yes or no.

The second question is: If there is, must this kind of gin be made in London and nowhere else? Of course, you can answer that also yes or no.

The third question refers more particularly to the second charge of the Government. It is this: In using the label in suit, did the maker of the gin intend to deceive or mislead the purchaser by representing the gin to be a foreign product when, in truth, it was not a foreign product? That you can answer yes or no. I am not going to ask you to remember these questions. I will give them to the foreman.

Mr. Johnson has just called my attention to what he supposed to be an omission, namely, that I had not referred to the fact that the label contained the words "Distilled in New York as in Vauxhall, London." But, as you remember, I did so allude to it, but I mention

it again in case there is to be any doubt on the subject. Besides, you will have the label before you, so that you can inspect it for yourselves.

I answered the defendant's first point in the charge and the second point I refuse.

Mr. BRINTON. May I record an exception? It is rather a statement to the court than an exception. The Government most respectfully excepts to that portion of the charge which advises the jury that the Government's case relies almost entirely, or practically entirely, upon the use of the word "London", for the reason that the Government relies equally upon the charge that the label used by the defendants is in similitude and resemblance to the imported label, and, in this connection, the Government respectfully urges that the court has adopted a view of the second charge of the libel which is not the meaning which was intended to be given to it, or which it holds, or should hold. The second charge of the libel charges that

> the principal label thereon as hereinabove set forth was then and there in resemblance and similitude as to arrangement and design to a label and brand which had heretofore been widely used and was well known to the trade in connection with and as theretofore borne upon a genuine imported gin, then and there the product of, and represented to be the product of, London, England, which resemblance and similitude as aforesaid was then and there calculated to deceive and mislead the purchaser of the said article into believing that the said article was the product of London, England, and by virtue of which said resemblance and similtude the said article did then and there purport to be a foreign product.

and the Government submits that that charge does not raise an issue of intention, but the issue as to whether this similitude between this label and the foreign label is, in itself, calculated to lead persons to believe that the article is a foreign product and, therefore, that it purports to be such. It certainly was not the intention to charge intention, as the Government conceded that is not the issue in this case.

The COURT. In response to what the Government has said, if I did not allude to the foreign label, it was because I did not hear it much alluded to in the course of the trial or in the argument; but I am glad to have my attention called to it, and I say to you distinctly that, as the foreign label, that is the label on the foreign product, has been introduced in evidence here, it is before you for purposes of comparison with the domestic label and in order that you may give such weight to it as you think it ought to have in connection with the other instructions that I have given you. I decline to say to you that the intention of the defendant is of no consequence in this matter. If I understand what the implied meaning of the words "deceive" and "mislead" is, it necessarily means that there is an intention to lead somebody astray. I can not understand that you could talk of someone deceiving another unless he was intending to do it. Besides, the first part of this section, section 8, under which the first charge of the Government is drawn, I have explained to you, and that would cover a case where the mere facts were of the kind I have alluded to and where there was no question of intention in it at all. I can not see the point of having these two charges brought by the Government unless they were intended to be dif-

ferent, and, upon the construction just suggested to me, they are the same.

Mr. BRINTON. The Government respectfully excepts to the submission by the court to the jury of the question substantially to the effect as to whether there is a distinct kind of gin known as "London dry gin", submitting that the question, if such a question is to be submitted, should be to the effect as to whether there is a distinct kind or type of gin known generally throughout the trade of the United States as "London dry gin."

The COURT. With regard to that suggestion, which is now made for the first time, I say that I think there is a good deal of force in that, as this gin in question was offered to the American public, and I accept the suggestion of the United States in that respect and you may so consider it.

The point for charge presented by the defendant, which was refused by the court without reading, is as follows:

2. Under all the evidence, your verdict must be for the defendants.

The jury found for the claimant.

A motion for a new trial was filed on behalf of the United States and was refused, as will more fully appear upon the following opinion by the court:

J. B. MCPHERSON, *Circuit Judge.* It can hardly be doubted, I think, that the Government's treatment of the claimant in this dispute leaves something to be desired. In consequence of a difference of opinion between the Department of Agriculture and the claimant and concerning the label now in question, the subject was discussed and considered, and in the end the Department announced distinctly that the objection of misbranding would not be taken. The claimant thereupon proceeded to use the label for nine months, when the Department changed its mind without previous warning, and, without giving the claimant an opportunity to conform to its new attitude, made two separate seizures, taking the position now that the bottles *were* misbranded. Under the circumstances, this seems rather drastic action and can hardly be commended; at all events, it leaves the Government without apparent equity in its favor.

Neither, I think, is any legal support left, in view of the special findings that accompanied the general verdict. The indispensable basis of the attack upon the label is the averment that "London Dry Gin" is a descriptive phrase, which points to the place of origin, and not the kind of liquor. If, however, "London Dry Gin" describes a well-known liquor, having certain characteristics that identify it wherever it may be made, the Government's case is wholly without foundation, no matter under which clause of section 8 of the Food and Drugs Act (act June 30, 1906, ch. 3915, 34 Stat. 771) the seizure may be defended. And this is precisely the point upon which the evidence conflicted, and is precisely the point determined by the jury in two special findings that make part of the verdict. Two of the questions put by the court and the answers thereto are as follows:

1. Is there a distinct kind of gin known as London dry gin?—Answer. Yes.
2. If there is, must this kind of gin be made in London and nowhere else?—Answer. No.

These findings, I think, conclusively repel the charge of using a label forbidden by the act; and (if the claimant had a right to use the label) it is immaterial to consider the questions raised by the Government upon the subject covered by the third question and answer:

3. In using the label in suit, did the maker of the gin intend to deceive or mislead the purchaser by representing the gin to be a foreign product?—Answer. No.

Of course the verdict does not and cannot lay down a general rule even in reference to this particular phrase. The jury necessarily acted upon a certain amount and quality of evidence, and as this might not be present in another dispute with another claimant the verdict can do no more than settle the one controversy that was in issue.

Although the instructions to the jury concerning the quality of evidence required to make out the Government's case are not complained of, I may say briefly that a difference of opinion on this subject no doubt exists. A decision by the Court of Appeals in the Fourth Circuit—*Grain Distilling Co.* v. *United States*, 24 Treasury Decisions (Mar. 13, 1913), p. 74, No. 1837—having been called to my attention, I may cite a recent opinion in the contrary sense by the Court of Appeals in the Second Circuit—*United States* v. *Regan*, 203 Fed. 433.

The motion for a new trial in each case is refused.

UNITED STATES v. McCONNON & CO.

(District Court, D. Minnesota, May 22, 1913)

N.J. No. 2853

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilt.

This was an information against McConnon & Company, alleging shipment from the State of Minnesota into the State of Tennessee, of a quantity of so-called McConnon's Extract of Vanillin and Coumarin which was adulterated and misbranded. The article was labeled: "McConnon's Extract of Vanillin and Coumarin. Alcohol 24%. Net contents from 4½ to 4¾ oz. Burnt Sugar Color * * *."

Adulteration of the product was alleged in the information for the reason that it purported to be, and was represented by the labels to be, an extract of vanillin and coumarin, whereas in truth and in fact, it was a compound of vanillin and coumarin, mixed and colored with burnt sugar in a manner whereby the inferiority of said product was concealed. Misbranding of the product was alleged for the reason that the labels and brands thereof contained and bore a statement regarding said article which was false and misleading in that by said labels and brands the article purported to be, and was represented to be, an "Extract of Vanillin and Coumarin. Burnt Sugar Color", whereas, in truth and in fact, said article was not an extract of vanillin and coumarin, but was a compound of vanillin and coumarin, artificially colored with burnt sugar in imitation of vanilla

extract. Misbranding was alleged for the further reason that the product labeled and branded as aforesaid purported to be, and was represented to be, an extract of vanillin and coumarin, whereas in truth and in fact, it was a compound of said substances with burnt sugar color and prepared in imitation of vanilla extract and was offered for sale without being labeled as an imitation of vanilla extract. Misbranding was alleged for the further reason that the product purported to be, and was represented to be, an extract of vanillin and coumarin, whereas in truth and in fact, it was a compound of vanillin and coumarin and was not labeled and branded so as to plainly indicate that it was a compound, with the world "compound" plainly stated upon the packages in which it was offered for sale.

MORRIS, *District Judge* (charge to the jury). The defendant company in this case stands here charged with the violation of what is known as the Pure Food and Drugs Act, passed by Congress on the 30th day of June 1906. It is charged with violating this act in two respects. First, with violating the section against misbranding of articles of food; and second, with violating the section of the act against adulteration of food. The charge rests upon the label placed upon the bottles of the preparation here in question. The first count in the indictment charges a misbranding, and the section of the law, as far as it is necessary to be considered here, is as follows:

> That the term misbranding as used herein shall apply to all * * * articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, * * *
>
> That for the purposes of this act an article shall also be deemed to be misbranded: * * *.
>
> In the case of food:
>
> First. If it be an imitation of * * * another article.
>
> Second. If it be labeled or branded so as to deceive or mislead the purchaser * * *.

The third subdivision I need not read. And,

> Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular.

The defendant stands here charged with having violated that section of the act, in that, in this label he has caused people to buy what is in reality an imitation of another article, to wit, vanilla extract or extract of vanilla. In this first count it is also charged that by this label this preparation was so labeled as to mislead purchasers, and third, it is charged that the label and brand contain statements regarding the ingredients contained therein, which statements are false or misleading. Those are the three particulars in which this act is alleged in this information to have been violated in the misbranding. In this information it is also charged that this preparation was adulterated, and thereby violated this provision of the act, "That for the purposes of this act an article shall be deemed to be adulterated if it be colored in a manner whereby inferiority is concealed."

Then first, as to the misbranding that is charged. You know what the label is, the bottle is there and the label is on it. It is charged

that that label is such that it causes people to believe that it is something that it is not. In other words, that the label makes this preparation an imitation of another article; that is, an imitation of vanilla extract. Also, that the package is so labeled as to deceive or mislead the purchaser; and third, that the label contains a statement in regard to the ingredients or substances contained therein which is false or misleading.

The object of this act, as has been stated by counsel on both sides, is twofold. First, to prevent people who have articles to sell from placing in them ingredients that are injurious or deleterious to the health of people, and causing them to buy without knowing that fact. Now, as far as this information is concerned, that may be left out of the question, because there is no charge and no proof of that; indeed, it is admitted here in court that there is nothing in this preparation which is injurious to the health of anybody. So that we pass to the second object of this act, and that is the one which it is charged here this defendant has violated. The second object of the statute is to prevent people from so labeling an article that a man buying it will think that he is buying one thing, when in reality he is buying another. In this case the charge is that this label is so made that people purchasing this preparation would think, and would have good reason to think, and the label would lead them to believe, that they were buying vanilla extract, when in truth and in fact they were buying something else, to wit, a preparation, whether we call it an extract or a compound or a mixture, made of vanillin and coumarin and burnt sugar. So that it seems to me the whole of this case simmers down to one proposition, and that is this: Is that label so worded and so printed, taking it as it looks and as it is, the type on it and everything about it, and in connection with the color of the preparation—is that label such that a purchaser of this article would think, and have reason to think and believe, when he reads the label, that he was buying vanilla extract, when he was in fact buying another thing? The whole question simmers itself down to that.

As to the misbranding; is that article so branded, first, that it is an imitation of vanilla extract; that people buying it and looking at the brand, and looking at the article, would think that it was vanilla extract? That is the first charge. Second, Is this so branded as to deceive and mislead anyone buying it into the belief that he was buying vanilla extract, when in fact he was buying another mixture? And, third, does it contain a statement which is false or misleading?

You cannot say that the label is false, unless the word "extract" makes it false; that I shall come to hereafter. As to its ingredients, you cannot say that the label is false, because the label says that it does contain vanillin, that it does contain coumarin, that it does contain burnt sugar, and that it does contain alcohol. These things it says it contains. But is it misleading? Is it misleading in that it has the words extract of vanillin and coumarin colored with burnt sugar and with so much alcohol in it? Is it misleading by reason that the word extract is used instead of some other word, as, for instance, compound or flavoring, or some word other than extract? Does that make it misleading? Would that make a man going into a store and buying it, or buying it from a traveling vendor, looking

at that label, think that he was buying extract of vanilla which is extracted from the vanilla bean—not something made from a composition or extract of vanillin and coumarin, but an extract of the vanilla bean? Would the words used on that label, in the connection in which they are used, considering the color of the preparation that is in the bottle, would that make a man buying it believe that he was buying vanilla extract? That is the whole question.

Now, I come to the word extract. This label must be taken as meaning what would be ordinarily understood by the public in reading it. The ordinary and customary meaning given to the word is what should govern you in determining this question, and not the technical meaning of it. What impression, in other words, does that label produce upon the mind, your mind and my mind, when we go to buy that preparation? What impression, what meaning? That you must determine from all the testimony which has been offered here with reference to that question.

Extract of vanillin and coumarin, what meaning does that convey to our minds, the ordinary mind? What meaning does it convey to people who go and buy a bottle of flavoring for food? If that label, framed as it is, worded as it is, would cause an ordinary man to believe that he was buying vanilla extract, then this defendant is guilty. If it would not, then the defendant is not guilty, that is, on the first count of this information. That is the whole question. Take that label now as it stands, as it is, look at it with the wording on it and the coloring of the mixture in the bottle, would that cause the ordinary purchaser who wanted a flavoring extract to think and believe, and have good reason to believe, that he was buying vanilla extract, and not a compound of vanillin and coumarin with burnt sugar in it? If it would so mislead that purchaser, then that bottle is mislabeled and misbranded under this act, and this defendant is guilty. If it would not, then this defendant is not guilty, upon that proposition.

Now as to the adulteration part of it. "An article shall be deemed to be adulterated according to this act, if it be colored in a manner whereby inferiority is concealed." And this brings us right back to the same question. Does the coloring cause a man to believe when he wants vanilla extract that he is getting that or something that is not inferior to vanilla extract? Do I make myself understood? Does the coloring in that bottle with that burnt sugar so operate that it would cause a man buying it, when he wanted vanilla extract, to think that it was the superior article and to get something which without that coloring he would have thought was an inferior article? That is the question on this second count. If that coloring matter does do that, then this defendant is guilty on the second count; if it does not, then it is not guilty.

So after all, it comes down to a single question as to whether or not the purchaser of that article has been deceived into buying a preparation of vanillin and coumarin when he thought he was buying extract of vanilla. That is about all there is of this case. A man has a right to use coloring matter in any article, provided that the coloring matter is not employed to imitate any natural product or another product of recognized name and quality. If this defendant employed that coloring matter for imitating the vanilla extract, and

making people believe that they were getting vanilla extract, then it was employing it to imitate the natural product or some other product of recognized name and quality. That is where this coloring matter comes in. It comes in as bearing upon the intention of this defendant, as bearing upon the natural result of that labeling in connection with the coloring matter.

Now, as to whether this defendant put that label on the bottle with the intention of causing this deception. If the putting of the label on the bottle must naturally and probably have produced that result, a man is held to intend to produce the natural and probable results of his action. Of course, if you believe from the evidence that this defendant colored that mixture and put that label on it with the actual intention of deceiving people who might buy it, then he violated this law. If the natural and probable result of putting that coloring matter in there and that label on the bottle would be to mislead the public, and to cause a man to think that he was buying vanilla extract when he was buying something else, then the defendant would be held to intend the natural and probable result of what he did even though you may not believe that such was his actual intention. That is all there is of this case.

This defendant stands here charged with an offense, which, while it is a misdemeanor, gives him the right to the same degree of proof that he would have a right to in any criminal action. The facts which are necessary to be proved in order to convict him must be shown beyond a reasonable doubt, and the evidence must satisfy you beyond a reasonable doubt either that the defendant intended to accomplish the deceit, or that the natural and probable result or tendency of the label was to accomplish such deceit. The evidence must show and satisfy you of either of these matters beyond a reasonable doubt. I cannot give you any definition that would clear up what we mean by a reasonable doubt. The law writers and the judges have been trying to do that for a long time, and after all they get back to the words reasonable doubt. Those words mean exactly what they say; a reasonable doubt, not an imaginary or fanciful doubt, but a doubt such as you would act upon in the most important affairs of your own life. A doubt coming out of the evidence; a doubt arising from the evidence; not one that can be conjured up by the mind, not an imaginary, not a fanciful one, but a reasonable one. That is what it means. That doubt must be based upon the testimony. The Government must establish the fact of the defendant's guilt beyond a reasonable doubt. If this testimony does not so satisfy your minds, then this defendant is entitled to an acquittal. But, if it does so satisfy your minds, then there should be a conviction, and the defendant should be found guilty as charged either in the first or in the second count, or as in the entire information.

I have been talking to you about 15 or 20 minutes, and have got back to the original proposition. All there is in this case is, did the defendant intend to accomplish a deceit, or was the natural tendency of this label to accomplish a deceit? Was that label such, taken in connection with the coloring of the product, taken in connection with what you believe to be the customary meaning of the word extract—was that label such that it would naturally and probably cause a purchaser of that preparation to believe that he was buying vanilla

extract when he was buying this preparation which is not vanilla extract? That is the whole thing.

The only way I can aid you in deciding that question, is put yourself in the place of a purchaser who wanted to buy a flavoring extract, an extract that would give the peculiar fragrancy and delicious aroma that a product of the vanilla bean gives, that we all know vanilla gives. Put yourself in the place of a man buying and being presented with that bottle with that label on it, with that coloring in it, and ask yourself the question, "Would I be deceived when I read that label into believing that I was buying vanilla extract?" If you believe that you would be or that an ordinary purchaser would be so deceived, then this defendant is guilty; but unless you are satisfied of that fact beyond a reasonable doubt, then this defendant is not guilty, and should be so found by any man who comes to that conclusion.

That is all, so far as I can see, that there is in this case. I have been presented with a number of instructions, but I think that I have got the law boiled down, and I think I have got this case so that the jury understands it. Put yourselves in the place of a man buying a bottle of flavoring fluid—that is, what this is intended for—to flavor food. Ask yourself, if a man comes to sell me that preparation—I look at it and read the label, I examine the color; would I be deceived into believing that I was buying vanilla extract instead of something else? That is the whole question.

Now, gentlemen of the jury, you have heard all the testimony and you will decide the case upon the testimony that has been offered here in court. There has been a whole lot of it; some of it I have not quite understood, I do not know whether you have or not, most of it I have. But, gentlemen, all these witnesses have been very frank, especially these scientific gentlemen; they have acted like men who are standing upon scientific principles. They have been frank and open, they have been clear, and if any part of their testimony I have not understood, it is not due to them, it is due to my own stupidity, or to my own lack of scientific training perhaps. But from all of this testimony you have got to decide this question. Was this defendant branding an article so that it would make people think, who were buying one thing, that they were buying another? Did the coloring matter in this fluid so change its character from what it would otherwise have been as to make people believe that they were buying vanilla extract when they were buying something else? That is the whole question for you to decide.

UNITED STATES v. EXCELSIOR BAKING CO.

(District Court, E.D. Pennsylvania, June 12, 1913)

N.J. No. 2895

Indictment charging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty. Motions for a new trial and in arrest of judgment denied.

THOMPSON, *District Judge* (charge to jury). The defendant corporation in this case is charged with the violation of what is known

as the "Pure Food and Drugs Act." The object of that act, as you all are aware, is to protect the consumers from having food or drugs sold to them and delivered to them which are adulterated or misbranded. Under this act it is not necessary to prove the knowledge of a defendant that the article shipped in interstate commerce was adulterated or misbranded. The responsibility is put upon dealers who ship. That is for the protection of the customer. The responsibility is put upon them of shipping only articles that are not adulterated or misbranded.

The charge in this case is that the defendant corporation shipped in interstate commerce from Philadelphia, in the State of Pennsylvania, to Newark, in the State of New Jersey, the egg product that has been testified to in this case, and that the egg product in question was adulterated. Under the interstate commerce act, which is known as the "Pure Food and Drugs Act", adulteration is defined in this way, an article is, under the act, held to be adulterated if it consists in whole or in part of a filthy, decomposed, or putrid animal substance. The charge in this case was that the egg product which has been testified to was filthy, putrid, and decomposed. The defendant here is charged, through its president, with having delivered for shipment by the Pennsylvania company this food product which is alleged to be adulterated.

It seems to me that the first question for you to consider would be whether the product was in fact shipped by the president of the defendant within the scope of his authority as the president of the company and within the scope of his employment. Upon the witness stand he testified that he did not make out the shipping order through which this merchandise was shipped, and that he knew nothing about it. You will have to take into consideration the fact that he is an interested party in this case, being the president, and one of the owners of the defendant company, and the Government is, therefore, allowed to contradict his testimony by introducing expert testimony to show that the shipping order upon which this product was shipped, or alleged to be shipped, was in the same handwriting, written by the same person as the other shipping orders which it is admitted he did fill out and sign. So that the first question for you to consider will be the question as to whether that shipping order signed "Frank Riley" was written by the same person who wrote the other shipping orders. You have the testimony of the expert, and you have heard from him the basis on which he expresses an opinion that, without any doubt in his mind, the same person wrote the shipping order in dispute who wrote the shipping orders which are admitted to be the act of the president of the defendant company. The inspection of these documents is also for you. You have a right, with your own knowledge of handwriting, to compare the two. They will be before you for comparison, and if you find from the evidence of the expert and from your comparison of the handwriting that the handwriting is the same in both instances, the handwriting of the president of the defendant company, then you have taken one step in the consideration of the case. If, however, upon a comparison of the handwriting and a consideration of the testimony of the expert you are not satisfied that it was written by the same person, then you would be justified in going no further in the case at all, because that is the link which connects the defendant company with the transac-

tion. So if you are not satisfied that it is his handwriting, written by the same person, you would then return a verdict of "Not guilty." But if, after having examined the writings, you are satisfied beyond a reasonable doubt that the documents were written by the same person, then you will take up the other questions in the case.

Now, it is for you to determine from the testimony, as you have heard it, whether the article which was inspected by the laboratory at Washington, and which has been testified to be adulterated within the meaning of the act, was the food that was shipped from the defendant to the concern in Newark, N.J. You will take into consideration the documentary evidence in the case and the testimony of the witnesses, and if you find from the documentary evidence and from the testimony that this frozen egg product is sufficiently traced from the defendant to the department at Washington, and you find it was adulterated, and you find it was shipped in interstate commerce by the defendant, and it was adulterated within the meaning of the act, then you would be justified in returning a verdict of guilty. You will bear in mind in this case, as in all criminal cases, the defendant is entitled to the presumption of innocence, and it is upon the Government to establish the defendant's guilt beyond a reasonable doubt. When I say "reasonable doubt", I mean a doubt which would arise in the mind of a reasonable man from the evidence, and you are not to be influenced by anything outside of the evidence to determine whether or not a doubt exists; that is to say, no prejudice or whim or anything of that sort should influence you, but you should be governed entirely by the evidence in the case.

I do not know as there is anything further for me to say to you. The documents in evidence will be submitted to you. You can take them out, and you will return a verdict as you think the evidence warrants it.

Mr. BRINTON. Some point was made in the argument about the date of shipment.

The COURT. The fact that there was a discrepancy between the date of the shipping order and that laid in the indictment is entirely immaterial.

I will say to you, gentlemen, there has been some point raised here as to the guaranty under the act. There has been no evidence here to establish any guaranty by the dealer from whom it is alleged this article came to relieve the defendant in this case. The act provides just what sort of a guaranty shall be given, and it is not necessary for me to go into the details of it, but no guaranty has been proved in the case, such as comes within the act.

UNITED STATES v. FIVE CASES OF CHAMPAGNE

(Distict Court, N.D., New York, June 23, 1913)

205 Fed. 817; N.J. No. 3109

Libel under section 10 of the Food and Drugs Act. Trial before the court. Decree in favor of the United States.

RAY, *District Judge*. About March 15, 1913, James L. Green, a wholesale liquor dealer of Watertown, N.Y., ordered from Henry H.

Shufeldt and Co., of Peoria, Ill., five cases of champagne, and said Shufeldt & Co. shipped and billed to him five cases of so-called champagne to fill the order and same was shipped and transported and received in interstate commerce. Each case contained 24 bottles, and each bottle holds about 1 pint of a liquid mixture which, on due examination and test, is found to consist of a very cheap, ordinary, low-grade carbonated white wine. It is not champagne in any sense of that word, but a low-grade, cheap white wine charged with gas. It is bottled and labeled in the following manner. The bottle itself is of the same shape and made in imitation of the ordinary champagne bottle. This bottle is corked and dressed about the neck the same as and in very close imitation in every way of the ordinary genuine champagne bottle, or bottle containing champagne; for instance, Mumm's Extra Dry. It has the same style of label and seal, both attached in the same manner. On the label is the name "Special Gold Cabinet, Superior Quality." There is also a coat of arms, and on one side initials "H. H. S. & Co.", and on the other "3015."

In short, the bottles containing the cheap carbonated wine are such a close imitation in form, or shape, dress, corking, and label, that the ordinary observer would and does easily mistake, accept, and use the imitation as a genuine bottle of imported champagne. This would and does happen with a large number of purchasers and users, and it may be said with the ordinary user unless he gives the labels an inspection to determine whether it is the genuine champagne bottle. Evidently it is gotten up and dressed and labeled in this way to deceive the ordinary purchaser and user of champagne. The wooden boxes and markings and labels thereon in which shipped also closely imitate the boxes in which genuine champagne is shipped. This is such an imitation as would make a case of unfair competition in trade. The Food and Drugs Act of June 30, 1906, provides amongst other things:

> The term "food," as used herein, shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound. (Section 6.)

Section 2 prohibits the introduction into any state from another state of any article of food which is authorized or misbranded within the meaning of this act.

Section 8 provides:

> That for the purposes of this act an article shall also be deemed to be misbranded: * * * In the case of food: First. If it be *an imitation* of or offered for sale under the distinctive name of another article. Second. If it *be labeled* or branded *so as to deceive or mislead the purchaser*, or * * *. *Provided*, That an article of food (drink) which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases: First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under *their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article*, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced. * * * Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word "Compound," "imitation," or "blend," as the case may be, is plainly stated on the package in which it is offered for sale.

In this case there is nothing to indicate to the purchaser that these bottles contain an imitation or that an imitation is intended.

Section 10 provides for the seizure and condemnation of adulterated or unbranded [misbranded] articles while being transported in interstate commerce, or after transportation and while unsold or in original unbroken packages, which is this case.

This wine in question was and is an imitation of genuine imported champagne, and was and is so labeled and branded as to deceive and mislead both the purchaser and users into the belief that it is genuine champagne. Is it within the proviso or exception quoted? It contains no added poisonous or deleterious ingredient or ingredients. It was not and is not offered for sale under the distinctive name "champagne", as that word is not on either bottle, label, or package, if the statute means, by "offered for sale under the distinctive name of another article", that it must be so advertised, or bear on the package containing it the distinctive name of some other article. Even if it has a distinctive name "Special Gold Cabinet", still it is "an imitation of" and was actually "offered for sale" under the name "champagne", which is the distinctive name of another article; that is, "champagne" was ordered, and the seller sent this article as and for champagne, thus not only offering it for sale as champagne, but selling it as champagne. By his acts he represented it to be champagne. Hence this carbonated wine contained in these bottles and packages is not within the proviso or exception, and must be held to be *misbranded* and subject to seizure and condemnation. It is not sufficient to remove an imitation and misbranded article from the condemnation of this law that it has a distinctive name applied to it, as the very language of the proviso requires that, if known under its own distinctive name (if it has one), it (the article) *must not be either an imitation of another article* or offered for sale under the distinctive name of *another article*. Here this carbonated wine contained in these bottles and cases was in fact offered for sale and sold under the distinctive name of champagne, another article, and, what is conclusive, was and is, in fact, an imitation of imported champagne. Again, can a *distinctive* name be given to an *imitation* article unless it be to distinguish one imitation from another? Clearly this cannot be done so as to bring a wine made and bottled and dressed in imitation of champagne, and sold and offered for sale as champagne, and delivered to fulfill orders for champagne, within the exception or proviso quoted, when it is so labeled or branded as to deceive and mislead the purchaser.

In this case it is sufficient to bring these cases of wine, the wine contained in these bottles, within the condemnation of the statute, and without the protection of the exception or proviso, that they are in fact "an imitation of another article", viz, genuine imported champagne, and are labeled and branded so as to deceive or mislead the purchaser, and are not labeled, branded, or tagged so as to plainly indicate that they are imitations, and the word "imitation" is not on the package. It must be borne in mind that in stating that this wine was actually offered for sale and sold under the distinctive name "champagne", I do not mean that the word "champagne" was on the bottles, labels, or packages, but that the purchaser ordered champagne, and expected to get champagne, and the seller knew this, and supplied this cheap, carbonated wine, put up in these bottles, dressed, ornamented, and labeled in close imitation of cham-

pagne, and by these acts represented to the purchaser that he was selling and shipping to him genuine champagne. I think these facts bring the act of the seller within the language of the act, "offered for sale under the distinctive name of another article". Hence I hold that, within the meaning of this statute, this wine was not only offered for sale, but actually sold, "under the distinctive name of another article"; that is, genuine champagne. Again, these bottles containing this wine—that is, the package containing it, both bottles and box—bore designs and devices thereon plainly intended to relate to the contents of such bottles, and indicate to the purchaser and user thereof the nature and character of the substance contained in such bottles. In addition to the marks and words and designs mentioned, there were the words "Extra Dry," indicating a grade of champagne, and these words were a plain misrepresentation and misstatement as to the character and quality of the contents, which were not "extra dry." These designs and devices very plainly said to a purchaser, "Champagne", and were intended by the seller to say to the purchaser, "This bottle contains extra dry champagne." These designs and devices were false and misleading. The design and devices and certain of the words on these bottles could relate to the substances contained therein only, and had but one purpose and meaning.

It was the purpose of Congress in enacting this, the "Food and Drugs Act," June 30, 1906, to put a stop to the transportation and sale in interstate commerce of adulterated and misbranded articles of food, drink, and drugs. It was intended to reach all forms of misrepresentation by misbranding, by the use of words, or by the use of designs or devices, pictures, etc., calculated to mislead and deceive, cheat, or defraud the purchasers. If A., in New York, orders of B., in Illinois, 1,000 one-pound packages of corn and 1,000 packages are shipped and transported from the one State to the other in fulfillment of the order, and such packages have labels reading "Fine Illinois", with the picture thereon, or on the package itself an ear of corn, but the packages in fact contain sawdust only, is there or is there not an offer for sale under the distinctive name of another article, and is or is not the package so labeled or branded as to deceive or mislead the purchaser, and does or does not the package containing the sawdust or its label bear a design, or device, regarding the substance contained in such package, which is false or misleading in any particular? What does the picture of the ear of corn on the package say? And, in such case, is there or is there not a violation of the act in question? Having in view the evils to be remedied, the purpose of Congress, and the language of the act, it seems to me there can be but one answer.

A statute, if its wording will permit, is always to be construed so as to make effectual the intent of the law-making body in enacting it. In selling articles of food, including liquids for drinking, frauds on the public may be perpetrated in two ways: (1) By adulterating or artificially coloring it, etc., the article itself; and (2) by putting it in packages or receptacles so formed or labeled and dressed as to induce the purchaser to take it as one article, when in fact it is another. Congress aimed at both modes of committing a fraud on the public.

There will be a judgment of condemnation.

HUYLER'S v. HOUSTON, Secretary of Agriculture

(Supreme Court, District of Columbia, June 25, 1913)

N.J. No. 3343

In Equity. Bill to enjoin the Secretary of Agriculture from publishing, pursuant to section 4 of the Food and Drugs Act, notice of a certain judgment of the Police Court of the District of Columbia. Bill dismissed.[67]

Anderson, *Judge*. This is a bill for injunction to restrain the Secretary of Agriculture from publishing, pursuant to section 4 of the Food and Drugs Act of June 30, 1906, notice of a certain judgment of the Police Court of the District of Columbia imposing a fine of $200 upon the plaintiff in case No. 185115 charging him with offering for sale and selling an adulterated article of food to one Rodney A. Griffin.

The plaintiff contended in the Police Court that that court had no jurisdiction over the alleged offense, because the act of Congress (sec. 5) provides for prosecutions "in the proper courts of the United States", thereby meaning, it was claimed by the plaintiff, only constitutional courts of the United States. The Police Court, however, overruled the objection, and held that the act meant all legislative courts of the United States. A writ of error to the Court of Appeals was subsequently applied for, but denied.

This suit has, accordingly, been brought to obtain relief against the irreparable injury which, it is contended, will result from the publication by the defendant under said act of notice of said judgment. The case is now before the court upon the defendant's answer to the rule to show cause and also upon the defendant's demurrer to the bill.

QUESTION FOR DECISION

The sole question for determination herein is one of law, namely, whether Congress intended by the use of the words "in the proper courts of the United States" in this statute to include the Police Court of the District of Columbia.

In *United States* v. *Mills*, 11 App.D.C. 500, 507, it was said:

> When there is mention of the courts of the United States in any statute, we may conclusively assume that only the courts of general jurisdiction intended by the Constitution are meant, unless there is special reason to be deduced from the context of the statute for giving to the expression a different meaning.

In the act under consideration the language, it is to be noted, is "the proper courts of the United States", and this language would seem to clearly import that all courts exercising the criminal jurisdiction of the United States, in so far as the penalties prescribed by the act come within their statutory jurisdiction, should have cognizance of these offenses. That the penalties for a first offense under this act come within the statutory jurisdiction of the Police Court is unquestioned.

It follows from what has been already said that the rule to show cause must be discharged, and the demurrer to the bill sustained, and the bill dismissed.

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[67] Affirmed, *Huyler's* v. *Houston*, p. 572, *post*.

UNITED STATES v. SPRAGUE ET AL.

(District Court, E.D. New York, July 31, 1913)

208 Fed. 419; N.J. No. 3295

Information alleging violation of section 2 of the Food and Drugs Act. Motion to quash and demurrer to information overruled.[68]

CHATFIELD, *District Judge.* The defendants have been brought into court upon an information filed under act June 30, 1906, ch. 3915, 34 Stat. 768, known as the "Pure Food and Drugs Act." The precise charge is that the defendants, as copartners, shipped from Far Rockaway, N.Y., to the State of Pennsylvania, 10 barrels of oysters, upon the 12th day of October 1911; that the oysters were "adulterated" in that they "consisted in part of filthy, decomposed, and putrid animal and vegetable substance", and that the oysters were an article of food, as distinguished from drugs, etc. The information is sufficient in its general form. The defendants have appeared in court and interposed a motion to quash the information upon three grounds: (1) That the information does not charge the defendants with knowingly and willfully doing any of the things mentioned; (2) that the law above referred to does not cover, and was not intended to cover, the shipment of oysters, and that a shipment of unopened oysters, in their natural condition, after removal from the water, is not within the language or intent of the sections relating to adulteration; (3) that the papers upon which the information was issued, and which are filed with the information, do not show the oysters to have been, in whole or in part, of a filthy, decomposed, or putrid animal or vegetable substance. The defendants have also interposed a demurrer upon the same grounds above mentioned, alleging that the information does not state facts sufficient to constitute a crime.

It is apparent that some of these questions would be raised properly by demurrer rather than by motion to quash (for the alleged defects are claimed upon the allegations of the information, and argument thereon is based upon its language). The question with respect to the scope of the act, and the motion based upon the physical composition or analysis of the substance in question, can be raised by the motions. In support of the motion to quash, the defendants have relied upon facts which are matters of common knowledge and admitted by the United States attorney, to the effect that the oysters in question were unopened when taken from the waters of a bay in this district by the shippers and, without any treatment or manufacture except that of gathering or packing for shipment, were transmitted in a living state. This presupposes that the muscular structure of the oyster has kept the shell closed, and that nothing has been added thereto, or could have been added thereto, except through the application of liquid. It is alleged and admitted that no liquid has been supplied beyond the ordinary water upon or in which the oysters live. In addition, the motion is based upon the allegations of

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[68] Defendants subsequently entered a plea of *nolo contendere,* and the court suspended sentence.

the information that the adulteration complained of consists of bacteria, particularly the bacillus typhosus and other animal and vegetable bacilli, which were admittedly absorbed by the live oyster during its process of growth; that is to say, from the liquid which it consumed in its natural functions. The court will not attempt to differentiate between the points raised by demurrer and those raised upon the motion to quash, other than to state them as they are taken up in order.

As to the objection that the oysters did not consist in whole or in part of filthy, decomposed, or putrefied animal or vegetable substance, no argument would be needed, if living bacilli had been knowingly introduced into an oyster by the defendants, and allowed to reproduce therein. It seems hardly open to argument that the words "filthy, decomposed, and putrefied" would be applicable to certain conditions resulting from the presence of living organisms; and in fact, from common knowledge of the present state of scientific research, the conditions of animal substance known as "filthy, decomposed, and putrefied" are caused by the presence of such living organisms. When we consider a specific bacillus such as that named, whether or not its presence might cause decomposition or putrefaction raises a question of fact that cannot be disposed of upon this motion, for the degree of decomposition of tissue might be so slight as to render the use of those words inapplicable from the standpoint of a substance intended for food. But the language used in the statute is in the alternative, and in the information the words "filthy, decomposed, and putrid" are stated in conjunction. A substance containing bacilli liable to cause disease to such an extent as to make it dangerous for food purposes is certainly "filthy", under the meaning of that word as generally used, and especially since the result of investigation has shown that filth or dirtiness is dangerous through the germs which it contains, and not solely because of offense to the senses.

The statute prohibits the *manufacture* of an article of food or drugs which is "adulterated or misbranded", and by section 7, subd. 6, the definition of the word "adulteration", for the purposes of the statute, is made to cover a substance consisting in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not. It may be assumed that oysters, while belonging to the animal kingdom, would not be classified as animals. But even if they be treated as fish or mollusk, and assuming that the words "whether manufactured or not" relate only to the clause as to the "portion of an animal unfit for food", the indication is that the certain intent of Congress was to give full meaning to the definition of "adulteration" defined as "consisting in whole or in part of a filthy substance." The ordinary use of "adulteration" implies an actual addition to the original substance, through human agency. But the word as used in the section does not restrict this to addition by the hand of man, and if the adulteration of filthy, decomposed, or putrid substance has been added by nature and is contained in the article to be shipped, it is adulterated in the eyes of the law.

This brings us to the principal question in the case. The statute makes it unlawful to manufacture any article of food or drug which

is adulterated or misbranded within the meaning of this act. If a person, through his servants, makes an article which is in fact adulterated, he is liable for the manufacture, within the jurisdiction of the act of Congress, even though he does not know that the Pure Food and Drugs Law is on the statute book, and does not know that the resultant condition of his process of manufacture has produced a substance which on analysis appears to be adulterated through containing decomposed animal matter. In the same way, he would be liable for a misbranding if the methods employed in his business caused the sending out of goods in violation of the statute. The law further makes any article of food or drugs which is adulterated or misbranded, within the meaning of the act, contraband; that is, the introduction of them into another State or Territory is prohibited. Such goods cannot be transmitted by interstate commerce without rendering the goods subject to seizure and destruction, and under section 10 this of itself shows that the knowledge or intent of the party shipping is not a material element of the situation which is prohibited by the act of Congress. The law further provides that if any person shall ship or deliver for shipment, in unbroken packages or otherwise, an adulterated or misbranded article, or shall offer such for sale, he shall be guilty of a misdemeanor.

The information in this proceeding charges the defendants with having offered for shipment an article which must be held to be adulterated and to be plainly contraband under the law. They are bound by the fact that the law was in existence. They are bound by the fact that they knew that they were manufacturing for shipment, or were actually shipping by interstate commerce, certain packages of oysters, which would be contraband or subject to seizure if found to contain filthy or decomposed matter (that is, "adulterated") within the meaning of the law. Congress has seen fit to impose a penalty for such a violation, and it is no defense to claim that the person causing the violation neither knew at the time that the goods were offensive, nor intended to violate the law. Hence an allegation that the defendants knew that the article was adulterated, at the time that they intentionally and willfully shipped it or caused it to be shipped, would apply only to cases where the adulteration had been placed in the goods by or with the knowledge of the shipper, or where an examination of the article had disclosed its presence. But Congress has gone much further, and in the exercise of its police power has imposed a penalty upon the sending of the deleterious or harmful substance, where the shipper is responsible for the act of sending, even though he may have nothing to do with the condition of the article sent, except as possession or ownership make him responsible. The use of interstate commerce or of means of shipping an article from one point to the other, like the manufacture of an article, or its adulteration with a subtsance by the person preparing it, is an act which, when alleged in an indictment, need be charged as "knowingly" committed only if the person charged has to be alleged to be in possession of and exercising his mental faculties. Such an allegation is not necessary where, as here, the word "ship" means "cause to be shipped." Where a person intentionally uses or has used means of transportation, under such conditions that he may unwittingly be liable to a fine, then, subject to constitutional limita-

tions, the imposition of the fine for the specific act must be determined solely from the conditions under which the penalty would be imposed, and not from the intent or purpose of the one liable to the fine.

The defendants have cited a number of cases to show that criminal intent requires knowledge or conscious action on the part of the criminal. They argue that a charge in the language of the statute is not sufficient if the act alleged could be innocently done, unless guilty knowledge is present, from which intent would have to be inferred. But this statute compels liability, if the harmful act has occurred through a shipment personally made by the defendant, or for which he is in a business sense responsible as shipper. The extent of the responsibility is left to the court, when considering the amount of punishment. The determination of when the defendant should be held as the shipper of the contraband article is a matter of law, but the fault of indefiniteness, or of failure to set forth what is charged to be criminal, cannot be urged against the present information. The statutory requirements render the matter more definite, so far as limiting or defining the circumstances under which Congress intended that criminal responsibility should be placed upon an individual, and less latitude is given to those enforcing the law (with respect to everything except the amount of punishment) than if a determination as to the knowledge or information of the defendant were to be entered into.

The conclusion must be that if the person accused is responsible under the statute for the consequences of a shipment by interstate commerce, and if that responsibility carries with it a punishment for violation of some regulation necessary for the safety of health, then the information will lie.

The demurrer will be overruled, and the motion to quash denied.

UNITED STATES v. 539 BOXES AND 322 CARTONS OF WM. RADAM'S MICROBE KILLER

(District Court, D. Minnesota, Oct. 11, 1913)

N.J. No. 3004

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict in favor of the United States.

The United States attorney filed a libel, and thereafter an amended libel, for the seizure and condemnation of 539 wooden boxes and 322 pasteboard cartons of Wm. Radam's Microbe Killer, alleging that the product had been transported from the State of New York into the State of Minnesota, and remained unsold in the original unbroken packages.

Misbranding of the product was alleged for the reason that the following statements regarding the curative and therapeutic effect of said product, "Wm. Radam's Microbe Killer", appear in the said printed circular accompanying said shipment:

On cover:

The Great Digestive Blood Purifier and Tonic Sane—Safe—Sure.

On page 2:

Radam's Microbe Killer drunk in glassful doses destroys the microbes without injury to the system and thereby prevents and eradicates disease.

On page 3:

Through ignorance, indulgence, or indiscretion, we create within ourselves the fermentation that microbes seek for food. Increasing very rapidly they cause congestion of the blood that brings pain, fever, inflammation, etc.—in other words, makes us sick. To get well we must relieve this congestion, get rid of the microbes. Wm. Radam's Microbe Killer never fails to do this if taken in time and used as directed.

On page 4:

Likewise Microbe Killer disinfects the whole system when its gases are released by the heat of the stomach. When microbes vanish disease disappears.

On page 8:

The "Microbe Killer" can be used in combination with doctors' prescriptions (taken one hour before) as it thoroughly overcomes the fermentative changes in the alimentary tract so often found in disease, thereby giving the drugs a better chance to be quickly absorbed and exert their effects, and in this way preventing prolonged convalescences.

On page 9:

In families where Consumption, Cancer, Syphilis and other hereditary diseases are known to exist, Microbe Killer should be taken as a preventive, in wineglassful doses, three times a day regularly for at least six months, thus preventing the disease from becoming active.

On page 11:

Radam's Microbe Killer cures every disease.

On page 15:

Mary Ewers of No. 242 Wykoff St., Brooklyn, N.Y., had cancer and asthma, and after taking Radam's Microbe Killer got better * * *. Asthma left her, the cancer got smaller and smaller and then disappeared.

On a strip label over neck of bottle appeared the statement:

A blood purifier, antiseptic and tonic.

and under directions on the label of each and every retail package appeared the following:

Drink one wineglassful after meals and at bedtime, also at other times as desired. Reduced quantity for children and infants. Apply externally wherever there is pain, inflammation, or ulceration.

No. 1.—For Headache, Neuralgia, Croup, Mumps, Measles, Whooping Cough, Worms, Diphtheria, Tonsilitis and Throat Complaints. Also for Asthma, Bronchitis and Consumption.

No. 2.—For Dyspepsia, Indigestion, Gastritis, Colds, Coughs, Malaria, Grippe, Catarrh, Rheumatism, Tumors, Cancer, Blood, Kidney, Bladder, Stomach and Liver Complaints also for the Skin, Hair, and Scalp.

No. 3.—Pure or diluted for external use, injections, gargles, etc. Drink pure for contagious diseases, as Yellow Fever, Leprosy, Small Pox, etc., also for Constipation and very stubborn, acute and chronic cases of disease where No. 2 fails to produce results. Use for 10 days at a time only, then resume with No. 2.

And upon the sides of each and all retail packages the labels read:

Being harmless it can be used without fear as directed. Microbe Killer can be added to drinking waters as a safeguard against disease. * * * It is unequaled as a digestive and for throat and stomach troubles * * *

and on a pasteboard cover inclosing each and every bottle of said product appeared the following statements:

Digestive—Antiseptic—Blood Purifier—Tonic * * * Harmless as water—* * * Added to milk makes food for the blood * * * For Consumption, Cancer, Catarrh, Rheumatism, Dyspepsia, Kidney, Stomach, Liver, Throat, Blood, etc. * * * Radam's Microbe Killer kills microbes and protects the blood from their attacks, thereby prolonging life.

all of which said statements, so appearing on the various labels as above set forth, regarding the curative and therapeutic effect of said product, "Wm. Radam's Microbe Killer," were false and fraudulent in this: That said product would not destroy microbes in the human system, was not harmless, was not a tonic, antiseptic, or digestive, was not "food for the blood," and was not effective for the treatment of consumption, cancer, catarrh, yellow fever, leprosy, diphtheria, or smallpox, and the designation of said product as "Microbe Killer," as appeared on each and every package of said product, was false and fraudulent, in that by said name said product falsely and fraudulently purported to have the power of destroying and killing microbes within the body, when such was not the case; and said statements were so falsely and fraudulently made, and said name, "Microbe Killer", so falsely and fraudulently applied to said product, with the intention to create the impression that said product was efficacious for the treatment of the diseases specified and the killing and destroying of microbes within the body.

The case having come on for trial of the issues before the court and a jury, the following charge was delivered to the jury by the court:

WILLARD, *District Judge.* Gentlemen of the jury: The statutes of the United States prohibit the transportation in interstate commerce of any food or drug that is adulterated or misbranded, and by interstate commerce is meant a shipment from one State of the United States to another State of the United States. For a violation of this statute the law provides two remedies. Section 2 of the Food and Drugs Act of 1906 declares that any person who ships any adulterated or misbranded article in violation of the law in interstate commerce, upon conviction shall be punished by a fine, and upon conviction the second time shall be punished by imprisonment. That you will observe is a prosecution against the individual. Section 10 of the same act declares that when such adulterated or misbranded food or drugs is shipped in interstate commerce in violation of law the Government may proceed directly against the article so shipped, and not require any process or proceeding against any individual. The case which we now have in hand is brought under section 10 of the act and not under section 2. There is no criminal prosecution whatever involved in this proceeding. The claimant, Ham, is not being proceeded against for a violation of law. He is not in this proceeding subject to any fine or to any imprisonment. This is what is called a proceeding against the property itself.

If you look at the libel or complaint you will see that it is entitled "The United States against 539 Wooden Boxes and 322 Cartons." The procedure in a case of this kind (and I call your attention to this matter because it is almost unknown in the State courts), while it is more frequent in the United States courts, it is not as frequent as the ordinary suit between man and man or between the Government and individuals—the procedure in a case like this

is the presentation of what is called the complaint or libel by the Government which is filed in this court. Thereupon the court orders the marshal of the United States for this district to seize the property described in the complaint. It is then the duty of the marshal to seize it, and it is also his duty to publish a notice in the newspapers of this seizure, warning any one who has any interest or may have any interest in the property to appear in court, present his claim and support it. That was done in this case. A libel was filed, the marshal went to the residence of this claimant, seized this product and carried it away. A notice was published, and in pursuance of that notice Mr. Ham appeared in court voluntarily and set up a claim to this property. That is the position in which Ham stands in this suit as a claimant of the property. The procedure in such case after a claimant does appear is to have a trial of the question as to whether the product is adulterated or misbranded. If it is not adulterated or misbranded, then it is turned over to the claimant. If it is adulterated or misbranded the subsequent proceedings depend upon which one of these two things is proven. If the property is found to be adulterated and injurious to health, then it is destroyed by order of the court. If after investigation it is shown to be misbranded only, where the property is not injurious to health, then the law provides that it may be turned over to the claimant upon his paying the costs of the proceeding and giving a bond that he will not sell or dispose of the property in violation of any law of the United States or of any State. It would mean in this case, if misbranded only, that he would have to change the label and change the wording on the cartons and cases so that it will not violate the law. This case on trial is for misbranding only; it is not a case of adulteration. There has been more or less testimony in the case as to injurious results which might follow the use of this article. That is a question which is not important in this case. It is not necessary in order for the Government to prevail here that it proved to you that this article is injurious in any respect. You would not be justified in finding a verdict for the claimant on the theory that it was harmless. That is not the question for you to try; the question for you to try is whether this article is misbranded or not; whether the label, as I shall later explain to you, is false or fraudulent; and whether the statements contained in this label are false or fraudulent. That being the nature of this prosecution, in order that the Government may recover it is necessary for it to prove two things. It must prove that the articles seized by it in this proceeding, or some part of them, were shipped in interstate commerce—that is, shipped from one State to another—after the 23d of August, 1912. The second thing which the Government must prove is that these articles or these packages so shipped were misbranded, in violation of the laws of the United States. Upon the first proposition, as to whether there was a shipment of this product after the 23d of August, 1912, in interstate commerce, I apprehend you will find no difficulty. The testimony, as well as of the claimant as of the Government, I think, will satisfy you that there was a carload of this preparation shipped from New York to Minneapolis in the month of October 1912. It will also satisfy you, I think, that the carload was taken to the residence of the claimant Ham. It will also satisfy you,

I think, that a part of this carload so shipped in October 1912, was seized in this proceeding. So that upon the first of these propositions I apprehend that you will have no difficulty. The next question is, Was the product so seized by the Government, if you find that it was shipped in interstate commerce after the 23d day of August, 1912, misbranded? To know whether it was misbranded or not you must be referred to the law upon the subject of misbranding. Reference has been repeatedly made during the trial to the Sherley amendment. The origin of that amendment was this: Prior to August 1912 a case had reached the Supreme Court of the United States in which a person was prosecuted under the law, as it stood originally, for making false and fraudulent statements upon the labels of a patent medicine (I think in that case the statements were that the medicine would cure cancer); the Supreme Court of the United States held that the law as it then stood did not reach false statements in regard to the curative properties of a medicine. After that decision Congress, on the 23d of August 1912, passed an amendment to the original act, and that amendment is as follows:

That that part of section eight of the Food and Drugs Act of June thirtieth, nineteen hundred and six, defining what shall be misbranding in the case of drugs, be, and the same is hereby, amended by adding thereto a third paragraph, to read as follows:

This is the paragraph under which the present proceeding is had.

If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent.

So that the second question for you to determine in this case is whether any of the statements contained upon the label placed upon these bottles or upon the packages, or found in this little pamphlet which was contained in each package, and which representations are referred to in the libel and relied upon therein, are false and fraudulent. The testimony of the Government as to the character of this preparation is based, so far as the scientific witnesses are concerned, and by scientific witnesses I refer to the chemists and representatives of the Bureau of Chemistry, upon an analysis of the contents of these bottles which were bought by Lynch from Ham on the 4th day of December. If, as a matter of fact, these bottles did not come from a shipment made after the 23d of August 1912, but came from a shipment made some time before that, then the entire case of the Government falls right there, and your verdict will necessarily be for the claimant, because the testimony of all these witnesses would then relate to an article which was not shipped until after August 23. So when you come to the question of misbranding that will be the first thing which you will take up. Were these bottles which have been produced, which were bought by Lynch on the 4th day of December a part of this October 1912, shipment, or were they bottles which Ham had received prior to the month of August 1912? You will remember the evidence upon that point, and it is not necessary for me to refer to it, except to say this: As a part of the evidence upon which the Government relies, it has presented three receipts signed by Ham, in which it is definitely stated, as I understand it, that these bottles did come from the shipment of October 1912. Ham now says that he did not read the receipts when he

signed them, did not know what they contained, and that that statement is false. If this document which he signed contained any agreement or obligation on his part he would not be permitted, at least in this court under the rules prevailing in the United States courts in this circuit, to make any such claim. When a man signs a contract by which he agrees to do certain things it is his business to read the paper and to know what he is signing. In this court he is not permitted to come in and say that he did not read the contract before he signed it; he is not permitted to do that. However, these documents are not contracts; they are simply receipts and do not bind Ham to do anything, and the law in that case does permit him to give evidence such as has been given here. So it will be for you to say whether the statements made by Ham in those receipts or the statements made in these receipts signed by Ham are true, or whether they are false; whether what was then said over his signature is true, or whether what he says now is true. That will be for you to determine. If you believe that these bottles did not come from the October 1912, shipment, but came from some shipment made prior to that time, then it will be your duty to find a verdict for the claimant. If, however, you determine that these bottles did come from the October 1912, shipment, then you will pass to the further consideration of whether the packages were misbranded. In determining that you are not entitled to take into consideration all of the statements made in this pamphlet or upon the bottles or upon these cartons or boxes, but only such statements as are set forth in the libel which you will have before you, and you can consider it.

It is not necessary for you to find that all of the statements and representations made upon the packages or in this pamphlet are false and fraudulent. It is sufficient if you find that any one of them, any single one of them, is false and fraudulent within the meaning of the law. There has been testimony offered of a witness who was presented on the part of the Government that this preparation might kill germs in the mouth, and I think some of them testified that it might kill germs in the stomach. The fact that it might under certain circumstances be therefore a germ killer or a microbe killer does not justify you in finding a verdict for the claimant in this case. Before you can do that you must find that each and all of the representations as to the curative properties of this medicine found upon the packages are true, or are not false and fraudulent. As an illustration of what I mean, I will call your attention to the directions on the bottle of No. 3 where it says, "Pure or diluted for external use, injections, gargles, etc. Drink pure for contagious diseases, as yellow fever, leprosy, smallpox, etc." That, I charge you, amounts to a statement or representation that this preparation will be beneficial in a case of leprosy. If you find that the preparation is absolutely worthless in a case of leprosy, or absolutely worthless in a case of yellow fever, and that the manufacturer must have known that it was worthless, then having found the other facts which are necessary to find, it would be your duty to return a verdict for the Government in this case. In other words, it would be your duty to find that the representations were false and fraudulent, and it is not necessary for the Government to show that the representations with regard to coughs or colds, catarrh, or dyspepsia were also false

and fraudulent. I think you understand what I mean. The Government does not have to prove that this product is entirely worthless for what it is said to be beneficial. It is sufficient to prove that it is false and fraudulent as to any one of these statements.

The question now arises as to what is the meaning of the words false and fraudulent. If the question as to whether a statement or a representation is true or not is a matter of opinion, so that reasonable men might differ upon that question, some men might think one way and some men think another, then such representations cannot for the purposes of this case be said to be false or fraudulent. A verdict for the Government must stand not upon any question of opinion, but upon the proposition that the remedy is absolutely worthless; the label must be shown to be demonstratively false. If the truth of the statements upon these labels as a matter of fact is a matter of opinion, no verdict for the Government can be based on the falsity of such statements. No verdict on the ground of false statements can lawfully be based upon matters of mere opinion. By way of illustration, I might refer to the matter of vaccination. While it is generally believed that vaccination is a preventive of smallpox, yet there are many people, quite a number of them, who think that it is not. That is a matter of opinion. It is for you to determine, gentlemen, from all the evidence in the case whether these statements or any one of them upon these labels are false and fraudulent within the rule which I have given you. If you believe that this remedy is so absolutely worthless, for example, for leprosy or for catarrh or for consumption or for diphtheria, that the manufacturer must have known that, then you would be justified in finding that the statements made with reference to these diseases upon the labels are false and fraudulent.

I shall not attempt to go over the evidence in the case at all. The evidence of the witnesses for the Government as to the contents of these preparations is undisputed. The evidence as to what becomes of the acids in these preparations after they enter the human body is also undisputed. The effect of the acid when it was transformed, as declared by their testimony, is also undisputed. That testimony can not be called a matter of opinion. They are testifying to what they claim to be facts. The testimony of the physicians who have been examined by the Government is undisputed, and is contradicted by the testimony of no physician on the part of the claimant. The claimant has limited his testimony to the evidence of persons who say that they have been benefited in their cases by the use of this preparation. The nature of the troubles with which they were then afflicted does not appear any further than you gathered from the testimony which they gave with regard to their symptoms. No doctor has been presented who claims to know what the diseases were from which these witnesses were then suffering, with the exception of the witness Jones, and as to her the Government has presented some medical testimony.

If you find that this product was shipped in interstate commerce after the 23d of August 1912, and that it was misbranded in violation of the law, then you will pass to the consideration of how much of the carload was received or seized by the Government. The claim of the Government is that all of the packages which it seized were

contained in this carload of October 12. If you find from the evidence that that claim is substantiated, then your verdict should be for the condemnation of the product. It is said by the claimant, however, that a part of the packages seized by the Government was received by him prior to August 1912. He said about half of it. There has been some testimony as to 40 cases which were seized and were delivered afterwards by the Government to the claimant. The return of the marshal who seized this property shows, as I compute it, a seizure of 920 packages; the number of packages set out in the libel is 861. That would show a surrender of more than 40 packages. In any event, your verdict would be limited to the number of packages stated in the libel, which is 861. If you find that all of these 861 packages came from the shipment of October 12, then you will find a general verdict for the Government, if you find the other facts in favor of the Government. If, however, you are of the opinon that some of the 861 packages were packages which were received prior to August 1912 then it will be your duty to determine how many of the 861 packages were received prior to August 1912 and render a verdict for the Government for the difference, indicating that in your verdict.

The claimant has requested me to charge you as follows, and I do so: In order that your verdict may be for the United States of America in this case, the Government must show that the samples taken and analyzed were actually taken from goods transported in interstate commerce subsequent to August 23, 1912. He also requests me to charge you as follows, which I do: In order that your verdict may be for the United States of America, it is necessary for the Government to show that the goods described in the libel herein were the goods actually seized by the Government.

Counsel for the claimant also requests me to call your attention to certain newspaper articles, and one in particular in the Minneapolis Tribune of October 10, with reference to this trial. I say to you that you are bound by your oaths to try this case upon the testimony given here in court, and that you ought not and should not be influenced in any way by anything which the newspapers say about this case, or by anything which any of the witnesses may have said to newspaper reporters, which was published in the newspapers, regarding this case. If any of you read this article, you will lay it aside entirely and determine this case from the evidence which you heard in this court room and not upon anything you may have heard outside.

In this case the burden of proof is upon the Government and not upon the claimant. The Government must satisfy you by a preponderance of the evidence that its claim upon each one of these different elements which go to make up this claim is true. If you are in doubt as to what the fact may be upon any particular point which it is necessary for the Government to maintain, then your verdict must be for the claimant. You are the exclusive judges of the facts. You are bound to take the law from the court, but upon all questions of fact you are the sole judges, uninfluenced by any opinion which the court may have unintentionally expressed as to what it thinks itself of the case.

The clerk will give you two forms of verdict. One is a verdict for the claimant, and the other is a verdict for the United States Government. If you find for the Government on all of the issues, find that all of the 861 packages seized were in the shipment of October 12, 1912, then you will sign this verdict. If you find that there was only a part of that shipment, or if you find that only a part of the goods seized were in that shipment, then you will indicate the number of packages in your verdict, and find for the claimant as to a certain number of packages.

UNITED STATES v. WEEKS

(District Court, S.D. New York, Oct. 17, 1913)

N.J. No. 3334

Information in two counts, alleging violation of section 2 of the Food and Drugs Act. Demurrer sustained as to first count, dismissed as to second. Two additional informations. Jury trial of all informations. Verdict of guilty.[69]

On August 8, 1912, the United States attorney filed an information against Oscar J. Weeks, alleging shipment from the State of New York into the State of Texas, of a quantity of fruit wild cherry compound, which was alleged to have been adulterated and misbranded. The product was labeled: "Fruit Wild Cherry Compound. Guaranteed to contain no Ether or Chloroform. From O. J. Weeks & Co. Specialties for Manufacturing Bakers, Confectioners and Ice Cream Makers, New York, N. Y. U. S. Serial Number 2049. Guaranteed under the Food and Drugs Act, June 30, 1906."

Adulteration of the product was alleged in the information for the reason that a substance, to wit, an imitation wild cherry essence, had been mixed and packed with said article, purporting to be fruit wild cherry compound, so as to reduce and lower and injuriously affect the quality and strength of said article, and for the further reason that a substance, to wit, an imitation wild cherry essence, had been substituted in part for the genuine article, fruit wild cherry, which the said article purported to be. Adulteration was alleged for the further reason that the article had been colored in a manner whereby inferiority was concealed.

Misbranding was alleged for the reason that the label and package of the said article bore the statement, "Fruit Wild Cherry Compound", which said statement was false and misleading in that it conveyed the impression that said article was a fruit wild cherry compound, whereas, in truth and in fact, the said article consisted chiefly of imitation wild cherry essence, artificially colored. Misbranding was alleged for the further reason that the article was labeled and branded "Fruit Wild Cherry Compound", so as to deceive and mislead the purchaser into the belief that said article was a genuine fruit wild cherry compound, whereas it consisted chiefly of an imitation wild cherry essence, artificially colored.

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[69] Reversed in part, affirmed in part, *Weeks* v. *United States*, p. 646, *post*. Judgment of Circuit Court of Appeals affirmed by Supreme Court, *Weeks* v. *United States*, p. 867, *post*.

The defendant thereafter interposed a demurrer to this information, and the demurrer as to the first count of the information was sustained, and as to the second count was disallowed, as will more fully appear from the following decision by the court:

MAYER, *District Judge.* There are four cases and the defendants have filed motions to quash in each.

As to the three cases (4–426, 475, and 427), I decided on oral argument favorably to the Government's contention on all but one point, and upon that I reserved decision.

The proposition in question is that the information should be quashed because they are not supported by verification or oath showing personal knowledge or probable cause.

The proceeding by information, as in this case, is an ancient method of procedure which has come to us from the common law of England and it is well settled that this method of procedure is proper here. The law on the subject is concisely stated in Bishop on Criminal Procedure.

The demurrers in three of the cases are, therefore, disallowed.

In the case against Weeks (No. 4–500), demurrer has been interposed upon the additional ground that the counts of the information and each of them are insufficient and fail to charge an offense. The information is in two counts.

In the first count the information states that the article of food was labeled as follows:

> Fruit Wild Cherry Compound. Guaranteed to contain no Ether or Chloroform. From O. J. Weeks & Co. Specialties for Manufacturing Bakers, Confectioners and Ice Cream Makers, New York, N. Y. U. S. Serial Number 2049. Guaranteed under the Food & Drugs Act, June 30, 1906,

and being so labeled was adulterated in that a substance, to wit, an imitation wild cherry essence, had been mixed and packed with the article of food purporting to be fruit wild cherry compound so as to reduce and lower and injuriously affect the quality and strength of the article.

It is further stated that the article is adulterated in that an imitation wild cherry essence had been substituted in part for the genuine article, fruit wild cherry, which the article purports to be, and further that the article is adulterated in that it has been colored in a manner whereby inferiority is concealed.

Briefly, the information attacks the propriety of the label.

It is obvious from reading the label that there is no suggestion that the article purports to consist wholly of fruit wild cherry. The very phraseology negatives any such suggestion.

In this connection it may be well to comment on *Frank* v. *United States*, 192 Fed. Rep. at page 869, cited by the Government. There it will be noted that the article was called "compound white pepper." The court said:

> A primary label "White Pepper Compound" would doubtless fairly indicate that the article is a compound of white pepper and some other ingredient * * *.

Then the court goes on to say that the term "compound white pepper" does not necessarily import the same idea as "white pepper compound" and calls attention to the fact that the adjective "com-

pound" is sometimes used colloquially as meaning "having added strength."

But the word "compound" in the case at bar, as in the phrase "white pepper compound", is a noun and indicates that the fruit wild cherry is in composition or combination with something else. A good many dictionary definitions will be found, and it is necessary only to cite one which is concise and clearly stated: "that which is compound or compounded; anything that is a combination of two or more elements, ingredients or parts, a compound substance." (Standard Dictionary.)

Assuming that the article does not contain any added poisonous or deleterious ingredients, there is nothing to prevent the combination of fruit wild cherry with an imitation wild cherry essence, and it is obvious that the purchaser is at once notified by the title that the article in question does not consist wholly of fruit wild cherry but that fruit wild cherry is only one of the ingredients in combination with other ingredients.

The Government asks me to hold that the ingredients of the compound must be stated on the package. I find no warrant in the statute for any such holding. The statute was carefully drawn after extended discussion and certainly if Congress had intended that the ingredients of a compound should be set forth upon the label, the statute would have so stated.

I have not overlooked the case of *William Henning & Co.* v. *United States*, 193 Fed. Rep. 52. In the report of that case there is nothing to indicate how the label read and for all I know, it may have been subject to the criticism for use of the word "compound" as in the *Frank case*, or there may have been some other fact which contributed to the decision.

The statement under this count, that the article had been colored in a manner whereby inferiority is concealed, is of no consequence. The coloring may have been the proper and natural result of the combination. There is in this count no allegation of artificial coloring.

For the reasons briefly outlined, the demurrer to this count is sustained.

The second count refers to the same label but here it is stated that the article consists chiefly of imitation "wild cherry essence artificially colored."

This, to my mind, presents an entirely different situation. I think the phrase or name "Fruit Wild Cherry Compound" conveys to the mind a representation that the dominant element in the combination is genuine fruit wild cherry and that to this genuine fruit wild cherry has been added something else, for instance, in the nature of an essence or extract which, in combination with the genuine fruit wild cherry, makes the "Fruit Wild Cherry Compound." Of course, the purpose of the statute as to misbranding, was to prevent deception of the public and if it be shown that the dominant element in this compound is the imitation essence and not the fruit, then it seems to me the statute has been violated.

In this count the statement is made that the article consists chiefly of an imitation "wild cherry essence artificially colored." When I use the expression, "dominant" I do not mean that necessarily the

fruit wild cherry must be greater in volume than the imitation essence. Sometimes one element of combination, by reason of its character and strength, even if smaller in quantity than another element, may, nevertheless, control the character of the combination. This, and questions relevant to it, can best be developed on the trial when the court and jury will have the benefit of expert explanation.

I think it unwise on demurrer, to pass upon the question raised as to artificial coloring, and that a much more satisfactory result will be attained when the court is enlightened upon the trial upon this subject, and it is not necessary to pass upon this point because I have already indicated that I shall disallow the demurrer to this count in any event.

For the reasons stated the demurrer to the second count is disallowed.

On May 21, 1913, the United States attorney filed an additional information in this case, and, in this latter information, it was alleged that said product was adulterated in that it was artificially colored with a coal tar dye in such a manner as to simulate a true fruit wild cherry, and in a manner whereby its inferiority was concealed.

Misbranding of the product was alleged in this information for the reason that it was sold and offered for sale by said defendant under the distinctive name of another article, to wit, fruit wild cherry, whereas, in truth and in fact, the said article was not fruit wild cherry but was an imitation thereof.

On April 22, 1913, the United States attorney filed another information against the said Oscar J. Weeks, alleging shipment by him from the State of New York into the State of Georgia, of a quantity of "Special Lemon", so called, which was misbranded. This product was labeled: "Special Lemon. Lemon Terpene and Citral—O. J. Weeks & Co., New York, N. Y. U. S. Serial number 2049 Guaranteed under the Food & Drugs Act, June 30, 1906."

Misbranding of the product was alleged in the information for the reason that the label of the article bore the statement "Special Lemon", which said statement was false and misleading in that it would indicate that said article was a product derived from lemon, whereas, in truth and in fact, said article was not a product derived from lemon, but was a mixture containing alcohol and citral derived from lemon grass, and was in fact an imitation of lemon oil. Misbranding was alleged for the further reason that the article was labeled as aforesaid so as to deceive and mislead the purchaser thereof in that said label would indicate that the said article was a product derived from lemon, whereas, in truth and in fact, the said article was a product containing alcohol and citral derived from lemon grass, and was in fact an imitation of lemon oil. Misbranding was alleged for the further reason that the article was an imitation of lemon oil, and was offered for sale by said defendant under the distinctive name of another article, to wit, a product derived from lemon, whereas, in truth and in fact, said article was not a product derived from lemon, but was a mixture containing alcohol and citral derived from lemon grass, and was in fact an imitation of a product derived from lemon oil.

On October 17, 1913, the case based on the two informations first referred to, and the case based on the last mentioned information, having been consolidated into one court proceeding, and having come on for trial before the court and a jury, the following charge was delivered to the jury by the court:

HUNT, *District Judge.* Gentlemen: Cases of this character are of course important to the interests of the Government and important to the interests of men engaged in business. The Government as you know has, within the past few years, taken up and given very great consideration through Congress, to legislation which is intended to prevent the manufacture, sale or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines or liquors, and for regulating traffic in such things, and in the execution of its purpose has passed statutes wherein are found those particular sections under which the indictment now in this case before you has to be considered.

On the other hand, as I have intimated, there is no aim on the part of the Government to interfere with legitimate business operations carried on in the manufacture of such products as may be used in the way of drugs, food or medicines, and liquors, unless there is a clear violation of the statutes.

While there are several counts in these indictments, the case is simplified by eliminating the more formal allegations and condensing the substance of the charges in this way.

Let us take the so-called special lemon case. The first count in the indictment in that case charges that the article was misbranded, in that the statement "special lemon" was false and misleading, in that it would indicate that the article was a product derived from lemon, whereas, it is charged, that the article was not a product derived from lemon, but was a mixture containing alcohol and citral, derived from lemon grass, and was in fact an imitation of lemon oil.

The charge also is that it was misbranded so as to mislead and deceive, in that the label, which is in evidence before you, would indicate that it was a product derived from lemon, whereas the Government says it was a product containing alcohol and citral, derived from lemon grass, and was in fact an imitation of lemon oil. That is the first count.

The second count in the special lemon case charges that the article labeled "special lemon" as indicated in the label which is introduced in evidence, was misbranded, in that it was an imitation of lemon oil, and was offered for sale under the distinctive name of another article, namely, a product derived from lemon, whereas it was not a product derived from lemon, but was a mixture containing alcohol and citral, derived from lemon grass and was an imitation of a product derived from lemon.

Next we turn to the law. The indictment uses the word "misbranded" as Congress has defined misbranded. The statute says it shall apply to all articles of food or other articles which enter into the composition of food, the package or label of which shall bear any statement designed or devised regarding such article or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which

is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

Later on it says:

That for the purpose of this Act an article shall also be deemed to be misbranded if it be an imitation of or offered for sale under the name of another article.

Now, take that brand, label—I mean as it is offered in evidence (you will be permitted to take it to your jury room) and ask yourselves whether you are satisfied that it was a misbrand, by its bearing any statement or device or design which was false or misleading in any particular. Was there any imitation, as charged in the indictment, or was it the article offered for sale under the distinctive name of another article than it really was.

You have heard the experts on behalf of the Government and in behalf of the defendant. There is some contradiction of testimony between them as to the composition of the elements which entered into this article. I will not endeavor to recapitulate it. It is somewhat technical in its nature. If you desire to have any of it read, I will ask the stenographer to read it to you, in case you do not recall what anyone said. But the question resolves itself into whether or not as offered, it was misleading and was a misrepresentation, and would ordinarily deceive a purchaser to whom it was offered.

Now, we come to the wild cherry case. You will remember that in the wild cherry case there are two indictments. The first charges substantially that the defendant shipped to Texas an article which entered into the composition of food labeled "fruit wild cherry compound. Guaranteed to contain no ether or chloroform. From O. J. Weeks & Co."

The charge is that this article was misbranded in that the label and the statement on the label was false and misleading, in that it conveyed the impression that the article was a fruit wild cherry compound, whereas the charge is that the article consists chiefly of imitation wild cherry essence artificially colored, and that it is further misbranded in that the label "fruit wild cherry compound" would deceive and mislead a purchaser in the belief that it was a genuine fruit wild cherry compound, whereas it consisted, so it is alleged, chiefly of imitation wild cherry essence artificially colored.

The second indictment in the wild cherry case charges that the article was shipped so adulterated in that it was artificially colored with coal-tar dye, in such a manner that it was intended to simulate a true fruit wild cherry color, and in a manner whereby its inferiority was concealed.

The second count of the second indictment charges that the article was misbranded and sold and offered for sale by Weeks & Co. under the distinctive name of another article, to wit, fruit wild cherry, whereas in truth and in fact the article was not fruit wild cherry, but was an imitation thereof.

As in the other case, you take the label, take the testimony of these gentlemen with relation to what there was in the contents and bottles, and ask yourselves whether there was a misleading, material misleading element there; whether it would deceive a purchaser.

Whether the purchaser would get what the label purported to say he was getting.

In both of these cases, if the label only conveyed ordinarily to the purchaser that which was within the bottle, then the defendant should not be convicted.

If it was misleading and intended to mislead, if it was misbranded as already explained to you, as I have read the statute, and you are satisfied that it was misbranded, was labeled falsely, then you should convict.

The defendant of course is presumed to be innocent. The usual rules apply here that do in all criminal cases. The Government undertakes to satisfy you of his guilt, and the proof must be such as convinces you in a way where you would be willing to act in your own most grave and important concerns of life.

If there is any particular bit of the testimony, as I have said before, that you would like to have read, you are at liberty to call for it. I say that in this case because it is of a technical character, and if I endeavored to recapitulate it myself, as detailed by the chemists, I would feel that I should ask the stenographer to go over it, lest my recollections be imperfect.

You have the testimony as to what entered into those respective articles. Whether or not there was wild cherry, whether or not it was in such an insignificant amount, or such a significant amount as to remove or to prove the charge of misleading as made in the indictment.

What is the meaning of the word used in the lemon case, on the label? I will read that to you. "Special lemon, lemon terpene and citral." We have had some gentlemen tell us here what their ideas were as to what the word "special" means. The essential point is to remember the whole thing "special lemon, lemon terpene and citral."

Ordinarily, special would mean, I should say, something with a particular characteristic out, perhaps, of the ordinary. "Special lemon"—the word lemon appears there. Why was that used? What was its purpose? And followed by "lemon terpene and citral."

You have heard the definition of what terpenes are. I do not know but that I am correct in saying that they may be regarded as perhaps a by-product derived from the lemon rind. Am I correct in that statement? Generally, citral is I think conceded to be a lemon grass product; lemon grass.

I will give you the indictments.

When you have reached a conclusion, you will by your foreman announce what it is.

You may convict upon any of the counts submitted or you may acquit under certain ones and convict under others, or you may acquit under all, as you think the evidence justifies.

Mr. STEPHENSON. Your honor, will you instruct the jury not to consider the first count?

The COURT. I have marked that. I made no reference to that. Gentlemen, you will find my own mark striking out the first count

of the indictment in the cherry compound case, which was numbered four.

Mr. CARLIN. I respectfully request the court to charge, under the first subdivision of the fourth section, defining adulterations, and I ask the court to charge there, that if they find that the words "special lemon" was a distinctive name for this article, they must acquit in the special lemon case.

The COURT. I deny that. That is covered.

Mr. CARLIN. I ask the court to charge that that first subdivision applies to and modifies the section 1 which was read by the court. They both must be considered together, in the law of misbranding.

The COURT. I decline that.

(Exception by defendant.)

Mr. CARLIN. I respectfully ask the court to charge that they must consider in this label, not only the words "special lemon", but also the words "lemon terpene and citral."

The COURT. I have so charged.

Mr. CARLIN. I ask the court to charge, that if they find that this product consisted of lemons, terpene, and citral, they must acquit the defendant.

(Request denied.)

(Exception by defendant.)

Mr. CARLIN. I respectfully ask the court to charge that the jury can only consider the statement on the label, and cannot consider the testimony in regard to the conversation had by a salesman in Atlanta.

The COURT. That is declined. I will however tell the jury that they must remember that while that testimony is admissible, it is only binding on the defendant, provided they are satisfied beyond a reasonable doubt that they were made by his authority and direction. In other words to hold a principal liable in a criminal action, you must be satisfied that the respresentation was made by his authority.

Mr. CARLIN. Now, in the other case, the second case, I ask the court to charge the law in regard to mixtures and compounds. That is the second subdivision of the fourth, and that that is the law that applies to any compound which is shipped.

The COURT. Gentlemen, you will remember I read to you that "If it be an imitation of or offered for sale under the name of another articles", for the purposes of the article, it should be deemed to be misbranded.

There is a clause in the law: "In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said articles have been manufactured or produced", it shall not be deemed to be adulterated or misbranded.

Mr. CARLIN. The second question, if it is labeled a compound and contains no deleterious substance.

The COURT. I think that is covered. I deny that. I think the charge covers that.

(Exception by defendant.)

Mr. CARLIN. I ask the court to charge that it is not contended that this product contained any poisonous or deleterious ingredients, and if that be true, being labeled a compound, the product was properly labeled.

The COURT. I think that is immaterial. There is no suggestion here of any deleterious or poisonous substance.

(Exception by defendant.)

Mr. CARLIN. I ask the the court to charge, that if the product is found to have been shipped to the Novelty Candy Company in Jersey City, there is a fatal variance, and the verdict must be for the defendant.

The COURT. No, my view of the law is not in accordance with that. If the defendant sent a package to Jersey City, there to be shipped to Texas for his account, to be delivered in Texas to the consignee, that was a shipment.

(Exception by defendant.)

Mr. CARLIN. The district attorney in summing up spoke of ether and chloroform. I ask Your Honor to charge that there is no such question in this case.

The COURT. They will not be misled on that.

JUROR No. 6. Will Your Honor read again that last statement there about excepting compounds?

The COURT. The language is, that—

> If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:
>
> First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

That is applicable in cases of mixtures or compounds which are put out as articles of food under their own distinctive names, and not in imitation of or offered for sale under the distinctive name of another article. You will bear in mind, that the charge is that they have been put out under the distinctive name of other articles.

> In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word "compound," "imitation," or "blend," as the case may be, is plainly stated on the package in which it is offered for sale: *Provided*, That the term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only.

Mr. STEPHENSON. I ask Your Honor to charge that that last section which you have read does not apply to the article on which the word "compound" appears, if in fact the article is in imitation.

The COURT. That is true. Of course, it does not apply if the article is in imitation.

Mr. CARLIN. I except to that charge, and ask the court to define to the jury the difference between imitation and a compound.

(Denied.)

(Exception by defendant.)

UNITED STATES v. WEEKS

(District Court, S.D., New York, Oct. 17, 1913)

N.J. No. 3332

Two informations alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of not guilty as to first information, guilty as to second.[70]

The following charge was delivered to the jury.

HUNT, *District Judge.* I wish, gentlemen, that in finally submitting this case that I could with greater lucidity take up the testimony of these gentlemen who have testified as experts and put it all before you with such comment as might seem proper. But it is technical, and unless one has had an opportunity to give a great deal of study to the particular subject with which the matter under investigation is allied, it is difficult to enter into an analysis of what they have said. However, the law imposes upon you as jurors the duty of weighing the evidence carefully on both sides and considering it, and reaching conclusions which satisfy your minds, justified by the evidence you have heard from the witnesses on the stand.

Bear in mind, gentlemen, that this is a criminal case. The United States, by the usual process of indictment or information puts the defendant upon his trial, and charges that he has violated a certain act of Congress. Now, the act under which the indictments or informations are drawn is entitled: "An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes", passed in 1906 and amended in 1912.

Turning first to the Vanilla Extract case—there are two counts in the indictment. First, that which charges that this defendant shipped a certain article of food in a barrel labeled as follows:

> Vanilla Ext. From O. J. Weeks & Co. Manufacturers of specialties for bakers, confectioners, and ice-cream makers, 216 Franklin St., New York City, N. Y. Herrmann & Jaffa, New Orleans, La.

The charge is that this article shipped was adulterated, in that there was substituted wholly for the aforesaid article vanilla extract, another substance which was not vanilla extract, to wit, a substance containing coumarin, commercial glucose, and caramel.

The second count charges the defendant with having on May 29, 1911, sent a certain article of food in a barrel labeled as just heretofore read, addressed to Herrmann & Jaffa, New Orleans, La., which said article shipped as aforesaid was misbranded in that the aforesaid label regarding said article and the substance and ingredients contained therein, was false and misleading, and said label was calculated to mislead and deceive the purchaser thereof, in that said label would indicate that said article was extract of vanilla, whereas in truth and in fact said article was not extract of vanilla, but was a substance containing coumarin, commercial glucose, and caramel, and in fact was an imitation of the genuine product.

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[70] Affirmed, *Weeks* v. *United States,* p. 650, *post.*

The testimony is very brief under that charge. As I understand the case, as finally submitted to you on this information, it goes to show that there was a shipment to this New Orleans firm; that the barrel was marked as described in the information; that the substance contained in the barrel was not vanilla extract, but was a substitute made up of the substances containing coumarin, commercial glucose, and caramel.

The defendant says that he had nothing to do with misbranding, and he produces a witness who says that it was a pure and simple mistake; that he had no orders to misbrand; that he was in a hurry and that he failed to do that which he ought to have done. And the defendant on trial, authorized or countenanced the putting of the did not attend to the shipments himself. Now, that brings us properly to this point: There is running through the criminal law a doctrine of agency; that is to say, a man may be guilty criminally of doing that which is inhibited by the law, provided he aids, countenances, or advises, or knowingly stands by and permits that to be done which he knows to be criminal, and does not forbid it.

The question then in this case would seem to me to be this: Has the Government satisfied you by the measure of proof which is requisite in criminal cases—that is, beyond a reasonable doubt—that this defendant on trial, authorized or countenanced the putting of the label on the barrel that was placed there by an employee of his. Of course, a man may not shield himself from crime by closing his eyes to that which he must in reason know exists.

But on the other hand, the duty of the Government is to trace it to him in such a way that you feel satisfied that he is the responsible person, who either directed it or countenanced it, knowing that it was to be misbranded. If you are satisfied he was, beyond a reasonable doubt, then you should convict. If you are not so satisfied, you should acquit him.

Now, we turn to the Grain Alcohol case. One of the provisions of this statute is, that for the purposes of this act an article shall be deemed to be adulterated, in the case of food, if it contains any added poisons or other added deleterious ingredients which may render such article injurious to health. Then comes a provision, which is not material in this case, simply explanatory,

> that when in the preparation of food products for shipment they are preserved by any external application applied in such manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the covering of the package, the provisions of this act shall be construed as applying only when said products are ready for consumption.

That has naught to do with this case, so we go back:

Adulteration shall be deemed to be when a food contains any added poisonous or other added deleterious ingredients which may render such article injurious to health.

The charge here is that this was a shipment labeled "Grain Alcohol Varnish. O. J. Weeks & Co. Special for Manufacturing Bakers, Conf. and Ice Cream Makers, N. Y. Serial #2049", which said article shipped as aforesaid was adulterated, in that the said article contained an added poisonous and deleterious ingredient to wit, arsenic, which might render the said article injurious to health.

Now, gentlemen, in the light of this testimony, are you satisfied that the shellac was shipped as an article of food, or to be used for food purposes? Did it contain as an added ingredient, arsenic? And, would such added ingredient render the article injurious to health? Those are the essential questions for you to determine under this information.

I think you will find but little trouble with relation to the general proposition that shellac is oftentimes used for purposes of coating fudge candy, perhaps, to give it a gloss. I think one of the witnesses said that it is often so used or was often used. And the next question is, did it contain as an added ingredient arsenic. There is testimony on behalf of the prosecution to the effect that this fudge was analyzed and found to contain arsenic, and there is also testimony on behalf of the prosecution which tends to show that the amount of arsenic found would tend to injure the health of persons who ate the candy covered with the substance.

There is testimony on behalf of the defense by some of the experts to the effect that the amount of arsenic under any assumption that was indulged in in the case, could not have any injurious effect upon either a child or an adult, consuming it from day to day.

We have listened for several hours to discussions by these gentlemen as to the effect of arsenic upon the human system, some saying that it has what might be called a cumulative effect, and some, that that is an inaccurate term and that it does not cumulate in the system. We have testimony as to the precise amount that is often regarded as within a safe margin, that is, an amount which if taken by an adult or a child would do no harm. The testimony of the defense tends to show that the amount of arsenic which may have been contained in any of the shellac used, such as it is contended was used in this case, would not injure a child or an adult.

On the other hand, the testimony if I remember it, of the chemist from Boston, Dr. Boos, is that it might be that the 0.002 part of arsenic would have an insidious effect. And some of these gentlemen have quoted substantially from the report of the English commission made in 1900, wherein there was some expert detailed analysis of the effect of arsenical poison.

Bear in mind, there must have been the added ingredient, and the added ingredient must have been such that it might injure health. The question whether or not it was added, whether it was so deleterious, if deleterious at all, as that it would reasonably have a tendency to injure health, is one of fact that you as men of common sense exercising your own best judgment in the light of this testimony must solve.

The burden is upon the Government. The presumption is that the defendant is innocent. He stands innocent until the proof satisfies you of his guilt beyond a reasonable doubt—that is, so satisfies you that you would be willing to act in your own most important affairs of life.

The defendant has taken the witness stand in his own behalf. He has a right to do this. You should consider his testimony with the other evidence in the case, and give it such weight as you find it fairly entitled to. You may take into consideration the fact that

he is a defendant; the nature and seriousness of the offense with which he is charged, and sift his evidence.

Mr. CARLIN. I would ask the court to charge my second request.

The COURT. You may save your points. I think they are sufficiently covered. I do not know what your practice is here. The practice I have always indulged in as to the refusal of the court to give each and every instruction requested is the defendant excepts and the exception is noted to the refusal to give any instructions requested and not given.

There is one point here that you ask the court to charge:

> That to convict the defendant they must find that the varnish shipped by him was an article of food or an article which enters into the composition of food and that this must be proved to them beyond a reasonable doubt, otherwise they must find the defendant not guilty.

That is substantially covered by the charge I have given.

Mr. CARLIN. That is covered; yes.

Mr. STEPHENSON. I ask Your Honor to charge that guilty intent is not part of this offense, and it is not necessary to prove that the defendant knew the nature of the product which was shipped in this case, if it is a fact that he did make the shipment.

The COURT. That is true. The law makes the acts that are defined to be penal in themselves criminal. Whether or not the man intended to ship poison is immaterial in this case. The question is, did he?

JUROR No. 9. I want to understand if this man, after he sent this, not marked imitation, I understand he wrote and sent him labels, telling him it was imitation. Did I understand that right?

The COURT. No. There were labels shipped with the shipment. He says those labels were sent with the shipment.

The jury thereupon retired and after due deliberation returned into court with a verdict of not guilty upon the charge of shipping vanilla extract, which was alleged to have been adulterated and misbranded, and a verdict of guilty upon the charge of shipping grain alcohol varnish which was adulterated.

UNITED STATES v. 13 CRATES OF FROZEN EGGS

(District Court, S.D. New York, Oct. 20, 1913)

208 Fed., 950; N.J. No. 2859

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict in favor of the libelant by direction of the court.[71]

RAY, *District Judge.* The claimant, Armour and Co., of Chicago, Ill., having a plant and place of business there, is a purchaser of and dealer in eggs and other food products, not a producer. At Chicago, Ill., it purchased and had on hand these eggs in question and others like them. They were released from the

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[71] Affirmed, *United States* v. *13 Crates of Frozen Eggs,* p. 605, *post.*

shells and frozen, but by reason of decay had so far decomposed that they were not fit for human food or consumption as such. As unfit for human consumption these with others had been selected and segregated by claimant at Chicago, Ill., from their other eggs. It is conceded that these eggs had reached such a stage of decomposition as to come within the definition and description of "adulterated" articles of food if handled, shipped, or sold, or intended to be shipped and sold as an article of food. Eggs in this condition may be sold and used as an article of food, or for tanning purposes (that is, for use in the tanning of leather), and claimant had sold eggs of this description, selected and segregated at the same time as these, to a tannery or tanning firm located and doing business at a point not far distant from Chicago for tanning purposes. It had not shipped or sold any of its eggs of this description to be used and consumed as an article of food and did not contemplate doing so.

The 13 crates of frozen eggs seized and sought to be condemned in this proceeding were shipped by the claimant, Armour and Co., in interstate commerce from Chicago, Ill., to New York City, N.Y., where that corporation had and has a warehouse and place of business and had been received there, but had not been sold or disposed of or offered for sale when the seizure was made. There are tanneries in the vicinity of New York, and in fact the intention of the claimant in so transporting these eggs in question from Chicago to New York was to offer them for sale and dispose of them, if possible, at New York for use in tanning and not for use or consumption as food. This intention or purpose of the claimant had not been disclosed in any way or manner to any person or by any labeling or branding. The eggs in question had not been denatured or subjected to any chemical or other process. They were rotten, decayed eggs, unfit for human food, and came within the definition "adulterated" for the reason they consisted in whole or in part of a filthy and decomposed or putrid animal or vegetable substance. See subdivision 6, section 7, of the Food and Drugs Act of June 30, 1906, 34 Stat. 768.

By section 6 of the act it is provided that "The term food as used herein shall include all articles used for food * * * whether simple, mixed, or compound." By section 2 the introduction into one State from another State "* * * of any article of food * * * which is adulterated * * * within the meaning of this act is hereby prohibited." Section 10 provides for the seizure and condemnation of "any article of food * * * that is adulterated * * * within the meaning of this act" and which, having been transported in interstate commerce, remains unsold, etc.

The contention of the United States is that eggs are an article of food, and that they remain such if not denatured or subjected to some chemical process which destroys them as an article of food, and that when they become decomposed and therefore unfit for food they are within the meaning of the act (section 7, subdivision 6), an adulterated article of food and subject to the condemnation of the act. The contention of the claimant is that while the eggs prior to decomposition were an article of food, when decomposed they have lost their character as an article of food if the owner does not intend to

use, transport, or sell them as an article of food but does intend to transport them and sell them for tanning purposes only and transports them for that purpose only. The contention is that an undisclosed intent to transport in interstate commerce and sell decomposed eggs, which are actually unfit for food, for use in tanning only takes the same out of the category of "adulterated article of food."

The difficulty with this contention is that these eggs, or eggs of this character, not denatured, come squarely within the definition of an adulterated article of food. The character of the thing does not depend on the intent or purpose of the owner in transporting it or selling it, or the purpose the owner may have in selling it. It seems to me clear that the purpose of Congress was to prohibit the transportation of articles in interstate commerce which come within the definition given in the statute and make them subject to seizure and condemnation if so transported. If such is not the purpose, then interstate commerce may be flooded with eggs of this character and the Government will be compelled to prove that the intent of the one transporting the article was to use or sell same as an article of food. Even if the burden is not shifted and the presumption is that it was intended to use or sell such an article as food or as an article of food, still the owner so transporting the article will escape the operation of the statute by swearing to an undisclosed intent which the Government will be unable to disprove, unless the article has been actually put on sale or sold as an article of food. If these eggs had been denatured so as to destroy them as an article of food (that is, take them outside the statutory definition of "adulterated" article of food), the case would be entirely different. It is no hardship to give a construction to this Pure Food and Drugs Act which will make it effective and accomplish the purpose intended so long as it is not made oppressive. In all cases of the transportation of frozen eggs so far decayed as to render them unfit for human food the owner may denature them before shipping or perhaps label them; but in any event, so long as the statute stands as it does, the transportation in interstate commerce of frozen eggs, or eggs not frozen but so far decayed or decomposed that it may be said they consist "in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance", is prohibited, as eggs, whether the contents of the shell be therein, or removed and in cans or other receptacles and frozen or unfrozen, are an article generally and almost universally used and dealt in as and for food and are adulterated when they consist of a "decomposed animal or vegetable substance." Eggs are either an animal or a vegetable substance. Clearly they are not a mineral substance. The title of this Food and Drugs Act declares it to be:

> An act to prevent the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes.

Would it be an answer to the seizure and attempted condemnation of a carload of partly decomposed beef being transported from Chicago to New York, for the owner to say, "I did not intend it to be used or sold in New York for food, but as soap grease or a fertilizer"; such purpose not having been in any manner disclosed?

Philadelphia Pickling Co. v. *United States* (C.C.A. 3d Circuit), 202 Fed. 150, 120 C.C.A. 429, while not on "all fours" with this case in all its facts, is, it seems to me, on "all fours" in principle, unless it can be said that inasmuch as partially decayed eggs, a decomposed article of food, having become unfit for food, are no longer an adulterated article of food, but an article for use in tanning leather, and hence not within the act at all as they may be and sometimes are used for that purpose. This contention cannot be sustained. If decomposed eggs were incapable of being used for food, as in making cakes and the like, the case would be different. The construction of this Pure Food and Drugs Act contended for by this claimant would open the door to the unrestrained transportation in interstate commerce of partially decomposed eggs, as the owner and dealer would, it might be honestly, transport them for sale in another State for use in tanning and actually, so far as he is concerned, sell them for that purpose or to some one claiming to purchase them for such purpose, when in fact the purchaser was intending to use them as an article of food, or to dispose of them to some one to mix with flour, etc., and use as an ingredient in an article of food, such as cake, etc.

In *Hipolite Egg Company* v. *United States*, 220 U.S. 45, 31 Sup. Ct. 364, 55 L.Ed. 364, the object of this Pure Food and Drug Act is declared to be:

> To keep adulterated articles out of the channels of interstate commerce, or if they enter such commerce to condemn them while in transit, or in original or unbroken packages after reaching destination; and the provisions of section 10 of the act apply not only to articles for sale but also to articles to be used as raw material in the manufacture of some other product.

In that case the "other product" was an article of food as the eggs were to be used for baking purposes, but I do not see that such fact affects the force of the decisions as to the purpose of the act, which is to prevent the transportation in interstate commerce of adulterated articles which these eggs, within the definition of the law-making body, are conceded to have been.

Eggs released from the shell, and frozen or unfrozen, are an "article of food", and, if adulterated, their transportation in interstate commerce is prohibited, and the act says (section 7):

> That for the purposes of this act an article shall be deemed to be adulterated * * * In the case of food: * * * Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, etc.

The fact that decomposed eggs ought not to be used for food or as an ingredient of some food article does not remove them from the category of adulterated article of food, they being within the statutory definition, nor does the fact that they may be used for tanning purposes. If the statute is to be construed so as to make it effective to prevent the interstate transportation of eggs, decomposed or partly decomposed, and hence unfit for human consumption, and thus carry out the intent and purpose of Congress, the eggs in question must be held to be within the operation of the act and subject to condemnation.

There will be an entry directing a verdict of condemnation and a judgment accordingly.

UNITED STATES v. FINLAYSON ET AL.

(District Court, S.D. New York, Oct. 23, 1913)

N.J. No. 2914

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of not guilty.

The alleged offense consisted in the shipment from the State of New York into the State of Massachusetts of a quantity of gin which was alleged to be misbranded. The gin in question was labeled "Genuine Hollands Geneva Gin Deer's Head Brand Distilled by London Wine & Spirit Co. New York. Deer's Head Brand is the finest type of pure and well matured gin." Misbranding of this product was alleged for the reason that it purported to be a foreign product, to wit: A product of Holland, when not so, but was a product of the United States; and further misbranded in that the statements, designs, and devices on the label thereof were false and misleading and calculated to deceive and mislead the purchaser thereof in that said label indicated that the article was a product manufactured or produced in Holland, whereas, in truth, and in fact, it was a product manufactured and produced in the United States; and further misbranded in that it was an imitation of genuine Hollands Geneva gin, and was offered for sale under the distinctive name of that article, whereas it was not genuine Hollands Geneva gin, but was a different article.

MAYER, *District Judge* (charge to the jury). This question before you is apparently an important one, and the case deserves and I have no doubt will receive at your hands very careful and deliberate attention, and I am about to endeavor to instruct you as to the law with considerable care, so that the real issues in the case may be entirely clear to you, and that in such discussion as you may indulge in in the secrecy of the jury room, you may not be led off into subject matter unrelated to and irrelevant to the issue that you must determine.

At the outset you must dismiss from your minds any impression, if such should perhaps exist—and I feel quite confident that it does not—as to a controversy in this case between different classes of merchants.

This is not a case where these defendants are on trial for some encroachment on a label of another person in the same general line of business. If these defendants or any other persons, at any time, put out goods in some manner that another merchant feels is unfair to him, such question is to be decided in another tribunal, and at another time, and in a proper proceeding, because the case here is a criminal prosecution, specifically brought under a particular statute, whose language, so far as applicable here, will, I am sure, appear very clear and very simple to you.

You will not, I am sure, entertain any prejudice or impression, whatever your individual line of business may be, either for or against importers, or for or against domestic manufacturers, because that is not the question in this case. Nor is there any question here

before you of trade competition. Every man living in this country, whether he is engaged in the importation of goods, or in the domestic handling of goods, is entitled to compete fairly with other men in the same line of business, and along lines sanctioned by the law.

The sole question that you have to determine is a question of fact which I shall state to you in a few moments, and that question of fact, so far as you are concerned, comes as I have said on several occasions throughout this trial, within a narrow scope.

In this class of cases, the proceeding being of a criminal nature, it is begun usually by what is known as an information, which, to all intents and purposes, has the effect of an indictment. There were more counts in this information than are before you now, but only the last or third count is for you to consider, and I say that so that if you should have occasion to look at the indictment you will not read or pay any attention to the first and second counts.

The third count is brief, and so far as it is relevant I will read it.

It charges that in this jurisdiction the defendants, who are Mr. Finlayson, Mr. Armstrong, and Etta E. Parish, doing business under the name and style of London Wine & Spirit Company, made an interstate shipment of a certain article of food in a bottle labeled as follows—and then follows the label that you have seen and with which you are familiar—

which said article shipped as aforesaid, was misbranded in that it purported to be a foreign product, to wit, a product of Holland, when it was not so, but was a product of the United States. And the said article was further misbranded, in that the statement, design, and device on the label thereof were false and misleading and calculated to deceive and mislead the purchaser thereof, in that said label would indicate that the said article was a product manufactured or produced in Holland, whereas, in truth and in fact, the said article was an article manufactured and produced in the United States, and that said article was further misbranded, in that it was an imitation of genuine Hollands Geneva Gin, and was offered for sale under the distinctive name of that article, whereas, in truth and in fact, the said article was not genuine Hollands Geneva Gin, but was a different article.

Now the statute under which this information is laid reads as follows, so far as here applicable:

That the term "misbranded," as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

And then the statute goes on—

That for the purposes of this act an article shall also be deemed to be misbranded: * * *. If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so. * * *.

When Congress passed this act it also passed in the act a provision allowing the Department of Agriculture to make rules and regulations, in accordance with the act, which when made should have the force of law, and so there is this regulation, which has the force of law, and which is applicable to this case, and upon which this case will practically turn.

The use of a geographical name in connection with a food or drug product will not be deemed a misbranding when by reason of long usage it has come

to represent a generic term, and is used to indicate the style, type, or brand, but in all such cases, the State or Territory where any such article is manufactured or produced shall be stated upon the principal label.

The authorities recognize what many of us knew in one way or the other, that long usage has at times transformed a geographical name into a name that does not designate, necessarily, the place from which the article comes, but designates the style or type or brand of the article, and the further fact that this regulation was made by these experienced men in departmental work, doubtless—when I say "men" by "men" I mean, of course, always by the head of the department, but doubtless upon the advice and investigation of the subordinates under him—the very fact that such a regulation was made is in itself a recognition of the proposition that there are cases where the original meaning of the word has been added to, so that the word has a larger or more comprehensive meaning than it had originally.

"Generic" is a simple word, with which I think you are all familiar. It may be defined, I suppose, as meaning a class, as distinct from "specific", which might mean a particular member of a class, and when it is used in this regulation, which I have just read, in connection with the word "term", so as to create the phrase "a generic term", that word "generic" means a class. "A generic term" means the description of a class of product.

If I have made the simple words of this act clear, and the words of this regulation clear, then we may go on to consider what is the issue before you.

If, as a fact, you believe that the words "Holland" or "Hollands Gin" or "Hollands Geneva Gin" have acquired this generic meaning, so that they are no longer confined to a description of the place from which the gin comes, then the defendants are entitled to an acquittal at your hands, without any further consideration upon your part.

If you believe that those words include domestic gin of the Holland flavor and type, then the use of the word "Genuine" in this label does not add anything to the Government's position in the case. If that be your construction of the facts in the case, then "Genuine" may be construed as meaning a gin of the Holland taste or type, as distinctive from the other kinds of gin; to wit, the English gins, such as Tom, Dry, and Sloe Gin.

There is no definition of what "long usage" is. Those words are elastic, because you can readily see that there are certain kinds of products known in our commercial life which have been known for a considerable time; there are other kinds of products which have been known only a very short time, and the words "long usage" are a good deal like the word "reasonable"; they change with time and circumstances and the developments of a complex civilization. You are to determine. I am not going to define "long usage", because I cannot do it. You are to determine upon the facts of this case whether the usage that has been testified to may fairly be said to be a "long usage."

The evidence in the case shows that so far as these defendants are concerned they have used this particular label for a matter of, I think, at least 17 years, excepting, perhaps, the lower part, and

that they have used for some 15 years, so that their use of this term preceded the Food and Drugs Act.

You have also the testimony of other domestic manufacturers as to usage for a considerable number of years.

Have these gentlemen who put out domestic gin under this designation done so fairly and honestly, with no attempt at deception, and in such a manner as to create in the mind of the purchaser the idea that when he asks for a Holland gin he is asking for a gin of a flavor and a taste different from the other kinds of gin?

We are not at all concerned with what the importer thinks about it or what the domestic manufacturer thinks about it. We are concerned to determine whether, on all the evidence in this case, the purchaser, the ordinary, sane, fair-minded man, is purchasing an article that is intended to make him think it comes from Holland, or an article which has become widely known as an article not necessarily coming from Holland, but having a taste different from the other kinds of gin.

Pretty nearly everything but the crucial question in this case is not a matter of contradiction. The defendants do not deny that there was an interstate shipment, which brings the case into this court. They admit and concede, without equivocation, that Holland gin or Hollands Geneva gin was originally the designation of gin made in Holland. They stand, as must the Government, upon the single proposition—the Government says that label means that it is intended to convince or lead any person who buys that article to believe that it was made in Holland, and the defendants say that that is not correct, that that label is intended, not to mislead he public but to inform the public that the contents of that bottle are gin of a certain flavor and type, and that that gin by long usage in his country has come to be known, because of its flavor and type, as a Holland gin.

That is the question in this case, and you have got to determine it on the evidence adduced. You have heard all of these witnesses. It seemed to me, although you will exercise your judgment and not take mine, that practically every man was conscientiously giving his point of view as he understood it. One set of men having their minds very much on the imported article, the other set of men being familiar with the course and practices of this particular branch of business in this country.

It is for you to determine, and that is one of the values of sending cases of this particular class to a jury of business men drawn from various kinds of work, because you are to determine the fact in this case, which is what I have said.

But there is another rule or set of rules which apply in this case. We have had in the case the atmosphere of a civil trial. That has been the court-room atmosphere, because counsel, notwithstanding their very natural occasional controversies, are gentlemen who tried the case in courteous fashion, and the whole conduct of the case has been such to make you forget, perhaps, and at times to make the court forget, that the case is not a civil case but a criminal case, and while the penalty under this act for a first offense is not a severe penalty, yet the mere conviction is a matter of profound importance to any reputable merchant.

There is no controversy here as to the contents of this bottle being other than entirely proper. No suggestion in the information, and therefore there will be none in the evidence, that this is other than a perfectly proper domestic gin, which has been put in the bottle that contains this label, so it is not a case where you are to be diverted by any notion of a bad product being put up.

It is also entirely clear in this case that a different process is used for the manufacture or distillation of Holland gin from these other gins, and that that process has long been used in this country and is familiar to persons in the trade, and as presumably is the taste to the man who drinks gin.

So that we get back, and I am repeating myself purposely, to the sole question as to whether this Hollands gin has acquired this extra meaning, and if it has, that is the end of the Government's case, and whether it has, is for you to say.

But, as I started to conclude, this is none the less a criminal case, and every man under our system is presumed to be innocent until he is proven guilty beyond a reasonable doubt, and before the Government may look for a conviction, or rather I would put it a little better, before a conviction may be had of any man informed against, or indicted, it is incumbent on the Government to prove his guilt beyond a reasonable doubt.

So that in this case your decision does not necessarily finally determine whether the defendants in some civil relationship may use this designation or not. If you entertain a reasonable doubt, such a doubt as a fair-minded man entertains in a consideration of the important affairs of his own life, then the defendants are none the less entitled to an acquittal at your hands.

Finally, I may say that in regard to the testimony in cases of this kind, it is quite usual to introduce the definitions from dictionaries. but those definitions have no greater force, and very frequently not as great a force, as the testimony that falls from human lips, where a witness is sworn and able to be examined and cross-examined. What you find in the dictionary is merely the conscientious definition, presumably conscientious, of learned men who have collated their information from various sources, and it has no more effect, and perhaps not as great, as the sworn words of human beings.

I think now that I have covered about all that is necessary to be said, and I hope that I have made the issue to be determined entirely clear, and I sincerely hope that you will confine your deliberations to that particular question that I have referred to under the rules that I have given you, and not be misled by anything that occurred in the case to indicate that this was, perchance, a controversy between merchants of various kinds.

The Government has made a certain request to charge. I feel that I have charged sufficiently fully, and I decline to grant the Government's request.

The request last referred to reads as follows:

That it is your duty to determine whether taking the label as a *whole* it is misleading to the average purchaser in that it creates in the mind of the purchaser the impression that he is getting a gin of the Holland type produced in Holland.

Mr. PROSKAUER. I have one request, Your Honor. May I state it orally?

The COURT. Yes.

Mr. PROSKAUER. I ask Your Honor to charge the jury that the words "distilled by the London Wine & Spirit Co., New York" is a fair compliance with the second provision of the section, stating that where the word has a generic meaning the label shall also contain a statement of the State where it is distilled or made.

Mr. AUCHINCLOSS. Your Honor, it seems to me that is a question for the jury.

The COURT. No, I think that is a question of law. I so charge.

Mr. PROSKAUER. In other words, Your Honor charges the jury that that is a fair statement that the product is made in New York.

The COURT. Yes; that leaves simply the single question for the jury to determine.

LIBBY, McNEILL & LIBBY v. UNITED STATES

(Circuit Court of Appeals, Fourth Circuit, Nov. 12, 1913)

210 Fed. 148; N.J. No. 2938

In error to the District Court for the Eastern District of Virginia. Judgment affirmed.[72]

Before PRITCHARD and WOODS, Circuit Judges, and ROSE, District Judge.

ROSE. *District Judge.* This is a prosecution under the Food and Drugs Act. It raises two questions as to the construction of that statute:

First. Are words in every-day use to be given when found on the labels of food products their ordinary and popular meaning rather than the commercial significance which they have acquired among manufacturers and dealers?

Second. Does the first proviso to section 8 of the act permit the use as a name for a compound or mixture intended for food of common words which will to an ordinary man appear to be descriptive but which, if so understood, will be false and misleading?

The plaintiff in error was the defendant below. It will be so called here. It is a Maine corporation. Its factory is in Chicago. Among other things it there prepared what it calls the "Target Brand of Condensed Skimmed Milk." It does not put out this product under its own name, but under that of the "Foster Packing Company." That designation is not the name of an actual corporation, but is a mere trade-name under which the defendant, for some reason of its own, chooses to market some of its products. It is admitted that what it labels "Condensed Skimmed Milk" contains something more than two parts of cane sugar to something less than three parts of the more nearly solid constituents of skimmed milk. The information charged that the product was adulterated, because cane sugar had been in part substituted for skimmed milk, and that it was mis-

[72]Affirming *United States* v. *Libby, McNeill & Libby,* p. 442, *ante.*

branded, because the label was false and misleading, in that the contents of the can were not wholly condensed skimmed milk, but were to the extent of 42 percent cane sugar.

The record shows that milk which has been reduced by evaporation to a fourth or less of its original weight is sometimes sweetened and sometimes is not. When it is sweetened, sugar is added to the skimmed milk while the latter is still in its natural state, in the proportion of 3 parts of sugar to 20 parts of milk. The mixture is then subjected to a process of condensation by evaporation, the effect of which is to reduce its weight by about 70 percent. Of the 30 percent remaining, upwards of two fifths will be sugar. Unsweetened skimmed milk is condensed or evaporated in the same manner, except that, of course, no sugar is added to it. Unsweetened condensed or evaporated milk, whether skimmed or unskimmed, must be thoroughly sterilized before being hermetically sealed. After the seal is broken, it will not keep as long as the sweetened. In the latter the sugar acts as a preservative.

The defendant offers much evidence that manufacturers and wholesale and retail dealers of and in food products know that what passes under the name of "condensed milk" or "condensed skimmed milk" contains a large percentage of sugar. Many of them said that when they ordered condensed skimmed milk they expect to get the sweetened article. If the unsweetened were sent them, they would feel that they had been imposed upon. From the testimony of some of these witnesses, however, it appeared that there were on the market many brands of sweetened condensed skimmed milk which were labeled "sweetened", and others which, containing no added sugar, were marked as "unsweetened."

The defendant asked the court to give eight instructions to the jury. Six of these, although in varying phraseology, were to the effect that, if condensed skimmed milk as commercially known is concentrated milk to which sugar has been added, the defendant must be acquitted. These instructions were refused.

There is no question that words should sometimes be given their trade or commercial meaning rather than their more ordinary one. Such has been long the rule of construction applied to tariff and revenue acts.

Laws regulating the payment of duties are for practical application to commercial operations, and are to be understood in a commercial sense. Such laws are intended for practical use and application by men engaged in commerce, and hence it has become a settled rule in the interpretation of statutes of this description to construe the language adopted by the legislature and particularly in the denomination of articles according to the commercial understanding of the terms used. *Tying* v. *Grinnell, Collector*, 92 U.S. 470, 23 L.Ed. 733.

On the other hand, when it is alleged that a particular description, branding, or method of offering of goods for sale will enable one dealer to pass off his products for those of another, it is usually immaterial whether dealers in such articles are deceived or not. The inquiry in such cases is whether the ultimate purchaser will be misled. Hopkins on Trade-Marks, section 106.

Pure food laws are intended to protect the public whose members may be, and in the more numerous part usually are, ignorant of the technical significance which ordinary words may have acquired in particular trades or industries.

The Supreme Court of Michigan has said that decisions construing revenue acts—

> do not apply to cases arising under the pure food laws of State governments. Courts will take cognizance of the well-known fact that farmers, laboring men, and consumers are not generally familiar with the customs of trade and commerce in importing goods, or of the understandings of the trade between manufacturers and merchants who buy these products for retail trade. Such construction would emasculate the pure food laws, and deprive the people of the protection which the legislature wisely intended to give them. *Armour & Co.* v. *Dairy & Food Commissioner*, 159 Mich. 10, 123 N.W. 580, 25 L.R.A. (N.S.) 616.

We fully concur in this statement of the true rule of construction to be applied to pure food statutes, whether State or Federal. It follows that the learned judge rightfully refused to instruct the jury otherwise.

The other two requests of the defendant for instructions were that the jury should be told in effect that, if they should find that condensed skimmed milk as manufactured and sold to the public is a mixture or compound sold under its own distinctive name, the defendant was not required to indicate on the label of the product the presence of sugar in it. These requests were also denied.

It is not necessary in this case to attempt an exhaustive construction of the first proviso of section 8 of the act. In our view it has no application to the facts of this case. The words on the label were all in ordinary use. Each and every one of them could and would be understood by the general public to have been intended to convey their accustomed meaning; that is to say, the average man who read the label would suppose that the can contained skimmed milk which had been reduced in bulk by evaporating or otherwise driving off a part of its fluids.

Defendant does not question that unsweetened milk may be and habitually is subjected to this process and that a marketable product is thereby obtained. The description on its label would be strictly accurate if applied to such milk product, provided that the words used are to be given their customary significance. Under such circumstances, the defendant may not use them to indicate the presence in substantial quantities of a constituent, the existence of which in the product they in their ordinary meaning impliedly deny.

The construction which is here put upon the statute works no hardship upon the defendant or upon other manufacturers and dealers in like case with it. It does not claim that its trade will be hurt by telling the purchasers of its goods that there is sugar in them. Its whole contention here rests upon the assumption that they already know that there is. If that be true, no harm will be done by stating the fact in plain language upon the label.

The defendant assigns error in the instructions actually given by the court below. They, however, do not appear to be open to criticism. They left to the jury to find, in addition to the other essential facts, whether sugar was a component part of condensed skimmed milk.

Affirmed.

UNITED STATES v. SIX CASES OF HONEY

(District Court, E.D. Pennsylvania, Nov. 25, 1913)

N.J. No. 3406

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict in favor of the United States.

The United States attorney filed a libel for the seizure and condemnation of 6 cases, 3 of which contained four 36-pound cans and 3 of which contained four 60-pound cans of honey, alleging that the product had been transported from the State of New York into the State of Pennsylvania, and charging adulteration and misbranding.

Adulteration of the product was alleged in the libel for the reason that a certain article, to wit, invert sugar, had been substituted in whole or in part for pure honey in the said article of food. Misbranding was alleged for the reason that the label upon each of the cans containing the article of food bore a statement regarding it and the ingredients and substances contained therein which was false and misleading, in that said label bore the following statement: " Excelsior Choice Pure Strained Honey. Guaranteed under the National Pure Food & Drugs Act, June 30th, 1906, under Serial No. 14914 by Excelsior Honey Co., N.Y.", which said statement, contained on said label, was calculated and adapted to convey the impression and belief that said article of food was pure honey, whereas, in truth and in fact, said article of food was not pure honey, but was a mixture of honey and invert sugar.

HOLLAND, *District Judge* (charge to jury). Gentlemen of the jury: The United States Government, through its officer, seized six packages or cases containing 18 cans of food product labeled " Excelsior Choice Pure Strained Honey," and it is claimed that it is put up in packages and labeled in violation of the Pure Food Act of June 30, 1906. Every man, woman, and child in the United States when hungry needs food and when sick needs drugs, but the individual citizen is unable to see to it that the food purchased or the drugs he must purchase are pure, and the Government has taken on itself the work of performing that for the whole people. So that this is a contest for pure food, for the protection of the individual citizen who has not the facilities or the information to protect himself, and it is a very beneficial and commendatory act, because we all know that impure foods are manufactured and sold, and it is against the manufacturer and vendor of these impure foods and the manufacturer and vendor of these impure drugs that this act is aimed, and it has no terrors for the man who manufactures or sells a pure article and brands it what it is. Notwithstanding the attempt to throw a very great deal of doubt and uncertainty over the work of the experts in this case, chemistry has been brought to such a high point of efficiency that it can be told with certainty, or, at any rate, with that degree of certainty which should authorize us to act, what is contained in almost any substance you put into the possession of the expert chemist.

They can tell whether or not honey is pure or whether it has some substance mixed in it, and it may be that they cannot tell it with the same degree of certainty that you can work a geometrical demonstration, but they can say, with a degree of certainty that should authorize us to act, in the examination of questions which come before courts, as to whether foods or drugs of a specific kind are pure or adulterated or misbranded.

Now, gentlemen of the jury, this act of Congress, to which I have alluded, says that it shall be unlawful for any person to manufacture any article of food or drug which is adulterated or misbranded within the meaning of this act, and then another section reads that for the purposes of this act an article shall be deemed to be adulterated if any substance has been substituted, wholly or in part, for the article. That is the statutory definition of adulteration that the term "misbranded" shall apply to all labels which shall bear any statement, design, or device regarding such article or the ingredients or substance contained therein which shall be false or misleading in any particular, and, further, that any article of food that is adulterated or misbranded within the meaning of this act shall be liable to be proceeded against in any district court of the United States, within the district where the same is found and seized for confiscation, by a process of libel for condemnation, and that is what is done here.

Now, you will notice, gentlemen of the jury, that an article is adulterated if any substance has been substituted wholly or in part for the article. It is not the dictionary definition of adulteration. You must take the statutory definition. It makes no difference what the article is; if any substance has been substituted wholly or in part it is an adulteration. There is no question as to whether it is deleterious or injurious to health; it may or may not be; the substitution may be as beneficial or more beneficial than the original article. What the law aims at is to guarantee to the consumer that when he desires to purchase a certain article, and goes to a manufacturer or vendor for that article and states what he wants, that he shall know that he gets what he pays for. That is the object of the law. It is to protect the consumer against adulteration and misbranding of their food and their drugs, so that they may be able to rely on what an article is said to contain, and they may rely that they will not be misled by the label.

The Government in its examination or supervision of matters of this kind concluded that this particular brand of honey which is labeled "Excelsior Choice Pure Strained Honey" is not a pure honey, and they seized these six cases, and they now bring this proceeding, charging that it is an impure or adulterated honey, in one of the counts of their libel and in the other that it is misbranded in that the label on it, "Excelsior Choice Pure Strained Honey," is not true; that it contains other matters besides pure honey, and therefore it is misbranded, and they call their experts to prove what they allege in this libel.

Now, we are entirely dependent upon the testimony of experts, with the sole exception of the defendant himself, who denies that he placed anything but Cuban and buckwheat honey in this mixture and boiled it. The Government experts come forth and they testify

and give an account of the analysis which they made for the purpose of ascertaining what this mixture contained. They state positively that they made these examinations and they give the result. They start with what they regard the most significant analysis, which is the one that produced the ash result, and they go through the entire list of known methods in chemistry by which you can ascertain whether honey is pure or adulterated or mixed with some other substance. They take the Fiehe and the Browne test, the tannin precipitate, the protein, the dextrose, and the levulose, polarization, and finally the tartaric. There are nine tests, and also Mr. Hilts said he looked through the microscope for pollen, and found the pollen, although it was in a scanty amount, which, of course, showed that there was some honey in it.

Now, they say, too, that the ash test revealed the fact that his mixture only showed ash to the amount of 0.028, and the Cuban honey has 0.07 ash, and that buckwheat honey has 0.07. They both have the same amount of ash; and then they reason that if there had been a mixture of buckwheat and Cuban honey, as claimed, that the ash should have been 0.07; but that it was only 0.028, which is only 40 percent of the ash which would have been contained in it if this mixture had been made up of Cuban and buckwheat honey, as claimed. And the Government experts say that what was done, in their judgment, was that about 40 percent of that mixture was either Cuban or buckwheat honey, with an ash of 0.07 percent, and the balance, or 60 percent, was a substance that had no ash. They do not just say that; but, at any rate, it was made up of a substance that reduced the ash to 0.028. Now, if there be no ash in commercial invert sugar, mark you, and you put 60 percent of that mixture with 40 percent of a honey containing 0.07 of ash, and mix them up together, and analyze it, you will produce a result which is produced here, to wit, ash 0.028, and the Government experts tell us they reasoned at once that there was some mixture of invert sugar.

Then they took up the Fiehe test, and they say they found—I will not go through the details of that—they found that there was an indication of invert sugar or adulteration of the mixture. Then they took up the Browne test, and they say that indicated the same thing. They corroborated the ash test and all the other tests, the precipitate test and the protein test, the tannin test (they all corroborated each other); and the dextrose test, the levulose test, and the polariscopic test; and then the tartaric test (they all corroborate each other—even the tartaric test). That was the last test that was made. You will recall that that is the only acid that the evidence shows is used in converting commercial sugar into a substance to be used for a mixture with honey, and they found tartaric acid in this mixture to the amount of 0.08. Now, the defendant himself says that he mixes in his other articles of sale tartaric acid to an amount only two points higher; that is, 0.1, or one-tenth, and this is 8 one-hundredths. So that the Government claims in its examination of this article it has availed itself of all the known processes in chemistry to ascertain exactly what is in this article of food and that every one points, in their judgment, unmistakably, to the one conclusion; and that is that it was a mixture of honey and invert sugar, or another substance than honey, in the proportions of 40 to 60. That is the evidence on the

side of the Government, and you will recall with what intelligence or lack of intelligence, satisfaction or lack of satisfaction to you they maintained their position as to the work they had done, and you will judge, of course, of the intelligence with which it was done, and judge whether or not you will accept their conclusions or the conclusions reached by the expert of the defendant. I might say also here, before I go to the defendant's side of the case, that the defendant claims the tartaric-acid test that was testified to was not mentioned until after the case had been closed, practically, and he had no chance to reply to it. That is true; but it should turn out that he is injured by it, even now if his experts should discover it or if it should be discovered hereafter, if it is taken in time, that there is no tartaric acid there he certainly will be entitled to protection, and, of course, he urges that that fact should be taken into consideration in his favor. So it should be. But, you will say, while you may take that into consideration, whether or not Mr. Hilts would or would not be prejudiced one way or the other in stating the exact truth in this matter as to any of the tests.

Now, as I have said, which will you take, the expert of the defendant or the experts of the Government? The defendant is called, and he tells you that this mixture is made up of Cuban and buckwheat honey, and he told us how he boiled and strained it, and that it was koshered for the purpose of selling to the Jewish trade, and it was boiled, and he told you when he was on the stand that the koshering was the straining. When recalled, after the expert testified, he came back and he told you that the skimming was the koshering, that the whole process was the koshering; at any rate, he boils this article that is here in question, and whether it was for the purpose of koshering it or not is not very clear in his statement, because honey is cleaned by straining it, and it is heated to a certain point, but he says he boils and skims the top off and then strains it, and then he calls it koshered honey, and he says that he never mixes anything but Cuban and buckwheat honey together in making it. The expert comes upon the stand, Mr. Deghuee, and he tells you just exactly what he did in the examination of this mixture. He had a big quantity of it, and he made a thorough examination, and he says that it was done under, I believe, the polariscopic test. The defendant's expert went through a number of these tests. He tells us he went through the ash test and what he found. He said that the low ash was not conclusive as to whether or not this honey was pure or adulterated, but it was suspicious and suggested a further investigation. He also said that buckwheat honey contained 0.07 and Cuban honey 0.07, and then he made the Browne test, and he found from that test that there was a suspicion and that he should go farther, and in all his tests he found that there was a suspicion and that he should go farther, with the exception of the polariscopic test. The general result of that, he claims, was to lead him to the conclusion that there was no adulteration. He found furfural; he found a red color, which he said lasted more than an hour, but after all, and after thorough deliberation, he said that the general result of the polariscopic test, which he made, led him to believe that there was no adulteration. If there was no adulteration, there was no misbranding, of course. If there

was adulteration, there is misbranding. Of course, as I have told you, gentlemen of the jury, you must say which conclusions you will adopt, those produced and testified to by the Government or those produced and testified to by the defendant. There is one other matter that is urged strongly upon you, and that is that it would have been a losing matter with the defendant if he had used sugar instead of honey. The defendant's counsel contends that he would have lost money if he had mixed sugar and honey together, and that it paid him, it was a matter of profit to him to mix the honeys which he claimed he mixed. You can make the calculation yourselves. The honeys which he claimed he mixed were Cuban and buckwheat. He says he mixed 20 percent of buckwheat at 7½ cents. At 7½ cents, 20 pounds of buckwheat would be worth $1.50. Eighty pounds of Cuban honey at 4½ cents would be $3.60. One hundred pounds of that mixture would be $5.10. Now, if you substitute sugar and water for that mixture at the rate of 6½ cents for sugar and nothing for the water, and that mixture is mixed together at the proportion of 3 to 7. you will find 100 pounds of that stuff, of that mixture, will cost $4.55. So that 100 pounds of the sugar and water mixture would cost $4.55, and 100 pounds of the buckwheat and Cuban mixture would cost $5.10. Now, you can very readily say whether it would be profitable or unprofitable to substitute stuff costing $4.55 for stuff costing $5.10, if that calculation is correct. But you can make it. It is a very material matter as to whether it was profitable or unprofitable. We cannot see any motive for this defendant adulterating with a more expensive article when it is going to injure him, but there would be some reason for him adulterating with a less expensive article, and especially so if there are other reasons for the combinations and the mixture. But that has only a significance as to whether or not a man had a motive. That goes to the motive. It is not any proof as to whether he did or did not adulterate. It simply goes to the motive.

The evidence upon which you will have to rely to ascertain whether it was pure or adulterated, and if adulterated, misbranded, is the evidence adduced upon the stand by the experts for the Government, and by the experts and the defendant for the defendant,

Gentlemen of the jury, you will now retire. I will be here until 6 o'clock. If you come to an agreement by that time I will receive the verdict.

Mr. PRICHARD. I except to that part of the charge which relates to the comparison of the cost of sugar and water with the comparison of the cost of the mixed honeys, because there is absolutely no evidence or charge by the Government that sugar and water could be sold or was sold by the defendant. The charge was that the invert sugar was added to the honey, and the evidence was that it could only be added to buckwheat honey, 20 percent, as a substitute for Cuban honey. So that the comparison should have been between $4.50, which he paid for the Cuban honey, and $5.10, which the sugar and water would have cost him if he had added it.

The COURT. I do not recollect any evidence to the effect that it would not have been entirely feasible to substitute the water and sugar converted into invert sugar by the addition of one-tenth of

1 percent of tartaric acid to a mixture of 20 percent of buckwheat honey and 80 percent of Cuban honey. I know of no evidence, I say, which would indicate that that substitution for one could not have been made for the other. He could have made that mixture, then substituted as much percent of the other mixture as he saw fit, so far as the evidence goes.

Mr. PRICHARD. Your Honor will give me an exception to that?

The COURT. Yes; you may have an exception.

(Exception noted for defendant, as requested, by direction of the court.)

Mr. PRICHARD. I also except to the charge where the court said that it is possible for expert testimony to determine with certainty that invert sugar was added to this substance.

(Exception noted for defendant, as requested, by order of the court.)

Mr. PRICHARD. I also except to the charge of the court where the court said that they might find that this was adulterated, if any substance was added, without confining the jury to the one substance which was specified in the statement.

(Exception noted for defendant, as requested, by direction of the court.)

Mr. PRICHARD. I also except to as much of the charge as says that the question turns entirely upon the testimony of experts without emphasizing or alluding to and giving importance to the testimony of the defendant himself and of the witnesses whom he called to corroborate him.

(Exception noted for defendant, as requested, by direction of the court.)

Mr. PRICHARD. I also except to so much of the charge that the Government experts testified that every test corroborated their opinion.

(Exception noted for defendant, as requested, by direction of the court.)

Mr. PRICHARD. I also except to the charge generally on the ground that it dwelt unduly upon the arguments for the Government without giving equal prominence to the arguments for the defendant.

(Exception noted for defendant, as requested, by direction of the court.)

Mr. PRICHARD. I also except to the charge where the court said that the evidence was that the only acid used in the preparation of commercial invert sugar was tartaric acid.

(Exception noted for defendant, as requested, by direction of the court.)

Mr. PRICHARD. I also except to that part of the charge of the court which says that this is a contest for pure food, for the protection of the individual citizen.

(Exception noted for defendant, as requested, by direction of the court.)

Mr. PRICHARD. I also except to that part of the charge of the court which says that if the defendant is injured by the testimony as to the tartaric-acid test being introduced, when defendant had no chance to reply to it, he will be entitled to protection.

(Exception noted for defendant, as requested, by direction of the court.)

Mr. PRICHARD. I also except to that part of the charge of the court which says that the defendant testified that koshering was the straining, but when recalled testified that the whole process was the koshering, and whether the boiling was for the purpose of koshering, is not very clear.

(Exception noted for defendant, as requested, by direction of the court.)

Mr. PRICHARD. I also except to that part of the charge of the court which says that Dr. Deghuee testified that in all his tests he found a suspicion, with the exception of the polariscopic test, and that Cuban and buckwheat honey contained 0.07 ash.

(Exception noted for defendant, as requested, by direction of the court.)

The COURT. Gentlemen of the jury, you may now retire.

UNITED STATES v. FIVE CASES OF HURDLE BRAND HOLLAND GIN

(Supreme Court, District of Columbia, Dec. 1, 1913)

N.J. No. 3397; 41 Washington Law Reporter, 783

Libel under section 10 of the Food and Drugs Act. Hearing on libel and answer. Libel dismissed.

GOULD, *Judge*. The questions involved in this case are raised by a libel filed by the United States under the act of Congress of June 30, 1906, commonly known as the Food and Drugs Act, in which it is sought to condemn five cases, containing twelve bottles each of a liquid called gin, on the ground that the same are misbranded. The misbranding is charged to consist in labeling the liquid in such manner as to deceive a purchaser into the belief that it is a foreign product distilled in Holland, in the Kingdom of the Netherlands, whereas it was, in fact, distilled at Warehouse Point, in the State of Connecticut. The claimants are A. E. Beitzel, in whose possession the gin was found, and the Baird Daniels Company, which distilled it. The label, a facsimile of which contains the alleged misbranding, appears in the libel.

Section 8 of the Food and Drugs Act provides as follows:

SEC. 8. That the term "misbranded," as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article or the ingredients of substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

* * * * * * *

In the case of food:

First. If it be an imitation of or offered for sale under the distinctive name of another article.

Second. If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so.

* * * * * * *

Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular.

On January 31, 1908, the department promulgated what is designated as regulation 19, which deals with the questions raised by the instant case. It reads as follows:

(b) The use of a geographical name shall not be permitted in connection with a food or drug product not manufactured or produced in that place when such name indicates that the article was manufactured or produced in that place.

(c) The use of a geographical name in connection with a food or drug product will not be deemed a misbranding when by reason of long usage it has come to represent a generic term and is used to indicate a style, type, or brand; but in all such cases the State or Territory where any such article is manufactured or produced shall be stated upon the principal label.

(d) A foreign name which is recognized as distinctive of a product of a foreign country shall not be used upon an article of domestic origin except as an indication of the type or style of quality or manufacture, and then only when so qualified that it can not be offered for sale under the name of a foreign article.

Two questions are thus presented for decision:

First. Has the word "Holland", by reason of long usage, come to represent a generic term as applied to gin?

Second. Does the label fairly state the State or Territory where the article in question is manufactured?

If the word "Holland", a geographical name, when used in connection with gin has acquired a generic meaning as indicating a particular style, type, or brand of gin, and if the place of manufacture is fairly stated upon the label, the claimant, the Baird Daniels Company, would appear to have complied with the law. Probably the larger question, suggested by the terms of the statute itself, is also involved, viz., whether the label is such as to deceive or mislead a purchaser or purports to be upon a foreign product when not so. For, as Attorney General Wickersham once said, one of the main purposes of the Pure Food Law is to prevent deception being practiced on the public.

First. The testimony for both the libelant and claimant leaves no room for doubt that Holland gin is essentially a distinct type or kind of gin, differing from either a dry gin or a sloe gin. The experts, having practical knowledge of the methods used in producing each kind, state that the Holland gin is an alcoholic beverage made from small grains, specifically rye, barley, and barley malt, and that, in the distilling, the essential oils of the grain are retained and the fusel oils eliminated, thus giving the liquor its peculiar flavor and rendering it a "Holland" gin, with or without the addition of juniper berries. In a dry gin, on the other hand, the essential oils are entirely eliminated and the pure neutral spirit is distilled from a variety of flavoring materials, one of which is usually juniper berries. The evidence clearly establishes the distinct characters and qualities of the two kinds of gin, the first known as Holland gin and the second as English or dry gin.

It may be observed, although not especially significant, that while Holland gin received its name from the fact that it was distilled in Holland, the evidence shows that the elements are not grown or produced in Holland. The grain is obtained by Holland distillers from Russia, Austria, and the United States, and the juniper berries from Italy or Germany.

The evidence also establishes the fact that gin, having the genuine characteristics of Holland gin, has been manufactured in this country for at least 18 years.

The standard dictionaries and encyclopedias, to which it is permitted to resort as authoritative sources for information in such cases (*United States* v. *Corno Feed*, 188 Fed. 453), make clear the distinctive character of Holland gin. The Century Dictionary and Cyclopedia, volume 3, page 2516, under the word "gin", says:

> Gin. Abbreviation of Geneva, or rather of the older form genever * * * see geneva juniper. An aromatic spirit prepared from rye or other grain and flavored with juniper berries. The two important varieties of gin are Dutch gin, also called Holland and Schiedam, and English gin, known often by the name "Old Tom." Holland gin is almost free from sweetness and is generally purer than English.

In the eleventh edition of the Encyclopedia Brittanica, vol. 12, p. 26, after defining the word "gin" as "an aromatized or compounded potable spirit, the characteristic flavor of which is derived from the juniper berry," and stating that the word is an abbreviation of geneva, both being primarily derived from the French genievre (juniper), says:

> There are two distinct types of gin, namely, the Dutch geneva or Holland and British gin. Each of these types exists in the shape of numerous subvarieties. Broadly speaking, British gin is prepared with a highly rectified spirit, whereas in the manufacture of Dutch gin a preliminary rectification is not an integral part of the process. The old-fashioned Hollands is prepared much after the following fashion: The mash, consisting of about one-third of malted barley or bere and two-thirds rye meal, is prepared and infused at somewhat high temperature. After cooling the whole is set to ferment with a small quantity of yeast. After two or three days the attenuation is complete, and the wash so obtained is distilled, and the resulting distillate (the low wines) is redistilled, with the addition of the flavoring matter (juniper berries, etc.) and a little salt. Originally the juniper berries were ground with the malt, but this practice no longer obtains, but some distillers, it is believed, still mix the juniper berries with the wort and subject the whole to fermentation. When the redistillation over juniper is repeated the product is termed double (geneva, etc.).

The testimony on behalf of the libelant fully recognized the distinctive character of Holland gin.

It is considered, therefore, that the term "Holland" in connection with the word gin is a geographical name which has become generic by reason of language, and represents a style, type, or brand.

Second. The second question above suggested is answered by the label itself. In letters sufficiently large and plain to repel any suggestion that they are deceptive in fact or in intent it is stated:

"Distilled by Baird Daniels Co., Warehouse Point, Conn."

The conclusion, therefore, is that the claimant has complied with the statute and regulations in respect to branding its product.

It was contended on behalf of the libelant that, admitting that "Holland" as applied to a gin has come to be a generic term, and admitting further that the label fairly states the place where the article is manufactured, yet the claimant should qualify his label by adding the word "Domestic" type, style, or process, in juxtaposition to the words "Holland Gin." Two answers to this contention suggest themselves: First, If "Holland" has become generic, and if the gin distilled by the claimant contains exactly the same ingredients and is made by the same process, and is, in essence, the same

identical thing as gin distilled in Holland, then it is "Holland" gin and not Holland "type", "style", or "process." In other words, it is entitled to be called what it is. Second. On the broader question as to whether the label as used is liable to deceive a purchaser into believing he is buying an imported article, it is rather difficult to understand how a customer who would fail to observe the words "Distilled by Baird Daniels Co., Warehouse Point, Conn." plainly printed on the label, would be more liable to notice the word "style", or "type", or other similar word, used in connection with the words "Holland gin."

There is also a charge of misbrading in the marking of the wooden crates or cases in which the bottles were transported, the words "Warehouse Point, Conn." being omitted. This is stated by the claimant to be an oversight, which will be remedied. The consumer, however, does not see the crates and is not, therefore, liable to be deceived by words or the omission of words thereon.

On the whole case the order will be that the libel be dismissed. The findings of fact will be made in accordance with this opinion.

UNITED STATES v. ANTIKAMNIA CHEMICAL COMPANY

(Supreme Court of the United States, Jan. 5, 1914)

231 U.S. 654

Error to and appeal from the Court of Appeals of the District of Columbia. Judgment reversed.[73]

Mr. Justice McKenna delivered the opinion of the Court.

Libel for the seizure and condemnation of certain drugs under the provisions of the act of Congress of June 30, 1906, commonly known as the Food and Drugs Act, ch. 3915, 34 Stat. 768.

The libel alleges that the drugs are in the possession and custody of The Wholesale Drug Exchange, a body corporate, at a numbered place in the city of Washington.

The drugs, it is alleged, are intended to be used for the cure and mitigation and prevention of diseases of man. They are described as follows:

Twenty packages, more or less, of said drug, labeled and branded as follows: "Antikamnia Tablets, Contain 305 grains of acetphenetidin, U. S. P. per ounce. Guaranteed by the Antikamnia Chemical Company, under the Food and Drugs Act, June 30, 1906, U. S. Serial Number 10. The Antikamnia tablets in this original ounce package contain no acetanilid, antifebrin, antipyrin, morphine, opium, codein, heroin, cocaine, alpha or beta eucaine, arsenic, strychnine, chloroform, cannabis indica, or chloral hydrate, Antikamnia tablets five grains. One ounce Antikamnia Tablets. Manufactured in the United States of America by the Antikamnia Chemical Co., St. Louis, U. S. A."

Also seventy other packages, more or less, of said drug, labeled and branded as follows: "Antikamnia and Codein Tablets. Contain 296 grains acetphenetidin, U. S. P. per ounce. Contains 18 grains sulp. codein per ounce. Guaranteed by the Antikamnia Chemical Company, under the Food and Drugs Act, June 30, 1906. U. S. Serial Number 10. The Antikamnia and Codein tablets in this original ounce package contain no acetanilid, antifebrin, antipyrin, morphine, opium, heroin, cocaine, alpha or beta eucaine, arsenic, strychnine, chloro-

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[73] Reversing *United States v. Antikamnia Chemical Co.*, p. 260, *ante*. For the case in the lower court, *United States* v. *100 Packages of Antikamnia Tablets*, see p. 178, *ante*.

form, cannabis indica, or chloral hydrate. One ounce Antikamnia and Codein Tablets. Manufactured in the United States of America by the Antikamnia Chemical Co., St. Louis, U. S. A."

Also ten other packages, more or less, of said drug, labeled and branded as follows: "Antikamnia and Quinine Tablets. Contain 165 grains of acetphenetidin, U. S. P. per ounce. Guaranteed by the Antikamnia Chemical Company under the Food and Drugs Act, June 30, 1906. U. S. Serial Number 10. The Antikamnia and Quinine Tablets in this original ounce package contain no acetanilid, antifebrin, antipyrin, morphine, opium, codein, heroin, cocaine, alpha or beta eucaine, arsenic, strychnine, chloroform, cannabis indica or chloral hydrate. One ounce Antikamnia and Quinine Tablets. Manufactured in the United States of America by the Antikamnia Chemical Co., St. Louis, U. S. A."

The ground of confiscation and condemnation alleged is that all of the packages of the drugs contain a large quantity and proportion of acetphenetidin, which, it is alleged, is a derivative of acetanilid, and that under the provisions of the act of Congress and of the regulations lawfully made thereunder it is provided and required that the label on each of the packages shall bear a statement that the acetphenetidin contained therein is a derivative of acetanilid; and yet, it is alleged that each and all of the packages fail to comply with such provisions.

It is also alleged that the packages are further misbranded, in that the labels thereon are false and misleading, for the reason that each and all of them bear the statement that no acetanilid is contained therein, and that the statement imports and signifies that there is no quantity of any derivative of acetanilid contained in the drug.

A warrant of arrest was issued upon which the marshal duly made return that he had arrested 20 packages of Antikamnia tablets, 10 packages of Antikamnia quinine tablets, and 63 packages labeled "Antikamnia and Codein Tablets", and otherwise duly executed the warrant.

The Antikamnia Chemical Company, appellee and defendant in error, alleging itself to be the owner of the drugs, petitioned to be made a defendant in the libel. The petition was granted, and the company thereupon filed the exceptions to the libel. The exceptions negative in detail the charges of the libel and assert conformity in the labeling of the packages to the act of Congress of June 30, 1906, quoting its eighth section as follows: "* * * or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilid, or any derivative or preparation of any such substances contained therein." And it is averred that the act does not provide that there should be added to any derivative of any of the substances contained therein the name of the parent substance, and the act cannot be added to or enlarged by requiring the company to add to the name of a known article, the fact that the article is a derivative of any of the substances mentioned in the act. It is averred, therefore, that the packages are not misbranded and that the statement on the labels that no acetanilid is contained therein is in no way false or misleading because the libel does not allege that there is acetanilid in the packages, and, therefore, the statement instead of being false and misleading is, according to the allegations of the libel, true.

The exceptions were sustained and the libel dismissed.

It was stipulated that Food Inspection Decision No. 112, issued January 27, 1910, by the United States Department of Agriculture

was considered by the court upon the hearing of the cause and should be included in and be considered part of the record on appeal.

The decision quotes section 8 of the act, states that the Attorney General, in an opinion rendered January 15, 1909, held that a derivative is a substance so related to one of the specified substances "that it would be rightly regarded by recognized authorities in chemistry as obtained from the latter 'by actual or theoretical substitution,' and it is not indispensable that it should be actually produced therefrom as a matter of fact;" further that the labeling of derivatives, as prescribed by section 8, is a proper subject conferred upon the department by section 3, and that a rule or regulation requiring the name of the specified substance to follow that of the derivative would be in harmony with the general purpose of the act, and an appropriate method by which to give effect to its provisions.

In conformity to this opinion, Regulation 28 of the Rules and Regulations for the enforcement of the Food and Drugs Act was amended as follows:

* * * Acetanilide (antifebrine, phenylacetamide). Derivatives—Acetphenetidine, * * * (g) In declaring the quantity or proportion of any of the specified substances the names by which they are designated in the act shall be used, and in declaring the quantity or proportion of the derivatives of any of the specified substances, in addition to the trade names of the derivative, the name of the specified substance shall also be stated, so as to indicate clearly that the product is a derivative of the particular specified substance.

The decree of the Supreme Court of the District dismissing the libel was affirmed by the Court of Appeals.

The case is not in very broad compass, though the arguments of counsel are somewhat elaborate. The libel is prosecuted for the condemnation of 100 packages of Antikamnia tablets as being misbranded in violation of the Food and Drugs Act of June 30, 1906, ch. 3915, 34 Stat. 768. The tablets contain acetphenetidin and the labels so state, and the proportion of the substance. It is a derivative of acetanilid, but the labels do not so state but do state that the tablets contain no acetanilid. And these omissions, it is contended by the Government, constitute a violation of the statute and of Regulation No. 28 as amended. The chemical company contends that the first statement is not required by the law and that the second statement is true, and therefore cannot be false or misleading.

Preceding the discussion of these contentions a question of jurisdiction is presented by the chemical company and a motion to dismiss is made on the ground that only the construction of the statute is involved in the decision of the court below. The company also moves for an affirmance of the judgment on the ground that the appeal is frivolous. *Contra* the Government contends that the Court of Appeals held invalid the regulation requiring the name of the primary substance as well as that of the derivative to be stated on the label; and that there is not only drawn in question, but so far denied, an authority exercised under the United States. We concur in this view. The validity of the regulation was and is denied. Its validity may, indeed, rest on the statute, but so did the validity of the rule of the Patent Office passed on in *Steinmetz* v. *Allen*, 192 U.S. 543. We there said (p. 556) of a rule of practice established by the Commissioner of Patents under a section of the Revised Statutes, "It thereby became a rule of procedure and constituted, in part, the powers of the primary examiner

and Commissioner. In other words, it became an authority of those officers, and, necessarily, an authority 'under the United States.' Its validity was and is assailed by the plaintiff in error. We think, therefore, we have jurisdiction, and the motion to dismiss is denied." *United States ex rel. Taylor* v. *Taft, Secretary of War*, 203 U.S. 461, is not in antagonism to this ruling. In that case the realtor was dismissed from the public service by an order of the Secretary of War as representative of the President. She sought restoration by mandamus. It was denied and she brought the case to this court on the ground that the validity of an authority exercised under the United States was drawn in question. Dismissing the case, this court said that as she did not question the authority of the President or his representative to dismiss her but contended only that certain rules and regulations of the civil service had not been observed, the validity of an authority exercised under the United States was not drawn in question but only the construction and application of regulation of the exercise of such authority. On page 465 it was said *Steinmetz* v. *Allen* was not to the contrary, " for there the validity of a rule constituting the authority of certain officers in the Patent Office was drawn in question."

Motion to dismiss is denied.

Joined with the motion to dismiss, we have seen, was a motion to affirm on the ground that the question of the authority of the Secretaries to make the regulation is frivolous in view of the decisions in *United States* v. *Grimaud*, 220 U.S. 506; *Williamson* v. *United States*, 207 U.S. 425, and other cases. How far this contention is tenable will be developed as we proceed with the consideration of the act and power of the Secretaries under it.

The purpose of the act is to secure the purity of food and drugs and to inform purchasers of what they are buying. Its provisions are directed to that purpose and must be construed to effect it.

Section 3 gives the Secretary of the Treasury, the Secretary of Agriculture and the Secretary of Commerce and Labor, power to " make uniform rules and regulations for carrying out the provisions " of the act and the power to collect specimens of foods and drugs offered in interstate and foreign commerce. It adopts the definitions of the United States Pharmacopœia or National Formulary and provides (sec. 8) that the term " misbranded " as used in the act " shall apply to all drugs * * * the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular." And, further, in case of drugs an article shall be deemed to be misbranded " if the package fail to bear a statement on the label of the quantity or proportion " of certain enumerated substances " or acetanilid, or any derivative or preparation of any such substances contained therein."

These are the applicatory provisions. How are they to be construed?

First, as to the power of the Secretaries. It is undoubtedly one of regulation only—an administrative power only—not a power to alter or add to the act. The extent of the power, however, must be determined by the purpose of the act and the difficulties its execution might encounter. The fact that a council of three Secretaries of governmental departments was given power to make the rules and

regulations for the execution of the law shows how complex the matters dealt with were considered to be, and the care that was necessary to be taken to guard against their defeat or perversion. The composition of drugs is a matter of technical skill, their denomination often by words of scholastic origin, conveying no meaning to the uninformed, their uses and abuses learned only by experience, beneficial or evil. It was this experience that the law sought to avail itself of and to avail itself against the ever increasing powers of the laboratory or the disguises of a technical nomenclature. Hence the provision of the law that the term "drug" as used in the act shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use, and hence also the provision that a drug or food product is misbranded in case it fails to bear a statement on the label of the quantity or proportion of certain enumerated substances, including acetanilid, "or any derivative or preparation of any such substance contained therein." Experience had demonstrated the quality of those substances, their effects had become common knowledge; their names, therefore, were all the warning it was necessary for the law to give. But derivatives of them might, probably would, be of their quality, so derivatives of them were to be guarded against, and the law hence further provided that the labels on them should state the "quantity or proportion" of "any derivative or preparation" of them. This much is clear—there is no obscurity in the words and purpose of the law. The query then occurs, such being the words and purpose, if the quantity or proportion of the substances or any derivative or preparation of them must be stated, is it administrative of the law or additive to it to require by regulation that not only the name of the derivative or preparation be stated but from what substance derived or of what it is a preparation? It certainly cannot be said that the purpose of the law is not exactly fulfilled by the regulation. If it fulfills the purpose of the law it cannot be said to be an addition to the law, unless, indeed, it can be contended that the law provided a means for its defeat by the easy device of mysterious names. There is illustration in the present case. What information does the use of the word "acetphenetidin" convey to anybody of its good or evil origin. If it be said, that the like question may be asked of any of the primary substances, we reply that they are the precautions of the law and adopted as such because they had demonstrated themselves, the value of their use, the detriment of their abuse, and it was believed that their names would carry no deception.

But let us turn from the power of the Secretaries to the law itself and inquire if it needs the assistance of a regulation. It is the contention of the Government that it does not, that its requirement that the primary substances should be labeled and that their derivatives should be labeled means, necessarily, that it should be stated of what they are the derivatives to make the warning of the labels complete. A great deal of what we have said in discussing the power of the Secretaries applies to this contention and supports it. The purpose of the law is the ever insistent consideration in its interpretation. The purpose is to prevent the surreptitious sale of certain noxious drugs or their derivatives, the latter supposedly partaking of the quality of parent article and as effective of evil consequences. This

being the purpose, did the law leave it unexecuted? We cannot attribute to it such defect, and a serious defect it might be. Nor can we consider as a case of omission that which involves so definitely the mischief which was intended to be redressed and which is fairly within the language of the law. And we say this without regard to the various illustrations contained in the Government's brief of the deceptions which can be practiced by using the name of the derivative alone, for the chemical company insists that we may not, in the absence of allegations and proof, look for knowledge in the encyclopedias, or medical lexicons or to trade practices for trade disguises, actual or possible. It is not necessary to enter upon the challenged ground. The law furnishes its own tests of what the labels should reveal, and we may grant, for the argument's sake, as contended, that it has penal character; but this does not mean that it should not be given its reasonable intendment. There is no hardship in this either to the manufacturer or the seller of drugs. They surely know what they make or vend—know whether it is primary or of what a derivative—and the law requires only that they put their knowledge on the labels for the information of purchasers. No serious burden is thereby imposed on honest business. Indeed, it makes the label on the packages an assurance as well as a warning and benefits all concerned, manufacturer, seller, and purchaser. And this in the interest of the public health.

Decree reversed and cause remanded with direction to reverse the decree of the Supreme Court and remand the cause with direction to overrule the exceptions to the libel.

UNITED STATES v. 150 CASES OF FRUIT PUDDINE

(District Court, D. Massachusetts, Jan. 17, 1914)

211 Fed. 360; N.J. No. 3329

Libel under section 10 of the Food and Drugs Act. Trial before the court. Decree in favor of the United States.

MORTON, *District Judge.* This is a proceeding under the Food and Drugs Act, by information (or libel) against 150 cases of a food product called "Puddine" or "Fruit Puddine." A jury having been waived by both parties, the case was tried before me upon fact and law. I find the material facts, in addition to those alleged in the information and admitted in the answer, to be as follows:

"Puddine" or "Fruit Puddine" is the distinctive name, adopted and used as early as 1889, of a proprietary food product consisting largely of cornstarch. It is manufactured by the claimant and is put up in packages or cartons of different flavors, adapted to the retail trade. It does not contain any deleterious or poisonous ingredient. It is not an imitation of, or offered for sale under the distinctive name of, any other article; and the name "Puddine" or "Fruit Puddine" is accompanied on the same label or carton with a true statement of the place where it has been manufactured.

The alleged misbrandings lies in the words "Cream Vanilla", "Rose Vanilla", and "Fruit Flavored", which appear upon the

cartons. "Cream Vanilla" and "Rose Vanilla" are two of the many flavors in which Puddine is manufactured. All the cartons in question appear to have been marked "Fruit Flavored Puddine", to which is added on some cartons "Cream Vanilla", and on others "Rose Vanilla", according to the flavor of the Puddine therein.

The plaintiff contends that branding any article of food with the word "Vanilla", alone or in combination with other words, is a representation that it is flavored with vegetable extract of vanilla made from the vanilla bean; that the word "Cream" prefixed to the word "Vanilla" means the best or highest grade of vanilla; that the words "Cream Vanilla" on the claimant's cartons mean "flavored with the highest grade of vegetable extract of vanilla"; that the word "Rose" prefixed to the word "Vanilla" means a combination of the vegetable flavors of rose and vanilla; that the words "Rose Vanilla" on the claimant's cartons mean "flavored with the vegetable extracts of rose and of vanilla"; and that the words "Fruit Flavored" mean flavored with fruits (commonly so called), capable of being used as flavoring substances.

The contention of the claimants, who are the manufacturers of the product, is that "Puddine" and "Fruit Puddine" are artificial words, adopted as the name of their product, and constitute a distinctive name for the article within section 8, subsection 4 (1), of the act in question; that "Cream Vanilla" and "Rose Vanilla" are also artificial words, adopted by them to indicate the taste and appearance of their product, and import nothing as to the origin of the taste; that they are not false or misleading; and that the term "Fruit" or "Fruit Flavored", while adopted as an arbitrary or artificial part of the name, is in fact true, because the grain out of which the product is manufactured is, botanically speaking, a fruit.

The words in question are to be construed in their ordinary or customary meaning so far as they have one. *United States* v. *75 Boxes of Pepper* (D.C.), 198 Fed. 934; *United States* v. *30 Cases of Grenadine* (D.C.), 199 Fed. 932; *Brina* v. *United States*, 105 C.C.A. 558, 179 Fed. 373.

The distinctive or trade name of the product is "Puddine", or "Fruit Puddine", always accompanied on the cartons by words indicating the flavor. "Puddine" and "Fruit Puddine" are frequently used without the adjective "Fruit Flavored", which is not part of the name. It seems clear that "Fruit Flavored" does signify, as the plaintiff contends, that the article is flavored with "fruit" in the common, not the botanical meaning of the word. As no such fruit is used in "Puddine", the words "Fruit Flavored" are untrue and misleading as applied to it; and the misleading effect of them is heightened by the picture of a dish of fruit which appears on some of the cartons. If Puddine were not an article of food known under its own distinctive name, it would clearly be "misbranded" with the act by reason of the words "Fruit Flavored" upon the cartons.

The claimant contends, however, that articles of food which come within the terms of the provisio to the fourth subsection of section 8 are exempt from the operation of the Food and Drugs Act, and are not to be deemed misbranded, no matter what misstatements are made upon the cartons. The plaintiff contends: (1) That the first

paragraph of section 8 prohibits all misbranding as therein defined, and is not limited by the provisio in question; and (2) that, even if the provisio does apply, it is not the intent of it to except from the operation of the act anything except the distinctive name itself; that even if, as to articles of food which come within the proviso, misstatements which form part of the name itself are not forbidden, it is nevertheless true that any other false or misleading statements regarding the ingredients or substances contained in such articles constitute misbranding.

It has been said that the sole purpose of this statue "was: (1) To protect purchasers from injurious deceits by the sale of inferior for superior articles, and (2) to protect the health of the people by preventing the sale of normally wholesome articles, to which have been added substances poisonous or detrimental to health." Sanborn, *J.*, *Hall-Baker Co.* v. *United States*, 198 Fed. 614 616, 117 C.C.A. 318 (C.C.A., 8th Circuit). In other words, deception and unwholesomeness are the evils which the act is designed to prevent. The last part of section 8, providing that "manufacturers of proprietary foods which contain no unwholesome added ingredients" shall not be required "to disclose their trade formulas, except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding", plainly implies that a proprietary product may be misbranded. The report of the committee (House of Representatives, 59th Cong., 1st sess., Report No. 2118, Mar. 7, 1906), and the debates, so far as they refer to the proviso in question, indicate that the attention of Congress was directed to protecting thereby established distinctive or trade names from being outlawed by the act.[74]

In *United States* v. *40 Barrels of Coca-Cola* (D.C.), 191 Fed. 431, 440, it was held that the proviso in question "was only intended to protect an article sold under its distinctive name from the charge of misbranding insofar as any statement or suggestion contained in the name itself is concerned." See, too, *United States* v. *American Chicle Co.*, U.S.Dist. Court, District of Oregon (no opinion filed).

It is undoubtedly true that persons purchasing a proprietary article of food, like Puddine, get what they go for, whether all the state-

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[74] The legislative history of this act is as follows: The bill which, after amendment, became the Food and Drugs Act of June 30, 1906, was Senate Bill No. 88, 59th Cong., 1st sess. It is printed in full in the Congressional Record for that session at p. 897. It was reported favorably to the Senate Dec. 14, 1905 (Senate Reports vol. 1, no. 8, 59th Cong., 1st sess), passed by the Senate Feb. 21, 1906 (Cong. Rec., 59th Cong., 1st sess., p. 2773), and was introduced in the House of Representatives the next day (p. 2853), and there referred to the Committee on Interstate and Foreign Commerce. The committee's report is found in House Reports, 59th Cong., 1st sess., vol. 1, Report No. 2118. The committee of the House recommended amendment to the Senate bill by substituting for it the Hepburn pure food bill (H.R. 4527, reported to the House Jan. 18, 1904, and passed by the House) as amended by the committee. The bill was passed by the House, with amendments, June 23, 1906 (Rec., pp. 9076, 9353), and sent back to the Senate, which refused to concur. Conference committees filed identical reports June 27, 1906, setting out in full the bill as agreed upon and recommending that it pass (House Reports, vol. 3, no. 5056; Senate Docs., vol. 8, Doc. 521; Cong. Rec., pp. 9353, 9379, 9381). The second conference report making certain minor improvements in secs. 1 and 2 of the bill, was filed June 29, 1906, giving the bill as finally enacted (House Reports, vol. 3, no. 5096). The bill was then passed and signed June 30, 1906.

As to the distinctive name proviso:

The subject matter of this proviso appeared in the original Senate bill, and the proviso as finally passed first appears in substance in the bill as amended by the House committee, where it is numbered par. 4 of sec. 7. There appears to have been no discussion at all of the "Distinctive Name" proviso in the debates in the Senate, and the only allusion to it in the debates in the House is found under the date of June 23, 1906 (Cong. Rec., 59th Cong., 1st sess., p. 9068).

ments on the carton are correct or not. But it is also true that the purchase of a proprietary article may well be induced by false statements concerning it upon the cartons; and it is not difficult to imagine cases in which reliance on such misstatements would work real injury to the purchaser. For example, if such an article were branded "Contains no sugar", when in fact it did, the misbranding might induce the purchase by persons whose diet demanded absence of sugar. Such articles are within the purview of the statute. It does not seem to me that the proviso in question was intended to except them absolutely from the provisions of the act and to leave the manufacturers free to make misrepresentations concerning them. Such a construction is out of harmony with all the rest of the statute and disregards one of the principal purposes of it. It seems to me that the protection afforded by the proviso is limited to the distinctive name; and, as so limited, I have no doubt that the proviso applies to the first paragraph of section 8 and fully protects distinctive names from being misbranding.

I therefore find and rule that the words "Fruit Flavored" upon the cartons containing Puddine were a statement regarding such article, or the ingredients or substances contained therein, which was false or misleading and constituted misbranding within the statute.

The conclusion above reached makes it unnecessary to consider whether the use of the words "Cream Vanilla" and "Rose Vanilla" constitutes misbranding; but I infer from what was said at the argument that this is a point upon which a decision is particularly desired by the parties. I therefore proceed to find the facts and state my conclusions in reference thereto.

No such extract, flavoring matter, or combination as "Rose Vanilla" is known to the trade, or to the public, except in connection with the defendant's products; nor any such extract or flavoring matter as "Cream Vanilla", except perhaps to a limited extent in the bottling trade, in which it is sometimes used to signify a high-grade vanilla extract; but such use is not known to the public generally and is wholly unrelated to the use by the claimant. "Cream Vanilla," as applied to the claimant's product, is certainly not understood by the public as meaning "flavored with a high-grade vanilla extract." The word "Rose", followed by "Vanilla", was registered by the claimant in the United States Patent Office as a trade mark applicable to "Puddine" on the 21st of May, 1889. Both "Rose Vanilla" and "Cream Vanilla" were in use by the claimant on Puddine before the Food and Drugs Act went into effect.

Puddine is not flavored with the vegetable extract of vanilla, but with vanillin, or synthetic vanilla, which is obtained from the oil of cloves. Natural vanillin is found in the vanilla bean and forms the characteristic and most important element in the vegetable extract of vanilla. It is what gives to vanilla extract its characteristic taste. Synthetic vanillin is one of the comparatively recent discoveries in organic chemistry, of which indigo and madder are other examples. It is exactly the same as the natural vanillin. The flavor produced by synthetic vanillin is as wholesome as that produced by the vegetable extract of vanilla and is substantially identical with it in taste, the difference, if any, being due to accidental substances in

the natural extract. As used by the claimant, "Cream Vanilla" is applied to cream-colored Puddine flavored with vanillin, and "Rose Vanilla" to exactly the same thing colored pink with a harmless dye, the difference being in color only.

When a proprietary product is sold in different flavors, I see no reason why there may not be a distinctive name of a particular flavor, nor any reason for denying to such a name the protection of the proviso. The very purpose of the proviso, as I construe it, was to save distinctive names, which might be of great value, and the use of which might otherwise have been forbidden. "The purpose of the law is the ever-insistent consideration in its interpretation." McKenna, *J.*, *United States* v. *Antikamnia Chemical Co.* (January 5, 1914), 231 U.S. 654, 34 Sup. Ct. 222, 58 L.Ed. —. I find and rule that "Cream Vanilla" and "Rose Vanilla", as used with "Puddine", are artificial and distinctive names adopted by the claimant, the use of which is not misbranding. It is unnecessary to decide whether the word "Vanilla", applied to food, amounts, as the plaintiff contends, to a representation that the taste thereof has been produced by the vegetable extract and not by the synthetic product.

Decree for plaintiff.

UNITED STATES v. 90 BOXES OF MACARONI

(District Court, D. of Connecticut, Jan. 31, 1914)

N.J. No. 3879

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict in favor of the United States.

The United States attorney filed a libel for the seizure and condemnation of 90 boxes of macaroni, alleging that the product had been shipped and transported from the State of New York into the State of Connecticut, and remained unsold in the original unbroken packages, and charging misbranding in violation of the Food and Drugs Act. The product was labeled, in part, "Macaroni, Gragnano Style, Savoy Brand."

Misbranding of the product was alleged in the libel for the reason that the labels were false and misleading, that is to say, said labels bore the words "Macaroni, Gragnano Style, Savoy Brand" "Guaranteed by the manufacturer under the Food and Drugs Act, June 30, 1906, Serial No. 35286," the word "Gragnano" being printed in flaring type, the words "Savoy Brand" being printed in large type, the word "Style" after the word "Gragnano" being printed in much less noticeable type than the word "Gragnano", and the words "Guaranteed by the manufacturer under the Food and Drugs Act, June 30, 1906, Serial No. 35286", being printed in much smaller type than the type used for printing the other words on the label; and said label also bore pictorial representation of a wheat field and three women reaping therein, with a bay and mountain in the distance, said pictorial representation being intended to be a representation of a foreign and Italian scene, and said label being in the general style and appearance of labels customarily used on boxes con-

taining macaroni produced in the district of Gragnano in Italy, said Gragnamo being famous for the production of the best macaroni; and said label being so printed as to deceive and mislead the purchaser into the belief that said macaroni was a foreign product, when as a matter of fact, it was an American product produced at Brooklyn, N.Y.; said macaroni was further misbranded in that the containers were branded "artificially colored" by means of a rubber stamp in so indistinct a manner as to be almost imperceptible although said macaroni was in fact so artificially colored as to resemble in color macaroni produced in Italy in said Gragnano district.

The case having come on for trial before the court and a jury, the following charge was delivered to the jury by the court:

THOMAS, *District Judge.* Gentlemen of the jury: On June 30, 1906, Congress passed a law familiarly known as the Pure Food Law, the operation of which has resulted in much good to the consuming public. Under this law among other things, provision is made for condemnation proceedings against any food product which the Government thinks is manufactured in violation of this law, and in this particular case the Government seeks to condemn 90 boxes of macaroni which are the subject of an interstate shipment, having been shipped from the claimant's factory in Brooklyn to one Frank Pepe in Waterbury, Conn. This action is in the nature of a civil process as distinguished from a criminal prosecution.

At the beginning of every judicial inquiry the law says that he who asserts the affirmative of any proposition of fact assumes the burden of proof; that is, he must prove what he says. Where claims are made upon the one side and denied upon the other, as here, the parties at issue upon the truth of those claims and the law places the burden of proving those claims upon the party who makes them. That burden is discharged by a fair preponderance of the evidence in favor of the party who bears it. If, on all the evidence presented to you on such disputed matters, there is a fair preponderance in favor of the party bearing the burden of proof, then you must find the facts as claimed by him to be true. If the evidence does not so preponderate then he has failed to satisfy you of the truth of his claims within the requirements of the law and your finding must so indicate. A fair preponderance of evidence is in civil cases, the standard measure of persuasion. Whether or not the proof has reached that measure you determine by weighing all the evidence in the case presented to you. The application of this rule, which I have just stated in this case, in this: From the material allegations set up in the libel filed by the Government which are denied in the answer filed by the claimant, the Government bears the burden of proof, i.e., it must prove such allegations by a fair preponderance of evidence and as to those material allegations set out by the claimant and alleged affirmatively in his answer and denied by the Government, the claimant, The Savarese Macaroni Co., bears the burden of proof, i.e., it must prove those allegations by a fair preponderance of evidence. In civil cases it is not necessary that the jury should be free from all reasonable doubt as to the proper conclusion to be drawn from the evidence. Every lawsuit seeks to accomplish a double purpose—first, to end a controversy; second, to end it justly; and in the administration of human action the first is almost as im-

portant as the last. It is enough, therefore, if your judgment rests not indeed on mere conjecture, but on a probability strong enough to induce a reasonable belief in an impartial mind.

It is true that the jury is a tribunal which is regarded by the law as one especially fitted to decide controverted questions of fact upon the evidence. The jury decides how much credibility is to be given to each witness, what weight justly belongs to the evidence, and between the statements of hostile and contradictory witnesses, where the truth lies.

A juror must use all his experience, his knowledge of human nature, his knowledge of human events, past and present, his knowledge of the motives which influence and control human action, and test the evidence in the case according to such knowledge and render his verdict accordingly; the juror who does not do this is remiss in his duty. It is properly within your province in listening to the testimony of witnesses to observe their demeanor on the witness stand, their manner and bearing, their intelligence, character, and means of knowledge, and to take into consideration any interest or bias any witness may have or entertain, and reconcile so far as possible any conflicting evidence. As that rule is important in this case I may state it another way. In weighing the evidence and determining the credibility of the witnesses and each of them, I think you should look to the manner and demeanor of each witness in testifying, to the readiness and willingness or tardiness or unwillingness, if any, in answering on the one side or the other; to interest or want of interest, if any, upon the one side or the other; as to whether the witnesses or any of them have any bias or interest, or not.

Second. The witnesses' means of knowledge and opportunity for knowing the facts he testified to and professes to know and understand. To the reasonableness or unreasonableness, the probability or improbability of the circumstances related by the witnesses when considered in connection with all the facts and circumstances in evidence before you and having thus carefully considered all of these matters, the jury must fix the weight and the value of the testimony of each and every witness and the evidence as a whole, and are not compelled to accept as true any statement made by any witness unless you find such statement to be true after considering the same in connection with all of the facts and circumstances in evidence before you, reconciling, as far as possible, any conflicting evidence.

Now, before we come to the questions particularly involved in this case I ought to and do remind and charge you that you and you alone are the sole judges of all questions of fact which arise here, and you are to determine those questions upon a careful consideration of all the evidence before you without direction or suggestion from the court as to what weight or value you should give to all or any part of the testimony, nor are you in any way to be governed in your conclusions by any opinion the court may seem to give you. The jury's first concern, where the parties are in flat conflict as to the essential facts and where the evidence is contradictory, is naturally to determine what the real facts are. You are to be guided in the performance of that duty by the court, only in following the law which the court gives you, so that while you are in every essential sense the sole judges of the facts, you are answerable to the court

for the application of the law to the facts as you find them; and you must receive from the court and apply to the case such instructions upon the law applicable to the questions arising here as shall guide your deliberations toward a verdict in harmony with the law's requirements.

In considering this case and in drawing your conclusions you will necessarily be guided to some extent by the testimony of expert witnesses. I therefore deem it necessary to instruct you with reference to the evidence of such witnesses. An expert witness is one who is skilled in any particular art, trade, or profession, being possessed of peculiar knowledge concerning the same, acquired by study, observation, and practice. The jury is not bound by expert testimony, but such testimony should be considered by you in connection with the other evidence in the case. Their evidence is subject to your consideration and to your supervision and to your judgment. Such testimony is to be taken and treated by you like the evidence of other witnesses and their testimony, their opinions are subject to the same rules of credit or discredit as the testimony of other witnesses and are not necessarily conclusive with the jury. Whether the matters testified to by them are facts, whether they are true or false, is to be determined by you and you alone, and you will carefully consider and examine their testimony in connection with all the other testimony in this case, as I say, subject to the same rules of credit and disbelief as the testimony of other witnesses.

Before taking up the issues in the case I want to call your attention to the stipulation entered into between counsel for the Government and the claimants and to its legal effect. The stipulation becomes undisputed evidence and establishes the facts stated in the stipulation, and you are entitled to draw such reasonable and logical inferences and conclusions from it as you deem proper either for or against either party for the purpose of aiding you in determining the issues in this case. It is not within the province of the court to draw any for you. As I said when the stipulation was read to you yesterday, you were to consider that stipulation as containing proven facts about which there is no controversy. You have heard counsel for the Government and the claimant make their respective claims with reference to the deductions and conclusions to be drawn from the facts stated in the stipulation, and here I say to you that you are the sole judges as to the proper inference to be drawn from those facts.

I will now direct your attention to the Pure Food Act and the provisions contained in it that have particular bearing upon this case. Among other things the act provides:

> That it shall be unlawful for any person to manufacture within any Territory * * * any article of food or drug which is adulterated or misbranded, within the meaning of this Act.

And right at this point I charge you that there is no claim made by the Government that there was any adulteration or that there was any poisonous or deleterious ingredient in the macaroni which might make it injurious or detrimental to the health of the consumers, so that upon this feature of the case before you, your consideration will be confined entirely to the subject of misbranding. In section 8 the law provides that the term "misbranded" shall apply to all articles

of food or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article or the ingredients or substances contained therein which shall be false or misleading in any particular, and it further provides that for the purpose of this act an article of food shall be deemed to be misbranded

> If it is labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so;

and further, that it shall be deemed to be misbranded

> If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular.

From the pleadings in the case we find that certain facts are admitted, hence it becomes unnecessary to offer evidence in support of the allegations so admitted. The Government alleges and the claimant admits that the macaroni in question was in the possession of Frank Pepe, of Waterbury; that said macaroni was, on various dates, shipped from Brooklyn, N.Y., to Frank Pepe, in Waterbury, Conn.; that the said boxes of macaroni were labeled "Macaroni, Gragnano Style—Savoy Brand", and further labeled "Guaranteed by the Manufacturer under the Food and Drugs Act of June 30, 1906, Serial No. 35286." That the word "Gragnano" was printed in flaring type and that the words "Savoy Brand" were printed in large type, and that the words "Guaranteed by the Manufacturer under the Food and Drugs Act of June 30, 1906, Serial No. 35286", were printed in much smaller type than the type used for printing the other words on said label; and said label also had printed on it a pictorial representation of a wheat field and three women reaping therein with a bay and mountain in the distance; said pictorial representation being, and being intended to be a representation of a foreign and Italian scene.

These allegations are admitted. The claimant denies in its pleadings that said 90 boxes of macaroni were misbranded within the meaning of this act which I have quoted, and further denies that the labels upon said 90 boxes of macaroni bear and at the time of said shipment and delivery bore certain statements, designs, and devices regarding said macaroni which were and are false and misleading, or intended to deceive and mislead the purchaser. Claimant denies all of that. The Government alleges and the claimant denies that said macaroni was further misbranded in that the boxes were stamped "artificially colored" by means of a rubber stamp in so indistinct a manner as to be almost imperceptible, although said macaroni was and is so artificially colored as to resemble in color macaroni produced in Italy and in the said Gragnano district. And in the amendment to the libel the Government alleges and the claimant denies that said macaroni was in fact artificially colored in a manner intended to conceal its inferiority and in a manner whereby its inferiority was in fact concealed, and that said 90 boxes of macaroni were and are further misbranded within the meaning of the act in that the boxes containing said macaroni and each of them, were and are so designed and devised by reason of their dimensions and by reason of colored paper strips pasted along the edges thereof as to be misleading in that they were in imitation of the boxes used for

the packing and shipping of macaroni in the district of Gragnano in Italy. The claimant admits that the boxes containing said macaroni are of similar dimensions and have pasted along the edges thereof certain strips of paper similar to the boxes used for the packing and shipping of macaroni made in the district of Gragnano, but denies that this is done for the purpose of misleading the purchaser and denies that the style and dress of the box is misleading. Such then are the issues before you as raised by the pleadings. Briefly, then, it may be stated that the questions for you to determine are—

First. Whether the macaroni was artificially colored with intent to conceal its inferiority. This allegation presupposes the existence of certain facts—first, whether the macaroni was artificially colored or not; second, if artificially colored, whether it was so colored with the specific intent to conceal its inferiority; and third, that it was an inferior macaroni. In order therefore to sustain the Government upon this aspect of the case you must find from all the evidence that the macaroni was inferior, that it was artificially colored, and that it was artificially colored for the specific purpose and intent of concealing its inferiority. If, from all the evidence you find all these three elements proven upon this aspect of the case, your verdict will be for the Government, and if, on the other hand, you should find that any one of these three elements is lacking—that is to say, either that it was not artificially colored, or, if so, that it was not done so with the specific intent of concealing its inferiority and that it was not an inferior product—then, of course, your verdict upon this aspect of the case would be for the Government [claimant?].

Now, you are bound to be guided, gentlemen of the jury, by the testimony of the experts for the purpose of coming to a conclusion with reference to this artificial color subject, and the fact that it is artificially colored for the specific intent of concealing its inferiority and that its inferiority was in fact concealed, and as I have given you the rules about expert witnesses and their testimony, you must analyze it, weigh it carefully, and decide upon this aspect of the case, as I say, largely from their testimony. It is not necessary to rehearse their evidence. You have seen all of them, you have heard their testimony, you have observed all of them upon the witness stand; you have heard their qualifications to testify; those are all matters proper for you to take into consideration in determining this particular issue between the Government and the claimant. The witness French says that this was not an inferior macaroni, and you will recall that it was, upon the analysis made by him, found to contain Durum semolina and was a first-class article. On the other hand, you heard the expert, Mr. Jacobs, on behalf of the Government, who says that the percentage of water soluble extract showed that it was a poor grade or low grade—inferior grade, I think, was his word. It is for you to harmonize that evidence and come to a conclusion. Upon this aspect of the case you cannot find for the Government unless you find three things—first, that it was artificially colored; and second, if so, that it was artificially colored so as to conceal its inferiority; and third, that it was an inferior article be-

cause it concealed its inferiority. The fact that it was inferior must exist.

I now direct your attention to the label, the style, and dress of the boxes; they are all in evidence before you. The testimony is conflicting upon this important feature of the case and you must reconcile it. While it is true that one may adopt and copyright a label for use in his business, and while those rights must be protected as they represent substantially invested interest, yet I charge you that if they are used in violation of law the fact that they are adopted and copyrighted is not of any avail; therefore, the important inquiry and a responsible one for you to decide in this case is whether this label, adopted and copyrighted and entitled to full protection, is in violation of this law and comes within the meaning of this act that we are now dicussing and comes within the meaning of this Pure Food and Drugs Act, and upon this particular feature of the case I call your attention again to that part of the act which says that an article shall be deemed to be misbranded

If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so.

In order to answer the inquiry fairly under this provision of the law you will naturally inquire as to whether or not all of the elements of the statute have been proven by the Government by a fair preponderance of the evidence; some of those inquiries would naturally be as follows: Is the package labeled or misbranded, and if so, is it labeled so as to deceive or mislead the purchaser? The words "deceive" or "mislead" require no legal definition; they are words that we all understand, and their full import is understood. The word "purchaser", it will be noted, is used without limitation or qualifying terms; the act does not say the wholesale, retail, or individual purchaser. If it is broad enough to include wholesale and retail purchasers it is also broad enough to include the ultimate consumer, as the purchaser and the label or brand of the particular box enclosing the article which he buys must be such as not to deceive or mislead him. It will not do to say that this law was framed to protect the wholesaler and retailer and not the common people; its primary purpose is the protection of the ultimate consumer. It is the purchasing public that the purpose of this statute is primarily intended to protect. It was the purpose of Congress in enacting this Pure Food and Drugs Act to put a stop to the transportation and sale in interstate commerce of adulterated and misbranded articles of food and drugs. It was intended to reach all forms of misrepresentation by misbranding by the use of words or by the use of designs or devices, pictures, etc., calculated to mislead or deceive, cheat, or defraud the purchasers.

There has been considerable contention on behalf of both sides as to just what kind of a purchaser is meant in that act. The standard to be applied by you in that connection is the standard of the ordinary man—the ordinary intelligent person. No law was ever passed for the special benefit of any one particular class; if passed it was not constitutional. You cannot legislate for the benefit of the Italian who can not read and write any more than you can legislate for the benefit of the highly educated person who may be very unwise about what

the ignorant Italian is very wise, but legislation is passed for the general public, for all persons, and therefore the standard to be applied by you in determining the kind of a person meant by the term " purchaser " is the standard of the ordinary intelligent person.

Coming back to the subject of labels in this connection it is also plain that it is the general purpose of this law to give the consumer the chance to know what he buys and what he eats. It is plain that Congress intended that no one who is desirous of knowing what the law is in that regard may make any mistake about it. The law requires the manufacturer to be honest in his statement of the contents of his package; it requires him to be honest in stating the truth about the labels he puts upon it. That is what the act is intended to accomplish and which, if this statute is properly enforced, it will accomplish.

This statute cannot be evaded by a mere subterfuge. It is to be enforced according to its letter and its spirit, and when that is done no one will suffer by it. I have made this reference to this statute, and it is proper that the statute should be given a fair interpretation, but it is a question of fact for you to determine by a careful consideration and analysis of all the evidence, whether in this particular case this claimant has violated it, and I caution you, gentlemen of the jury, that the burden is upon the Government to prove this contention. It is not important so far as your consideration is concerned, as to why the claimant is here or why he didn't do something else. He has a perfect right to be here under the law; he has elected his own action and why he didn't do something else is of no concern to us.

Now, we come again to the subject of labels and designs. The Government claims that the macaroni bore a certain label, a pictorial representation of a wheat field and three women reaping therein, with a bay and mountain in the distance in representation of a foreign scene in Italy; now, counsel for the claimant admits that this is a foreign scene, an Italian scene, but denies that they were false or misleading or intended to represent a foreign product. Now, the question for you to pass upon in this respect is: Did the labels tend to deceive a reasonably intelligent person into believing that the goods sold under that label were a foreign product? It is not the question of whether one person might be misled by what he sees upon the label, but it is the significance that the label in that respect would bear as to whether the macaroni is of foreign origin. The statute, gentlemen of the jury, does not require the place of manufacture to be stated on the label or the name of the manufacturer, so the label is not false or misleading in that respect.

You will notice, gentlemen, that the chief question is the question of fraud and deceit; whether these boxes bore certain designs and devices thereon plainly intended to conceal the contents of the boxes and giving a certain false intimation to the purchaser or user thereof as to the nature and character of the material in the boxes. It is for you, from all of the evidence introduced, to determine whether these words and devices and designs and pictures were intended by the manufacturer to be false and misleading and would convey to the purchaser the idea that this macaroni was manufac-

tured in Gragano district in Italy. If you believe from the evidence that this has been proven by the Government—that is, regarding the labels and their allegations that those statements are true and that these labels were so designed as to mislead and deceive the purchaser and intended to represent a foreign product when not so, as a matter of fact—then your verdict will be for the Government; otherwise, if you find this is not true, your verdict will be for the claimant.

Now, gentlemen of the jury, I have been requested to make certain charges, part of which I do make.

In behalf of the Government the term "label", as used in the Food and Drugs Act, applies to any printed, pictorial, or other matter upon or attached to any package of a food product, or any container thereof, subject to the provisions of the act.

The law requires the manufacturer to be honest in his statement of the contents of a package containing a food product, and it requires him to be honest in stating the truth of the labels put upon it. It is the purchasing public, the ultimate consumer, whom the provisions of this law are primarily intended to protect. "The law is not made for the protection of experts, but for the public, that vast multitude, which includes the ignorant, the unthinking, and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearance and general impressions." It makes no difference that dealers in the article are not deceived. It is the probable inexperience of the consumer that you should consider.

On behalf of the claimant I charge you as follows:

The law does not require the fact of the presence of harmless coloring to be stated upon the label on all the evidence in this case.

The words "Savoy Brand" indicate nothing as to the place of origin or manufacture of the macaroni or of the ingredients or substances therein.

The statute does not require the place of manufacture to be stated upon the label if the label is not false or misleading in this respect.

The statute clearly does not require, or permit the department to require, that the place where an article is manufactured shall appear on the label.

The statute clearly does not require, or permit the department to require, that the name of the manufacturer of the article should appear on the label.

The statute is drawn in such a way as to expressly permit the omission of the name of the manufacturer and of the place of manufacture.

The importance of this case must impress itself upon you. While the amount involved is insignificant so far as the 30 boxes of macaroni are concerned, which, by the marshal's return, is the amount received, while the value of that is insignificant, yet the importance of this case must have impressed itself upon you to give it important consideration, weighing in behalf of the Government and in behalf of the claimant the evidence, carefully considered within the rules I have given you, and when you have done so, render your verdict accordingly.

UNITED STATES v. 36 BOTTLES OF LONDON DRY GIN

(Circuit Court of Appeals, Third Circuit, Feb. 2, 1914)

210 Fed. 271; N.J. No. 2820

In Error to the District Court of the United States for the Eastern District of Pennsylvania. Judgment reversed.[75]

Before GRAY and BUFFINGTON, Circuit Judges, and YOUNG, District Judge.

YOUNG, *District Judge.* This is a proceeding by the United States for the condemnation of certain bottles of gin alleged to be misbranded in violation of the Food and Drugs Act of June 30, 1906. The eighth section of that act provides that an article shall be deemed to be misbranded "if it be labeled or branded so as to deceive or mislead the purchaser or purport to be a foreign product when not so." The cause went to trial before a jury upon the libel and amended libel and answer thereto by Sir Robert Burnett & Co., the claimant. The libel alleges that the bottles were labeled and branded so as to purport to be a foreign product, whereas they were in fact a domestic product. The amended libel alleges that the bottles were labeled and branded so as to deceive and mislead purchasers thereof and to purport to be a foreign product when not so.

The assignments of error raise the single question whether or not, in a proceeding under the Food and Drugs Act for the condemnation of misbranded articles, the intent of the claimant is a necessary ingredient in the determination of the case. The learned trial judge admitted evidence, over the Government's objection, for the purpose of showing good faith in the branding and absence of an intention to deceive. The court also submitted the question of intent as follows:

> The third question refers more particularly to the second charge of the Government. It is this: In using the label in suit, did the maker of the gin intend to deceive or mislead the purchaser by representing the gin to be a foreign product, when in truth it was not a foreign product.

Under the libel and amended libel, the sole question was whether the packages were so labeled and branded as to deceive and mislead the purchaser. This was not the question submitted to the jury, but the question submitted to the jury was, as we have seen: Did the maker of the gin intend to deceive or mislead the purchaser? The court was in error in submitting the question of intention to the jury. The Food and Drugs Act nowhere requires proof of intention by the use of the words "knowingly", "willfully", or such like words. The language of section 8, in the case of food, subsection 2, of the act, is:

> If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so.

This language clearly means if the label deceives or misleads the purchaser; if the purport of the label be that it is a foreign product

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[75] Reversing *United States* v. *36 Bottles of London Dry Gin*, p. 489, *ante*.

when it is not so. This the label, and the label alone, must determine. The intention of the user to deceive is of no consequence. The act strikes at deceiving the public by selling them one thing when they desire to purchase another. As has been frequently said by courts, the purchaser has the right to choose for himself what he will purchase, and when he has purchased, the right to receive that which he desires and not something else. It would be destructive of the act, nullify it entirely, to allow the intent of the maker to be considered as a defense. We believe the decided cases sustain the principle that the intent is not a necessary ingredient in the determination of the case.

In *McDermott* v. *Wisconsin*, 288 U.S. 115, on page 132, 33 Sup. Ct. 431, at page 435 (57 L.Ed. 754), it is said by Mr. Justice Day:

> The label upon the unsold article is in the one case the evidence of the shipper that he has complied with the act of Congress, while in the other, by its misleading and false character, it furnishes the proof upon which the Federal authorities depend to reach and punish the shipper and to condemn the goods. If truly labeled within the meaning of the act, his goods are immune from seizure by Federal authority; if the label is false or misleading within the terms of the law, the goods may be seized and condemned. In other words, the label is the means of vindication or the basis of punishment in determining the character of the interstate shipment dealt with by Congress.

It is the purchaser that is to be protected.

> The purchaser has a right to determine for himself which he will buy, and which he will receive, and which he will eat. The vendor cannot determine that for the purchaser. He, of course, can make his arguments but they should be fair and honest arguments. *United States* v. *100 Cases of Tepee Apples* (D.C.), 179 Fed. 987.

In *United States* v. *Johnson*, 221 U.S. 488, at page 497, 31 Sup. Ct. 627, at page 628 (55 L.Ed. 823), Mr. Justice Holmes says:

> In further confirmation, it should be noticed that although the indictment alleges a willful fraud, the shipment is punished by the statute if the article is misbranded, and that the article may be misbranded without any conscious fraud at all.

In the *District of Columbia* v. *Lynham*, 16 App.D.C. 85, it is said:

> It was no defense for a druggist prosecuted for selling an adulterated drug in violation of the Act of Congress February 17, 1898 (30 Statutes 246), relating to the adulteration of food and drugs in the District of Columbia, to show simply that he was at the time of sale * * * ignorant of the fact that the drug was adulterated, as he must know what he sells, or proposes to sell, and that it conforms to the standard prescribed by law.

In *United States* v. *Five Boxes of Asafoetida* (D.C.), 181 Fed. 561, it is said by Judge Holland:

> The article of food or drug adulterated or misbranded is declared to be forfeited as an offending thing which threatens the health of the citizen, and therefore subject to seizure, without regard to the acts or knowledge of the owners or claimants.

For these reasons, the judgment must be reversed, and a new trial granted.

HUYLER'S v. HOUSTON, Secretary of Agriculture

(Court of Appeals, District of Columbia, Feb. 2, 1914)

N.J. No. 3343

In Equity. Appeal from a decree of the Supreme Court of the District of Columbia. Decree affirmed.[76]

Mr. Justice Robb delivered the opinion of the court.

This is an appeal from a decree of the Supreme Court of the District sustaining appellee's demurrer and dismissing appellant's bill for an injunction to restrain the appellee, the Secretary of Agriculture, from publishing (pursuant to sec. 4 of the so-called Food and Drugs Act of June 30, 1906, 34 Stat. 768) notice of a judgment in the Police Court of the District of Columbia imposing a fine of $200 upon appellant after conviction of the offense of offering for sale and selling an adulterated article of food.

Section 4 of said act provides that a chemical examination of specimens of foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of that bureau, for the purpose of determining whether such articles be adulterated or misbranded within the meaning of the act, and if the result of that examination shows adulteration or misbranding, it is made the duty of the Secretary to notify the party from whom the sample was obtained. Thereupon the party so notified is given an opportunity to be heard and if, after hearing, it appears that any of the provisions of the act have been violated by such party it is made the duty of the Secretary at once to

certify the facts to the *proper United States district attorney*, with a copy of the result of the analysis or examination of such article duly authenticated by the analyst or officer making such examination, under the oath of such officer. *After judgment of the court, notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid.*

Section 5 of the act makes it the duty of each district attorney to whom such a violation shall be reported by the Secretary

or to whom any health or food or drug officer or agent of any State, Territory, or the District of Columbia shall present satisfactory evidence of such violation, to cause appropriate proceedings to be commenced and prosecuted in the *proper court of the United States*, without delay for the enforcement of the penalties herein provided.

Appellant was duly convicted in the Police Court of the District of Columbia and fined $200 for offering for sale and selling adulterated maple sugar. It is the contention of the appellant that the police court is not a "proper court of the United States" within the meaning of said section 5 of the Food and Drugs Act and hence that the judgment of that court is absolutely void. This contention is easily met. Section 43 of the code confers upon the Police Court original jurisdiction concurrently with the Supreme Court of the District except where otherwise therein provided, "of all crimes and offenses committed in the said District not capital or otherwise infamous and not punishable by imprisonment in the penitentiary,

[76] Affirming decree in *Huyler's* v. *Houston*, p. 507, *ante*.

except libel, conspiracy, and violations of the post-office and pension laws of the United States." The charge upon which appellant was prosecuted, being a first offense where the punishment may not exceed a fine of $200, was therefore within the jurisdiction of the Police Court. That the Police Court is a court of the United States, although not in the sense of the Constitution, has already been determined. *United States* v. *Mills*, 11 App.D.C. 500. The question here is not whether the police court is a court of the United States in the constitutional sense, but whether it is a " proper court of the United States ", within the meaning of the Food and Drugs Act. All other petty offenses against the United States, except those expressly reserved from its jurisdiction, are triable in that court, and no reason is perceived why one accused of adulterating food in this District is entitled to treatment different than would be accorded him if accused of some other petty offense against the laws of the United States. When, therefore, Congress used the words " in the proper courts of the United States ", we think it clear that it meant in the courts having jurisdiction of similar offenses. The Police Court was therefore a proper court within the meaning of this section.

Decree affirmed, with costs.

UNITED STATES v. SEVEN CASES OF BUFFALO LITHIA WATER

(Supreme Court, District of Columbia, Feb. 16, 1914)

Libel under section 10 of the Food and Drugs Act. Trial before the Court. Decree in favor of the United States.[77]

Gould, *Judge.* The original bill in this case was filed December 21, 1910. It sought to condemn seven cases of bottles containing water labeled as " Buffalo Lithia Water ", on the ground that they were misbranded and thereby violated the act of June 30, 1906, the misbranding being alleged to consist of statements that the liquid was a lithia water, whereas it did not contain an appreciable amount of lithium, and would not give the therapeutic effect of lithium when a reasonable quantity was consumed, and, further, that the water was not a lithia water, or entitled by reason of its ingredients to be so called. The libel also alleged, as a further misbranding, that the bottles were offered for sale under the distinctive name of lithia water, when in fact it was not lithia water, and that the bottles were labeled and branded so as to deceive and mislead the purchaser thereof.

A demurrer having been sustained to this libel on April 6, 1912, an amended libel was filed April 6, 1912, omitting the original allegation that the water did " not contain an appreciable amount of lithium, and will not give the therapeutic effect of lithium when a reasonable quantity " is consumed. A demurrer to the amended libel was overruled June 13, 1912, whereupon the claimants, on December 12, 1912, filed their answer denying that the water was misbranded.

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[77]Affirmed, *Goode* v. *United States*, p. 698, *post.*

Upon the issue thus joined, voluminous testimony has been taken in different parts of the country. The questions of fact involved have, by agreement, been submitted to the court sitting as a jury.

It is somewhat difficult to accurately describe the label as it is voluminous, but the most striking feature of it are the words "Buffalo Lithia Water Springs No. 2", in white letters, relatively large, on a blue field, surrounding the figure of a draped woman, in a sitting posture, holding an urn on her lap, and herself surrounded by the words in much smaller type "Buffalo Lithia Springs Water, Nature's Materia Medica." Beneath the foregoing, in a smaller but plain type, is the following: "This water is indicated in all affections due to the Uric Acid Diathesis—Gout or Rheumatism in all their forms, Stone in the Bladder, Kidneys, or Liver, Bright's Disease and Kidney Diseases of every form, Albuminuria of Pregnancy or Scarlet Fever, Uraemia and its accompanying troubles, Menstrual Irregularities, Acid Dyspepsia, Nervous Disorder in all its forms, Malarial Fevers, and in the preparation of Artificial Food for Infants. Dose: From six to eight glasses of the ordinary size per day is the average dose. Many persons, however, take a larger quantity." At the bottom of the label are the words "Buffalo Lithia Springs Water Co., Buffalo Springs, Virginia." At the top are the words "Guaranteed under the Food and Drugs Act, June 30, 1906."

It is admitted by the Government that the water in controversy is a natural spring water taken from a spring known as "Buffalo Lithia Springs" situated at Buffalo Lithia Springs, in Mecklenburg County, Virginia. It is also admitted that the claimants or their predecessors have been continously shipping and selling this water from this spring since 1878 under the label or brand "Buffalo Lithia Water."

There is little dispute as to the essential facts of the case. Naturally, the first question which the controversy suggests is, What is a "lithia water." There appears to be no definition given by the Pure Food Act or by the United States Pharmacopœia as to the quantity of lithium which a given amount of water must contain in order to reasonably entitle it to be designated "lithia" water. The Government has offered the testimony of chemists, pharmacologists, physicians, and druggists to the effect that the common understanding is that a natural lithia water is one that contains enough lithium so that when a reasonable quantity is consumed a physiological or therapeutic effect would be obtained in consequence of the lithium content. This appears not only to be a fair and reasonably accurate definition, one which appeals to the common sense and understanding of a nonscientific person, but is supported by the overwhelming weight of the testimony in the case. Speaking generally, and as an individual of average intelligence and information, it would seem that if one were offered a water which the vendor told him was a "lithia" water, one would have the right to expect enough lithium in the water to justify its characterization as such, thus differentiating it from ordinary potable water; and this amount would reasonably be expected to have some effect upon the consumer of the water by reason of the presence of the lithium.

This is especially true, in view of the fact that lithium has been quite commonly believed to have a therapeutic effect on physical

ailments which may be classified generally under the head of the uric-acid diathesis.

The second question which also arises quite naturally is as to the actual lithium content in a given quantity of the water in controversy. Several analyses were offered in evidence made by both the Government and by the claimants. As these differ so slightly in respect to the amount of lithium found in a given quantity of water, those made by the Government will be taken as accurate. In addition, the evidence is uncontradicted that the analyses made by the Government experts were made according to the most improved methods, and no attempt was made to impugn their accuracy or fairness.

Dr. Collins, an expert chemist employed in the Bureau of Chemistry, examined three samples of the water in controversy, two of which were part of the water seized. He gives in great detail every step taken by him in his analyses to determine the quantity of lithium. The result was that in two liters of the water (about 2⅕ quarts) he found no weighable amount of lithium. That is, a chemical analysis showed absolutely no appreciable amount of lithium in the bottle of water of the size usually sold. By the use of the spectroscope, however, it was found that there was two thousandths of a milligram in a liter; that is, about one ten-thousandth of a grain per gallon of water, or 1 grain in 10,000 gallons of water. To further illustrate the infinitesimal quantity of lithium in this water, it was testified that the average dose of lithium as a uric acid solvent was from 5 to 7½ grains three times a day. So that, for a person to obtain a therapeutic dose of lithium by drinking Buffalo Lithia Water he would have to drink from 150,000 to 225,000 gallons of water per day. It was further testified, without contradiction, that Potomac River water contains five times a much lithium per gallon as the water in controversy.

It has already been stated that the claimants made no question as to the accuracy of the Government analysis; it might be added that their own latest analysis, by the Lederle Laboratories in New York City, showed only a spectroscopic trace of lithium in the water.

The Government also produced pharmacologists and physicians, eminent in their professions, who testified that the amount of lithium disclosed in this water, either singly, or in combination with the other elements contained in it, could not, by any possibility, have any physiological or therapeutic effect upon the consumer.

It is concluded, therefore, that a person drinking Buffalo Lithia Water for the hoped-for benefit he may derive from the lithium in it, is deceived and mislead, because a potable quantity contains no appreciable lithium.

Moreover, this deception is increased and aggravated by the language on the label accompanying its designation as "Buffalo Lithia Water." Lithium is supposed to be a solvent for uric acid, to prevent the formation of calculi and to remove it from the system in rheumatism and gout. The label, immediately under the large letters "Buffalo Lithia Water", and in the center of the label, contains this language: "This water is indicated in all affections due to the Uric Acid Diathesis—Gout or Rheumatism in all their forms, Stone in the Bladder, Kidneys, or Liver, Albuminaria of Pregnancy or Scarlet

Fever, Uraemia and its accompanying troubles, Menstrual Irregularities, Acid Dyspepsia, Nervous Disorder in all forms, Malarial Fevers, and in the preparation of Artificial Food for Infants." The word "indicated" as a medical term, as defined by Webster, means "to point as to the proper remedy." The uric acid diathesis means the class of diseases due to the presence of an excess of uric acid. So that the purport and effect of the label to a purchaser is to tell him that this water, by reason of the lithium in it, is the proper remedy for those diseases which are due to uric acid, of which lithia is a solvent.

It becomes pertinent to notice the attitude of the courts toward labels of this character, irrespective of the Pure Food Act.

Where the manufacturer of a liquid laxative medicine to which he gave the name of "syrup of figs" and who had spent vast sums in advertising it, sought to enjoin another from using the name, it was held that he was not entitled to the injunction because he falsely represented to the public that the juice of the fig was the important medical agent in the composition of the medicine, when in fact only a suspicion of fig juice was put into it, and the real laxative was senna. This was so held notwithstanding there was much evidence showing that it was a very useful medicine and prescribed by physicians of high standing. In deciding the case Judge Taft said:

> This is a fraud upon the public. It is true it may be a harmless humbug to palm off upon the public as syrup of figs what is syrup of senna, but it is nevertheless of such character that a court of equity will not encourage it by extending any relief to the person who seeks to protect a business which has grown out of and is dependent upon such deceit. *California Fig Syrup Co.* v. *Frederick Stearns & Co.*, 73 Fed. 812.

This case was subsequently approved and followed by the Supreme Court in *Worden* v. *California Fig Syrup Co.*, 187 U.S. 516.

The same principle was applied in the cases of *Memphis Keeley Institute* v. *Leslie E. Keeley Co.* (C.C.A. Sixth Circuit), 155 Fed. 964, and *Bear Lithia Springs Co.* v. *Great Bear Spring Co.*, 71 N.J. Eq. 595.

If the courts assume this attitude toward falsely labeled articles under the general rules of law and equity, a fortiori should they assume it in applying a statute such as the Pure Food Act, which has for its objects "not only to protect the public from unwholesome food and drink, but to require that any article of food, drink, or medicine sold *shall be correctly described by its label.*" *U.S.* v. *Morgan et al.*, 181 Fed. 587.

In the very able oral argument and elaborate brief of claimant's learned counsel, there are two main contentions:

First. They deny that the label represents that the contents of said bottle is a "lithia water." They insist that the label distinctly states that the contents of the bottles is that "particular natural mineral water known both as Buffalo Lithia Water and Buffalo Lithia Springs Water, and was taken" from the Buffalo Lithia Springs No. 2, etc.

In other words, the argument seems to be that if Buffalo Lithia Springs are falsely named, being called "Lithia" Springs, when they do not flow water containing lithium, therefore the proprietors have the right to sell the product as being Buffalo Lithia Springs Water thus perpetuating upon the public the misnomer connected with the

origin of the water. It is not apparent how the deceit practiced upon the public by the label is mitigated by carrying it back to the designation of the spring from which the water comes.

Second. It is next contended that if the word "lithia", as used on the label, can be construed to represent that the contents of the bottles is "lithia water", such representation would not be false or misleading, within the purview of the Food and Drugs Act, because the contents of the bottle is a lithia water as the term is understood in the English language, viz, a natural spring water containing "some lithia" or a "trace of lithium."

Assuming that the term "lithia water" requires only "some" lithium in the water, it would seem that even that flexible term should not be attenuated to include a water which contained only one ten-thousandth of a grain in a gallon, and which even a trace in 2 liters could only be ascertained by use of the spectroscope. But the evidence in the case is overwhelming that the term "lithia water", as ordinarily understood, means a water containing a sufficient amount of lithium to give a therapeutic effect when drunk in reasonable quantities. It is true that the Food and Drugs Act does not prescribe the quantity of lithium that a water should contain to entitle it to the name "lithia water". But that this is not a fatal objection to the law has been frequently held. *Shawnee Milling Co.* v. *Temple*, 179 Fed. 517; *United States* v. *Sacks of Flour*, 180 Fed. 518.

And, even if a standard were fixed as to the quantity which would entitle a water to such designation, it is reasonable to suppose that it would require at least a weighable or appreciable amount in a potable quantity of water.

It is also argued that no natural water, designated as lithia water, contains sufficient lithium to give a therapeutic effect by drinking a reasonable quantity. The evidence is not quite clear on this question; but the most it would prove would be the misbranding of other so-called lithia waters.

It is therefore concluded that the statement "Buffalo Lithia Water", on the labels on the bottles seized, is false and misleading within the meaning of the first general paragraph of section 8 of the Food and Drugs Act, and judgment will be accordingly entered for the libelant.

UNITED STATES v. LEXINGTON MILL & ELEVATOR COMPANY

(Supreme Court of the United States, Feb. 24, 1914)

232 U.S. 399; N.J. No. 3398

On writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit. Judgment affirmed.[78]

Mr. Justice Day delivered the opinion of the Court.

The petitioner, the United States of America, proceeding under section 10 of the Food and Drugs Act, (June 30, 1906, ch. 3915, 34

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[78]Affirming *Lexington Mill & Elevator Co.* v. *United States*, p. 443, *ante*. For the case in the lower court, *United States* v. 625 *Sacks of Flour*, see p. 129, *ante*.

Stat. 768, 771), by libel filed in the District Court of the United States for the Western District of Missouri, sought to seize and condemn 625 sacks of flour in the possession of one Terry, which had been shipped from Lexington, Nebraska, to Castle, Mo., and which remained in original unbroken packages. The judgment of the District Court, upon verdict in favor of the Government, was reversed by the Circuit Court of Appeals for the Eighth Circuit (202 Fed. 615), and this writ of certiorari is to review the judgment of that court.

The amended libel charged that the flour had been treated by the "Alsop Process", so called, by which nitrogen peroxide gas, generated by electricity, was mixed with atmospheric air and the mixture then brought in contact with the flour, and that it was thereby adulterated under the fourth and fifth subdivisions of section 7 of the act, namely, (1) in that the flour had been mixed, colored, and stained in a manner whereby damage and inferiority was concealed and the flour given the appearance of a better grade of flour than it really was, and (2) in that the flour had been caused to contain added poisonous or other added deleterious ingredients, to wit, nitrites or nitrite reacting material, nitrogen peroxide, nitrous acid, nitric acid, and other poisonous and deleterious substances which might render the flour injurious to health. The libel also charged that the flour was adulterated under the first subdivision of section 7, and was misbranded; but the Government does not urge these features of the case here. The verdict was broad enough to cover the charge under the first subdivision of section 7, but in the view we take of the case as to the instruction of the court under subdivision 5 it need not be noticed.

The Lexington Mill & Elevator Company, the respondent herein, appeared, claiming the flour, and answered the libel, admitting that the flour had been treated by the Alsop Process, but denying that it had been adulterated and attacking the constitutionality of the act.

A special verdict to the effect that the flour was adulterated was returned, and judgment of condemnation entered. The case was taken to the Circuit Court of Appeals upon writ of error. The respondent contended that, among other errors, the instructions of the trial court as to adulteration were erroneous and that the act was unconstitutional. The Circuit Court of Appeals held that the testimony was insufficient to show that by the bleaching process the flour was so colored as to conceal inferiority and was thereby adulterated within the provisions of subdivision 4. That court also held—and this holding gives rise to the principal controversy here—that the trial court erred in instructing the jury that the addition of a poisonous substance in any quantity would adulterate the article for the reason that "the possibility of injury to health due to the added ingredient and in the quantity in which it is added, is plainly made an essential element of the prohibition." It did not pass upon the constitutionality of the act, in view of its rulings on the act's construction.

The case requires a construction of the Food and Drugs Act. Parts of the statute pertinent to this case are:

Sec. 7. That for the purposes of this act an article shall be deemed to be adulterated: * * *

In case of food:

First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

* * * * * * *

Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health.

* * * * * * *

Sec. 10. That any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act, and is being transported from one State, Territory, District, or insular possession to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, * * * shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. And if such article is condemned as being adulterated or misbranded, or of a poisonous or deleterious character, within the meaning of this act, the same shall be disposed of by destruction or sale, as the said court may direct.

Without reciting the testimony in detail it is enough to say that for the Government it tended to show that the added poisonous substances introduced into the flour by the Alsop process, in the proportion of 1.8 parts per million, calculated as nitrogen, may be injurious to the health of those who use the flour in bread and other forms of food. On the other hand, the testimony for the respondent tended to show that the process does not add to the flour any poisonous or deleterious ingredients which can in any manner render it injurious to the health of a consumer. On these conflicting proofs the trial court was required to submit the case to the jury. That court, after stating the claims of the parties, the Government insisting that the flour was adulterated and should be condemned if it contained any added poisonous or other added deleterious ingredient of a kind or character which was capable of rendering such article injurious to health; the respondent contending that the flour should not be condemned unless the added substances were present in such quantity that the flour would be thereby rendered injurious to health, gave certain instructions to the jury. Part of the charge, excepted to by the respondent, reads.

The fact that poisonous substances are to be found in the bodies of human beings, in the air, in potable water, and in articles of food, such as ham, bacon, fruits, certain vegetables, and other articles, does not justify the adding of the same or other poisonous substances to articles of food, such as flour, because the statute condemns the adding of poisonous substances. Therefore the court charges you that the Government need not prove that this flour or foodstuffs made by the use of it would injure the health of any consumer. It is the character—not the quantity—of the added substance, if any, which is to determine this case.

On the other hand the respondent insisted that the law is, and requested the court to charge the jury:

That the burden is upon the prosecution to prove the truth of the charge in the libel, that by the treatment of the flour in question by the said Alsop Process it has been caused to contain added poisonous or other added deleterious ingredients, to wit, nitrites or nitrite reacting material, which may render said flour injurious to health.

And in this connection you are further instructed that it is incumbent upon the Government to prove that any such added poisonous or other added deleterious ingredients, if any contained in said flour, are of such a character and contained in the flour seized in such quantities, conditions, and amounts as may

render said flour injurious to health, and unless you find that all of such facts are so proven you cannot find against the claimant or condemn the flour in question under that charge in the libel, and if you fail to so find your verdict upon that count or charge in the libel must be in favor of the claimant or defendant.

* * * * * * *

The law does not prohibit the adding of nitrites or nitrite reacting material to flour, and a jury cannot find for the Government or against the claimant, even if it be shown that nitrites or nitrite reacting material was added to the flour in question, unless they believe from a preponderance of the evidence that such addition, if any, rendered said flour injurious to the health of those who might consume the bread or other foods made from said flour.

It is evident from the charge given and requests refused that the trial court regarded the addition to the flour of any poisonous ingredients as an offense within this statute, no matter how small the quantity, and whether the flour might or might not injure the health of the consumer. At least such is the purport of the part of the charge above given, and if not correct, it was clearly misleading, notwithstanding other parts of the charge seem to recognize that in order to prove adulteration it is necessary to show that the flour may be injurious to health. The testimony shows that the effect of the Alsop Process is to bleach or whiten the flour and thus make it more marketable.

If the testimony introduced on the part of the respondent was believed by the jury they must necessarily have found that the added ingredient, nitrites of a poisonous character, did not have the effect to make the consumption of the flour by any possibility injurious to the health of the consumer.

The statute upon its face shows that the primary purpose of Congress was to prevent injury to the public health by the sale and transportation in interstate commerce of misbranded and adulterated foods. The legislation as against misbranding intended to make is possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was and not upon misrepresentations as to character and quality. As against adulteration, the statute was intended to protect the public health from possible injury by adding to articles of food consumption poisonous and deleterious substances which might render such articles injurious to the health of consumers. If this purpose has been effected by plain and unambiguous language, and the act is within the power of Congress, the only duty of the courts is to give it effect according to its terms. This principle has been frequently recognized in this court. *Lake County* v. *Rollins*, 130 U.S. 662, 670:

Where a law is expressed in plain and unabiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction.

Hamilton v. *Rathbone*, 175 U.S. 414, 421:

The cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary.

Furthermore, all the words used in the statute should be given their proper signification and effect. *Washington Market Co.* v. *Hoffman*, 101 U.S. 112, 115:

We are not at liberty (said Mr. Justice Strong) to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statu-

tory construction that signification and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sec. 2, it was said that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." This rule has been repeated innumerable times.

Applying these well-known principles in considering this statute, we find that the fifth subdivision of section 7 provides that food shall be deemed to be adulterated: "If it contain any added poisonous or other added deleterious ingredient *which may render such article injurious to health.*" The instruction of the trial court permitted this statute to be read without the final and qualifying words, concerning the effect of the article upon health. If Congress had so intended the provision would have stopped with the condemnation of food which contained any added poisonous or other added deleterious ingredient. In other words, the first and familiar consideration is that, if Congress had intended to enact the statute in that form, it would have done so by choice of apt words to express that intent. It did not do so, but only condemned food containing an added poisonous or other added deleterious ingredient when such addition might render the article of food injurious to the health. Congress has here, in this statute, with its penalties and forfeitures, definitely outlined its inhibition against a particular class of adulteration.

It is not required that the article of food containing added poisonous or other added deleterious ingredients must affect the public health, and it is not incumbent upon the Government in order to make out a case to establish that fact. The act has placed upon the Government the burden of establishing, in order to secure a verdict of condemnation under this statute, that the added poisonous or deleterious substances must be such as may render such article injurious to health. The word "may" is here used in its ordinary and usual signification, there being nothing to show the intention of Congress to affix to it any other meaning. It is, says Webster, "an auxiliary verb, qualifying the meaning of another verb, by expressing ability, * * *, contingency or liability, or possibility or probability." In thus describing the offense Congress doubtless took into consideration that flour may be used in many ways, in bread, cake, gravy, broth, etc. It may be consumed, when prepared as a food, by the strong and the weak, the old and the young, the well and the sick; and it is intended that if any flour, because of any added poisonous or other deleterious ingredient, may possibly injure the health of any of these, it shall come within the ban of the statute. If it can not by any possibility, when the facts are reasonably considered, injure the health of any consumer, such flour, though having a small addition of poisonous or deleterious ingredients, may not be condemned under the act. This is the plain meaning of the words, and in our view needs no additional support by reference to reports and debates, although it may be said in passing that the meaning which we have given to the statute was well expressed by Mr. Heyburn, chairman of the committee having it in charge upon the floor of the Senate (Congressional Record, vol. 40, pt. 2, p. 1131):

As to the use of the term "poisonous," let me state that everything which contain poison is not poison. It depends on the quantity and the combination. A very large majority of the things consumed by the human family contain,

under analysis, some kind of poison, but it depends upon the combination, the chemical relation which it bears to the body in which it exists, as to whether or not it is dangerous to take into the human system.

And such is the view of the English courts construing a similar statute. The English statute provides (sec. 3 of the Sale of Food and Drugs Act, 1875):

> No person shall mix, color, * * * or order or permit any other person to mix, color, * * * any article of food with any ingredient or material so as to render the article injurious to health.

That section was construed in *Hull* v. *Horsnell*, 68 J.P. 591, which involved preserved peas, the color of which had been retained by the addition of sulphate of copper, charged to be a poisonous substance and injurious to health. There was a conviction in the lower court. Lord Alverstone, *C.J.*, in reversing and remitting the case on appeal, said:

> In my opinion, if the justices convicted the appellant of an offence under section 3, of the Sale of Food and Drugs Act, 1875, on the ground that the ingredient mixed with the article of food was injurious to health,—that the sulphate of copper was injurious to health, and not on the ground that the peas by reason of the addition of sulphate of copper were rendered injurious to health, the conviction is clearly wrong. To constitute an offence under the latter part of section 3 the article of food sold must, by the addition of an ingredient, be rendered injurious to health. All the circumstances must be examined to see whether the article of food has been rendered injurious to health.

We reach the conclusion that the Circuit Court of Appeals did not err in reversing the judgment of the District Court for error in its charge with reference to subdivision 5 of section 7.

The Circuit Court of Appeals reached the conclusion that there was no substantial proof to warrant the conviction, under the fourth subdivision of section 7, that the flour was mixed, colored, and stained in a manner whereby damage and inferiority was concealed. As the case is to be retried to a jury, we say nothing more upon this point.

As to the objection on constitutional grounds, it is not contended that the statute as construed by the Circuit Court of Appeals and this court is unconstitutional.

It follows that the judgment of the Circuit Court of Appeals reversing the judgment of the District Court must be affirmed, and the case remanded to the District Court for new trial.[79]

Affirmed.

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[79] On April 21, 1919, counsel for the Government and for the Lexington Mill & Elevator Co., having reached an agreement as to a proper disposition of the case, and the same having come on for final disposition in the said United States District Court, the following decree was entered on said date:

"Now on this, the 21st day of April 1919, comes Francis M. Wilson, United States attorney and proctor for the libelant, and by leave of court first had and obtained, amends the amended libel or complaint heretofore filed in this cause, to wit: on the 19th day of May 1910, by striking out from the fourth page thereof the paragraph (c) reading as follows:

"'(c) In that, by the treatment as aforesaid, the said flour has been caused to contain added poisonous, or other added deleterious ingredients, to wit: nitrites or nitric reacting material, nitrogen peroxide, nitrous acid, nitric acid, and other poisonous and deleterious substances, which may render said flour injurious to health.'"

Now here comes also the Lexington Mill & Elevator Co., a corporation, claimant herein, by Bruce S. Elliott, Esq., attorney and proctor for said claimant, and the said claimant thereupon, after the amending of the said amended libel as aforesaid, withdraws its claim and answer heretofore filed to the said amended libel or complaint, and withdraws its appearance and declines to further appear or to make any further claim, answer, or defense herein.

And this proceeding now coming on to be heard in due course, it is shown to the court that heretofore, to wit, on or about the 9th day of April 1910, in the said Western Division of the said Western District of Missouri, and within the jurisdiction of this court,

UNITED STATES v. 200 CASES OF ADULTERATED TOMATO CATSUP

(District Court, D. Oregon, Mar. 9, 1914)

211 Fed. 780; N.J. No. 3372

Libel under section 10 of the Food and Drugs Act. Tried before the court. Decree in favor of the United States.

BEAN, *District Judge.* The United States, proceeding under the Pure Food and Drugs Act (34 Stat. 770), filed a libel in this court for the condemnation of 200 cases of tomato catsup, alleging that it was adulterated within the meaning of the act, which declares that a food product is deemed to be adulterated "if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance." After the seizure the product was claimed by the company which manufactured it and the proceedings defended. the claimant admits the interstate shipment and other jurisdictional facts, but denies that the catsup was decomposed or adulterated within the meaning of the law.

By stipulation of the parties the case was tried before the court without a jury. It turns upon two questions: First, whether the product was in fact decomposed; and, if so, whether it was "adulterated" as defined by the Pure Food Law. It was manufactured from pulp screened from peelings, cores, and byproducts of tomatoes, obtained in the course of their preparation for canning. The decay or decomposition of tomatoes or tomato products is commonly the result of the attack upon the fruit in the field, or in process of manufacture, of various forms of plant life, such as yeast, bacteria, and mold. They feed upon certain compounds in the fruit, reducing the food value of the product, and producing a byproduct of a more or less offensive character, and are evidences of decay and decom-

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six hundred and twenty-five (625) sacks of flour, more or less, each containing forty-eight (48) pounds, more or less, of flour branded and labeled as follows, to wit: "L 48 Pounds Lexington Cream * * * Fancy Patent. This Flour is Made of Finest Quality Hard Wheat. Lexington Cream. Lexington, Nebraska, Lexington Mill and Elevator Company", (being still in the original packages) were taken, seized, and detained by the United States marshal for the district aforesaid, pursuant to an order and warrant of this court made and filed on said 9th day of April 1910, and that the said marshal did publish a citation (in all respects pursuant to the said order of this court), giving notice generally unto all persons having, or pretending to have, any right, title, or interest in said property, to appear before this court in the city of Kansas City, Jackson County, Missouri, in the said judicial division and district on the following 30th day of April, if it should be a court day, or else on the next court day thereafter, at 10 o'clock in the forenoon of said day, then and there to make known their claims and allegations in said matter, and which said notice was published (in all respects pursuant to the said order), by the said marshal for at least fifteen (15) days, exclusive of Sundays, prior to the said return day in the Kansas City Journal, a daily newspaper published and printed in Kansas City, Missouri, aforesaid, and within the division and district in which said property was situated; and it further now appearing to the court that no one has appeared as notified and required by the said citation; and it further appearing that the clerk of this court (in all respects pursuant to the said order of the court), did on said 9th day of April 1910, issue the process and monition of this court usual in such cases; and it now appearing that no one has appeared thereto;

Now, therefore, it is ordered that the said amended libel be taken pro confesso; and the said cause coming on to be heard ex parte, and the court being fully advised, doth find all of the allegations of said amended libel herein are true.

It is, therefore, ordered adjudged and decreed that the said six hundred and twenty-five (625) sacks of flour, more or less, as aforesaid, be and the same are hereby condemned and forfeited to the United States, and the marshal of this court is hereby ordered and directed to proceed to confiscate and utterly destroy all of said property, and to report to this court how he executed this order and decree.

It is further ordered adjudged and decreed that the taxed costs of the libelant herein, and the taxed costs of the claimant, be paid by the claimant, Lexington Mill & Elevator Company, said claimant in open court consenting thereto.

position. The condiments used in the manufacture of tomato catsup have the effect of concealing decomposition or putrefaction from the senses, and its existence can most readily be determined by a bacteriological analysis of the manufactured product to ascertain whether the organisms referred to are present in sufficient quantities to indicate a decomposed state.

Various samples of the product in question have been carefully analyzed under the microscope, separately, by Dr. Schneider, of the University of California and the Government laboratory in San Francisco, and Prof. Beckwith, of the Oregon Agricultural College, both of whom are expert bacteriologists, and they agree that it contains bacteria, yeast, and mold in very large and unusual quantities, as high as from 350 million to 1 billion bacteria and 15 million yeast spores per cubic centimeter (about one quarter of a teaspoonful) and mold hyphæ in abundance, thus indicating in the opinion of these experts, a largely decomposed condition, Dr. Schneider says from 10 to 15 percent, and according to their testimony it is unfit for human food. This testimony is not contradicted in any way, although the claimant was permitted to and did take samples of the goods for analysis after their seizure. Nor is there any conflict among the experts as to the scientific deductions to be made therefrom. It would seem conclusive therefore of the fact that the product is decomposed in part or in whole. The examination of the bacteriologists is confirmed by a chemical analysis made by the chemist at the Government laboratory, and in my judgment finds support in the method of manufacture. The evidence shows that the fruit from which the product in question was manufactured was brought to the factory in carload lots in boxes containing about 50 pounds each. Without being sorted or examined in any way except the merest visual examination of the outer layer of fruit, the contents of the boxes were emptied for washing into a vat containing about 150 gallons of water, which was only changed once a day, except as it might be affected by a 1-inch stream running into the vat and an overflow pipe at the top. While in the water the tomatoes were stirred by a mechanical screwlike agitator, which subsequently carried them to the steaming table, where they were scalded with hot water to loosen the skin, and washed under a spray of cold water. From there they were taken in buckets to the peeling table, where the skins were removed and the tomatoes graded for canning. Then the skins, with such pulp as adhered to them, the stem ends, and like byproducts were placed in buckets by the operatives and subsequently taken to another department of the factory, where they were used in the manufacture of the catsup in question.

The washing of a large quantity of fruit which necessarily is more or less infected with bacteria, mold, and decay in the manner described would naturally have a tendency to foul the water and infect the entire lot, and especially the skins and byproduct from which the catsup in question was manufactured. Again, the claimant depended on the peelers or sorters to sort out and reject the decayed portions from the trimmings before they were sent to the catsup department. The peelers were paid by the piece for the peeled tomatoes only, and it is but natural that they would become careless or indifferent about the removal of the decayed material from that portion of the output for the handling of which they received no direct compensation. It

therefore seems to me that the method of manufacture adopted by the claimant was calculated to produce just such a product as the bacteriologists found the one in question to be. Better methods of handling the fruit are in vogue, for it is in evidence that in other factories, the output of which was shown to be unobjectionable, the tomatoes were sorted and the decayed or infected ones removed before being washed and were washed in perforated metal cylinders by sprays of clean water.

If the testimony in this case is to be considered, and it is uncontradicted, there is, in my judgment, but one conclusion which can be reached, and that is, the product in question was decomposed and adulterated within the meaning of the Food and Drugs Act.

It is argued for the claimant that since the presence of bacteria, mold, and yeast in any quantity is evidence of decomposition or the process of decomposition, and there is no fixed standard by which it can be determined when a product has reached such a stage of decomposition as to " consist in whole or in part of filthy, decomposed, or putrid vegetable substance," the Government cannot prevail. I infer from the testimony of the experts that it would be difficult, if not impossible, to fix any arbitrary standard by which the question could be determined, as it depends upon so many contingencies. In any event, no such standard has been fixed, in the absence of which each case must be determined on its own facts; and when it appears ,as in this case, that the product is so far decomposed as to be unfit for food it comes within the letter and spirit of the law. It was also urged that since there is no proof that the product in question would be injurious to health a verdict should be ordered in favor of the claimant; but I do not understand that such proof is necessary or required under the provisions of the Food and Drugs Act, on which this proceeding is based. The object of the law is to prevent the manufacture or interstate shipment of adulterated food, and when food is adulterated so as to " consist in whole or in part of filthy, decomposed, or putrid animal or vegetable substance " its interstate shipment is prohibited, whether its use would be injurious to health or not.

The recent decision of the Supreme Court, while not at hand, involved, as I understand from the press report, the construction of the fifth subdivision of section 7, and not the one involved in this controversy.

I conclude, therefore, that the motions for nonsuit and directed verdict should be overruled and that a decree should be entered in favor of the Government, as prayed for in the libel.

UNITED STATES v. HOPKINS

(District Court, Connecticut, Mar. 10, 1914)

N.J. No. 3413

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of acquittal.

The United States attorney filed an information against H. O. Hopkins, alleging the shipment in violation of the Food and Drugs

Act, from the State of Connecticut into the State of Rhode Island, of a quantity of milk which was alleged to have been adulterated.

Adulteration of the product was alleged in the information for the reason that it consisted in part of a filthy, decomposed, and [or] putrid animal or vegetable substance.

The cause having come on for trial before the court and a jury, the following charge was delivered to the jury:

THOMAS, *District Judge.* Gentlemen of the jury: In June 1906 Congress passed a law commonly known as the Food and Drugs Act, by which it was sought to better protect the consuming public against the scheming manufacturers of food and drugs. Among many other things it is provided in that law that it shall be unlawful for any person to manufacture any article of food that is adulterated within the meaning of the act. The act further provides, so far as this inquiry is concerned, that an article of food shall be deemed to be adulterated

if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance.

It further provides, as pertinent to this inquiry,

that the introduction into any State * * * from any other State * * * of any article of food * * * which is adulterated * * * within the meaning of this act, is hereby prohibited; and any person who shall ship or deliver for shipment from any State * * * to any other State * * * any such article so adulterated * * * within the meaning of this act * * * shall be guilty of a misdemeanor.

You will see that the act defines what is an adulterated article of food.

Now, this is a criminal prosecution. In every criminal case the law presumes that the accused is innocent until his guilt is established, and in this case it must be established by the Government beyond a reasonable doubt. The presumption of innocence in favor of an accused person follows him throughout the trial until sufficient evidence has been adduced by the Government to induce in your minds the belief that he is guilty beyond a reasonable doubt. At the beginning of every judicial inquiry the law says that he who asserts the affirmative of any proposition of fact assumes the burden of proof; that is, he must prove what he says. Where claims are made upon one side and denied upon the other, as here, the parties are at issue upon the truth of those claims, and the law in this case places the burden of proving those claims upon the Government. The burden of proof in this case is not discharged until the Government has proved all the material allegations of the indictment beyond a reasonable doubt, and if it fails to prove all of the material allegations beyond a reasonable doubt, then it has failed to sustain the burden which the law imposes upon it, and the accused is entitled to an acquittal.

What is a reasonable doubt? Not all phrases are aptly or accurately defined by the use of the words themselves, but in this case it may be fairly stated that a reasonable doubt may be defined by the use of the words themselves. It is such a doubt as a reasonable man would entertain in determining or deciding the important and graver affairs of life. It is not a mere guess, whim, conjecture, or possibility; it is a reasonable doubt arising in your minds after

a careful consideration of all the evidence in the case so that you are unable to say that you are reasonably certain that the Government has proven all of the material allegations of the indictment, and in this connection I charge you that if the Government fails to sustain the burden of proof or that you entertain a reasonable doubt as to any one of the material allegations of the indictment, then even the accused is entitled to the benefit of the doubt arising in your mind and should be acquitted, the same as he should be convicted in case you find that the Government has sustained the burden of proof and has satisfied you, beyond a reasonable doubt, of the truth of all of the material allegations of the indictment.

In weighing the evidence and determining the credibility of the witnesses and each of them you should look to the manner and demeanor of each witness in testifying; to the readiness and willingness or tardiness or unwillingness, if any, in answering upon the one side or the other; to whether the witnesses, or any of them, have any bias or interest or not; to the witness' means of knowledge and opportunity for knowing the facts he has testified to and professes to know and understand; to the reasonableness or unreasonableness and the probability or improbability of the circumstances related by the witnesses when considered in connection with all the facts and circumstances in evidence before you. And having thus carefully considered all these matters the jury must fix the weight and the value of the testimony of each and every witness and the evidence as a whole, and are not compelled to accept as true any statement made by any witness unless you find such statement to be true after considering the same in connection with all of the facts and circumstances in evidence before you, reconciling, as far as possible, any conflicting evidence.

It is true that the jury is a tribunal which is regarded by the law as one especially fitted to decide controverted questions of fact upon the evidence. The jury decides how much credibility is to be given to each witness, what weight justly belongs to the evidence, and between the statements of hostile and contradictory witnesses, where the truth lies. A juror must use all his experience, his knowledge of human nature, his knowledge of human events, past and present, his knowledge of the motives which influence and control human action, and test the evidence in this case according to such knowledge, and render his verdict accordingly. The juror who does not do this is remiss in his duty. It is properly within your province, in listening to the testimony of the witnesses, to observe their demeanor on the witness stand, their manner and bearing, intelligence and character, and means of knowledge, and to take into consideration, as I have said, any interest or bias any witness may have or entertain, and to reconcile, as far as possible, any conflicting evidence.

Before I address myself to the question particularly involved in this case I ought to and do remind and charge you that you and you alone are the sole judges of the questions of fact which arise here, and you are to determine these questions upon a careful consideration of all of the evidence before you without direction or suggestion from the court as to what weight or value you should give to all or any part of the testimony; nor are you in any way to be governed in

your conclusions by any opinion the court might seem to express or to give you.

A juror's first concern, where the parties are in flat conflict as to the essential facts, where the evidence is contradictory, is naturally to determine what the real facts are. You are to be guided in your performance of that duty by the court only in following the law which the court gives you. So that, while you are in every essential sense the sole judges of the facts, you are answerable to the court for the application of the law to the facts as you find them, and you must receive from the court and apply to the case such instructions upon the law applicable to the case arising here as shall guide your deliberations toward a verdict in harmony with the law's requirements.

In considering this case and in drawing your conclusions you will necessarily be guided to some extent by the testimony of expert witnesses. I therefore deem it necessary to instruct you with reference to the evidence of such witnesses. An expert witness is one who is skilled in any particular art, trade, or profession, being possessed of peculiar knowledge concerning the same, acquired by study, observation, and practice. The jury is not bound by expert testimony necessarily but such testimony should be considered by you in connection with the other evidence in the case. Their testimony is subject to your consideration and your supervision and your judgment. Such testimony is to be taken and treated by you like the testimony of other witnesses. Their opinions are subject to the same rules of credit or discredit as the testimony of the other witnesses and are not necessarily conclusive upon the jury. Whether the matters testified to by them are facts, whether they are true or false, is to be determined by the jury alone, and you will carefully consider and examine their testimony in connection with all the other testimony in this case, as I say, subject to the same rules of credit and disbelief as the testimony of other witnesses.

The material allegations of the information are as follows, all of which you must find to have been proven beyond a reasonable doubt before you can find the defendant guilty:

First. That H. O. Hopkins, the defendant, did unlawfully ship certain milk on September 6, 1911, and that it was the subject of an interstate shipment; that is, from one State to another, for it is only in an interstate shipment that the Federal courts have jurisdiction; or that he delivered for shipment said milk.

Second. That said milk was the subject of an interstate shipment—that is, from one State to another—in this case from Connecticut into Rhode Island.

Third. That said milk was an article of food.

Fourth. That said milk was adulterated.

Fifth. That the adulteration consisted in part of a filthy, decomposed, or putrid animal or vegetable substance.

Sixth. That no other person or agency save the defendant himself or his authorized agents caused this milk to be adulterated.

Under the first essential there has been much testimony with reference to the initials "H. O. H.", "H. H. O.", and "H. H." If you entertain a reasonable doubt from all the evidence about the sample taken by Mr. Meserve, the Government's inspector, and analyzed by Dr. Stiles, the Government's bacteriologist; if you entertain a

doubt about this milk being the defendant's milk, your inquiry is ended, and the defendant is entitled to the benefit of the doubt and should be acquitted. If you believe that it was the defendant's milk that was analyzed, you will pursue your inquiry and ascertain whether it was adulterated at the time the defendant left it on the depot platform at Plainfield. If you find that it was adulterated after he left it at the depot platform at Plainfield, either through the direct act of someone else adulterating it, the defendant should be acquitted, or if you find that it was adulterated through an indirect agency, through any foreign substance getting into the cans, or that it was old or impure milk through no fault of the defendant, because it was not properly iced or because it had been allowed to stand on the day in question, when the temperature was as testified by Mr. Tarr, 70° at 6 a.m. and 84° at noon, you could not then find the defendant guilty. You must take into consideration the conditions under which this milk was produced. In view of the fact that the evidence was given some days ago, I will recall to your minds some of it. You will remember the testimony of the defendant, giving you in detail the conditions under which he produced his milk; where he kept his cans and how he milked and when he milked and what he did with it after he drew the milk and the manner in which he eventually got it to the depot. If you find, as I say, that this milk was produced under those conditions, and being produced under such conditions as to satisfy you that it was not adulterated, as I have heretofore explained to you, and if you believe that at the time it was left by him at the depot platform at Plainfield that it was not adulterated within the meaning of this act, why then, of course, you could not find the defendant guilty. On the other hand, if you do believe, as it has been testified, that at the time it was left at the depot platform at Plainfield that it was adulterated within the meaning of this act and that this adulteration consisted of a filthy, decomposed animal or vegetable substance, why, of course, then the defendant would be guilty. In assisting you in arriving at your conclusion with reference to the adulteration you have the testimony of the experts. In behalf of the Government the testimony shows that these samples were taken at the depot in Providence, after the train had arrived in Providence. Defendant claims that ample time had intervened from the time he left it at the depot platform in Plainfield until the samples were taken by the experts for foreign substances, in a number of ways, to have gotten into those cans, either through the water from the ice filtering through the wooden stoppers, around the edges, or through some person willfully opening a can and putting in foreign substance of this nature. Of course if you find those facts to be true the defendant would not be guilty; and, on the other hand, if you find from all the testimony that such was not the case, but that it was adulterated as it was left there by Mr. Hopkins at the depot platform in Plainfield, why, then, of course he would be guilty. Take in that connection the testimony of the experts; you will recall the testimony of Dr. Stiles for the Government, after he took this sample, taking it in one vial he dumped it into another one, and he had some cotton in one end of the vial, and that his fingers were on the stopper somewhere, and that he put it in a suitcase with some ice, and

took it to Boston to his laboratory and analyzed it, the final analysis not occurring until he reached Boston. You are to take all of these matters into consideration, as to whether or not this milk was adulterated at the time Mr. Hopkins left it at the depot platform in Plainfield. And you will recall Dr. Stiles' testimony was to the effect that there were 20,000,000 bacilli, I believe, in the samples; it is for you to determine and for you to find out whether it is true that that was the condition which existed at Plainfield as the cans were delivered by Mr. Hopkins at the depot platform. Prof. Esten, of the Connecticut Agricultural Station, testified giving his opinion. You will bear in mind that this sample was taken the 6th of September and this defendant knew nothing about it until the 2d day of January following; in consequence of this it was impossible for him or his experts to analyze that particular sample and find out whether his experts would agree with the Government's experts; therefore their expert's opinion is adduced from facts testified to by Dr. Stiles. Prof. Esten testified—if I am not right it is for you to correct me—that, in his opinion, it is quite likely when that milk left Mr. Hopkins' farm or the Plainfield depot it had from 25,000 to 50,000 baccilli in it, and on account of the warmth of the day, if it was not thoroughly iced, that these germs multiplied rapidly and might naturally produce the results as testified to by Dr. Stiles in the interim between the time this milk was left at the depot platform in Plainfield until Dr. Stiles examined it at his laboratory in Boston.

We have had some testimony before us with reference to what is good milk, excellent milk, fair milk, etc. In Connecticut I ought to tell you that we have a statute which provides as follows: "Milk containing more than 1,000,000 bacteria per cubic centimeter shall be considered impure milk." By that it is reasonable to infer that the only inference that can be drawn is that if it does not exceed 1,000,000 it is not impure, but the minute it goes over the million, then it becomes impure milk. So you can use that as a standard as to whether this milk, at the time Mr. Hopkins delivered it on the depot platform at Plainfield, whether it then contained in excess of 1,000,000 bacteria so as to determine the question whether it was old and impure milk. Of course, Mr. Hopkins, the defendant, could not be charged with what happened after he delivered it in Plainfield. The inquiry and what you are to find from all this evidence is, What was the condition of this milk when he left it there at the depot?

The COURT. Mr. James, on your second list of requests do you want those claims stated?

Mr. JAMES. If Your Honor please.

The COURT. I have been requested to charge by the defendant as follows, and with slight modifications will charge as requested. Much of this is repetition, gentlemen, but in view of the court being requested to charge, I feel in duty bound to and do charge with slight modifications.

The constitutional right of liberty is so sacred that every person coming into court charged with a crime, whether it be a felony or a misdemeanor, is presumed to be innocent until the evidence overcomes that presumption of innocence to a degree arising to the

mental condition of the jury whereby there shall be no reasonable doubt. By reasonable doubt we mean just what those words indicate; a doubt arising beyond reason that develops from the evidence—that grows out of the evidence; not beyond a conjecture of a doubt, but a reasonable doubt. This respondent, Mr. Hopkins, is charged here with the violation of the Pure Food Act, so-called. Now, a little analysis of the law may aid you somewhat, probably materially, in disposing of this question. The law, as applied to this case, is, to use the language of the law, " that it shall be unlawful for any person to manufacture within the territory of the United States any article of food or drug which is adulterated or misbranded." You observe the language—adulterated or misbranded; unlawfully to manufacture any article of food that is adulterated or misbranded. It is also unlawful for any person to ship or deliver for shipment from one State or Territory to another any such manufactured, adulterated, or misbranded article of food. Now, that is the law, and in order to convict, you must find, beyond a reasonable doubt, that this milk was adulterated within the meaning of the act, as I have defined it. No claim that he manufactured. No claim but what this was milk that came from his dairy of cows. The claim is that the milk was adulterated, and then, in the language of the law, " delivered for shipment into another State." Now, to sustain that you must find, beyond a reasonable doubt, both of those things; first, that the milk was adulterated, and, second, that he delivered it for shipment at Plainfield into another State, and those two questions you must find beyond a reasonable doubt.

Now, you will naturally ask right off when you retire: What does " adulterate " mean; does it mean the accidental dropping of something into the milk or that something accidentally got into the milk and thereby changed its quality? Is that what is meant by adulteration? Well, now, the law itself says, " If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter ", it covers the meaning of " adulterated." Now, you want to think of that pretty carefully—filthy, decomposed, or putrid matter; putrid animal or vegetable substance. The law limits it right down to filthy, decomposed, or putrid animal or vegetable substance.

Take the general scope of this Pure Food and Drugs Act which, in my judgment, is one of the most wholesome acts ever passed by Congress, and it is the duty of the courts to see that it is enforced, was primarily driving at manufactured articles of drugs and food. Now, the question is whether we have a case here that comes up to that point, and we must keep within the law, and you will have to find from this evidence, beyond a reasonable doubt, that not only that milk was impure, but that the impurity consisted of a filthy or a decomposed or of a putrid animal or vegetable substance, in order to bring this man within the law. The law addressed itself to your common sense as to whether those things that were found in this milk show a state of facts that satisfy you, beyond a reasonable doubt, that those things were some one of these that I have enumerated and that this milk in question was adulterated, either

through a purpose on the part of this defendant or through carelessness—no claim of its being done on purpose, nobody claims that, for it is conceded here that he is a good, upright man; now, that may be by carelessness and a criminal carelessness, that is for you to say; but if you do not find that this milk was adulterated with some of these things that I have enumerated, that is the end of your inquiry and your verdict should be "Not guilty." If you do find that the impurities in that milk come within the definition that I have just read to you, then you should inquire as to whether or not the evidence satisfies you, beyond a reasonable doubt, that it was the defendant's carelessness that got that impurity into the milk, and you will find that in the evidence.

There are just two branches of evidence—one is as to just what the chemists found there and the other as to the care the defendant took—and if in considering those two questions you have a reasonable doubt, then you are to find in behalf of the defendant; if not, then it is your duty to convict. So the case rests right there.

And I want to say right here that no matter what the court may have said about the facts in this case as indicating to your mind what I think you ought to do, that is of no consequence; whether I think this man was guilty or not. You are not to guess as to what I think; you are to pass upon that, and when I allude to the testimony it is merely to illustrate the law and the question of the law; you take care of the facts.

The COURT. Any exceptions?

Mr. SCOTT. I except to that portion of the charge where you state that the law was primarily aimed at manufactured articles of food.

The COURT. I think it would be fair to say in connection with that that the law was primarily aimed at manufactured articles of food and drugs, and adulterated articles of food and drugs. I am charging you that it is also aimed at adulterated articles of food and drugs.

Mr. SCOTT. I except to that portion that it was primarily aimed at manufactured articles of food and drugs and the adulteration of food and drugs.

The COURT. Exception noted on the part of the Government.

Gentlemen, you may retire, and when you have agreed upon a verdict let me know.

UNITED STATES v. FOUR BOXES OF MULFORD'S WINTERGREENS

(District Court, N.D. New York, Mar. 10, 1914)

N.J. No. 3440

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict in favor of the United States.

The United States attorney filed a libel for the seizure and condemnation of 4 wooden boxes, each containing 36 small tin boxes of Mulford's wintergreen confectionery, alleging that the packages had been transported from the State of Pennsylvania into the State of New York, and charging adulteration in violation of the Food and Drugs Act.

Adulteration of the product was alleged for the reason that it contained 5.49 percent of talc, the said talc being an ingredient deleterious and detrimental to health, and the use of it being forbidden by law in the manufacture of confectionery. The case having come on for trial before the court and a jury, the following charge was delivered to the jury by the court:

RAY, *District Judge.* Gentlemen of the jury: This is a proceeding by the United States under the law known as the Pure Food and Drugs Act to condemn these four wooden boxes of wintergreens that you heard described. This law that you are called upon to enforce here, if it has been violated, and the Government contends that it has, is a wise law, an efficient law, enacted for the good of the people, all the people, the protection of trade, commerce, and individuals. No juror under his oath, no judge on the bench, has any right to question it or its wisdom, because when I take my seat here it is under a solemn oath that I will enforce the law as I find it and, of course, construe it. You take a solemn oath that you will enforce the law as you find it laid down to you by the court, and therefore you have nothing to do with the construction of the law or ordinarily with the meaning of it. It is for you to say what the facts are under the law as given. So, gentlemen, that simplifies this case so far as you are concerned very much.

Now, gentlemen, wintergreen they tell you is a drug. A stick of wintergreen candy which you buy for your child you would hardly call a drug. It would have a drug in it of course, if it had any of the oil of wintergreen to give it taste, and so the oil of peppermint or the essence of peppermint is a drug. But if you should purchase a stick of peppermint candy in the candy shop, or as they say a confectioner's shop, as in polite society they would speak of it, you would hardly say that the stick of peppermint candy was a drug. It contains a drug. However, gentlemen, should it appear that peppermint, wintergreen, or horehound candy, which has horehound in it, was made, manufactured, sold, and administered by doctors for medicinal purposes for the cure of disease, the alleviation or mitigation of disease, if that was the purpose in its manufacture and sale, even though there is a large amount of sugar and but a trifle of this essence or oil in it, why, then, of course, it would at once be taken out of the category of condiments and confections and would take its place in the category of drugs.

Now, Congress when it enacted this law undertook to define, so far as it reasonably could, a drug, a food, as the words are used in the act, and indicate what may be or may not be a confection as distinguished therefrom. Of course, the dictionary says that a confection may be a sweetmeat, any of the sweetmeats that a confectionery makes or sells, such as candy or other articles made of sugar, sirup, honey, or like anything of that nature. Of course, you all know that to make these candies, etc., distinguishable from the sugar which is the chief part of them they use various oils, such as wintergreen, peppermint, spearmint, and other things. You have been acquainted, of course, during boyhood and in childhood with peppermint candy and all those things.

Now, a confection may be defined to include an article produced by the mixing or compounding of sugars, sweets, etc., for pleasing

the taste mainly. Of course you know well enough, and you don't need any doctors here to tell you, that sugar is an article of food. They might bring all the doctors in the United States to swear to you that sugar was a drug and you wouldn't believe it, and I wouldn't believe it. Of course, sometimes it comes under the head of drugs, when it is used with other things, for medicinal purposes mainly. It is then used as a drug, but of itself it is not a drug. When it is put up and changed over in certain forms it is then a sweetmeat or a confection. When is is used in connection with other things for medicinal purposes and something is mixed with it, it becomes for the time being not a drug of itself, but in the use that is made of it, the compound, a drug.

"The term 'drug', as used in this act, shall include [I read it to you yesterday; I will read it again] all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use." That is, it must either be a medicine or a preparation recognized in the book. Of course as to these wintergreens, there is no pretense here that that particular composition is recognized in the United States Pharmocopœia, to which your attention has been called, as used in that section. That preparation is not mentioned or recognized there. Therefore, you must determine, gentlemen, what it is. Of course it is intended for internal use, but it is not recognized here; therefore it is not included here under this definition as a drug, unless it is a drug for other reasons. And it further says, "and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals." I will read that again: "and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals."

The defendant contends here that these wintergreens, these tablets, are a drug within the meaning of this act, for the reason that they may be used to sweeten the breath. Well, that, gentlemen, I will say to you as a matter of law, will not make that composition a drug within the meaning of the law. They claim they "aid digestion", and they explain why, by the use of the wintergreen, not the sugar; they don't claim that the sugar or the talc or whatever mineral oils there are in there, but the oil of wintergreen would aid digestion or alleviate indigestion. To be correct, cure indigestion; that the wintergreen would assist the stomach in getting rid of the gases produced by indigestion, and for that reason the tablets may be regarded as having a medicinal property. That is the contention of the defendant; that it is a drug, because the defendant says it is a mixture of substances, to wit, 93 parts of sugar, 5 parts of soapstone or talc, one half of 1 part mineral oil, some starch, one eighth of 1 part of the oil of wintergreen, and that the presence of that one eighth of 1 part out of 100 parts, regarding that as divided up into 100 parts, and then you take 1 one-hundredth of that and divide that into 8 parts, one of those 8 parts you can see would represent the wintergreen that is in there.

Mr. Dowd. One of those 800 parts?

The Court. One eighth of 1 of those parts. Now, if that is cut into 100 pieces you would have a representation of 100 parts, and one eighth of 1 part, the evidence is, is oil of wintergreen. Therefore,

if it was reduced, taken out, and separated and put in a solid, compared with that it would be one eighth of 1 one-hundredth certainly, unless mathematics have changed, so it would be one eight hundredths of the whole, so that if you could so cut that up that fraction would show you a solid mass of oil of wintergreen. Now, counsel for the Government points to the fact that the Pharmacopœia of the United States specifies as a dose for medicinal purposes 16 drops, and they have given you the evidence as to the infinitesimal part of that dose is represented in 1 of these tablets. I think the evidence tends to show that it would take some 5 boxes to get a dose; that you would have to eat 5 of these boxes of tablets before you would have a dose. Now, the United States attorney, the Government, says that that demonstrates to you, or should demonstrate, the fallacy of the contention by the defendant that this was ever intended as a medicine or for medicinal purposes or to be used as a drug for the cure or the mitigation of any disease or diseases. That it demonstrates it because recognized authority says you would have to take 16 drops—I think that is right, if I am wrong you can correct me—that you would have to eat 5 boxes of these tablets to get a dose, and the only purpose they point out of the wintergreen is to aid and cure indigestion, and they say if you had to take 5 boxes of that sugar, pure sugar with the mixture of soapstone, which is talc, that instead of aiding your digestion or the digestion of a man who had indigestion that it would aggravate the disease, and that if he did not have indigestion before he certainly would have after he took the medicine. Of course, I mention that to you gentlemen as bearing on the reasonableness or unreasonableness of these contentions that have been put forward here by the respective parties as to what this is, what it was intended for, whether as a medicinal preparation, as a mixture of substances intended to be used for the cure or mitigation or prevention of disease of either man or other animals. Was it made and intended for that purpose and put on the market for that purpose, or was it made and put on the market as a confection and for the purpose of confectionery; that is, sugar, sweetmeats with certain additions, wintergreen in some cases and peppermint in others, because it is sweet and pleasant to the taste, and these various ingredients do make it more pleasant to the taste and more agreeable to the throat and all that sort of thing? Now, which was it?

If you find, gentlemen, under this evidence that this was a mixture of substances intended to be used and put on the market and sold for use for the cure, mitigation, or prevention of disease of either man or other animals, why, then, of course, gentlemen, you should find that it is not a confection, and then it would not be adulterated within the meaning of the act as applied to confectionery, because the act says: "In the case of confectionery, if it contain terra alba, barytes, talc"—I don't need to name the others—talc or spiritous liquors, etc., then it is adulterated. Of course, gentlemen, a mere trace of talc found in there accidentally or put there for some other purpose would not make it adulterated within the meaning of the law, but this is not a trace; it is 5 parts out of 100, and it is a material part, I will tell you as a matter of law. So that, gentlemen, if you find that these wintergreens are a confection within the

definition of confectionery, as you have heard it given, then I tell you, as a matter of law, it will be your duty to find a verdict in favor of the Government for the condemnation of these four wooden boxes of wintergreens, because it is plainly, as a matter of law, within the condemnation of the act.

This is not a criminal case, gentlemen. This is not an attack upon these estimable gentlemen here in this city, men of the highest character, Walker & Gibson. This is not an attack on them, no reflection on them, nor intended to be. If the law is to be enforced it does not make any difference where the Government finds these impure and deteriorated articles, whether they find them in a barroom, in a cigar store, a drug store in this city, or in your parlor or mine, if it is a violation of the law for it to be made and put on the market at all, why, then, wherever found, whether it is found in the barn of the poor man or in the parlor of the rich man, it is equally a violation of the law, because it is the quality of the thing that condemns it, and not the character of the man who happens to be handling it. Of course, there is not the slightest evidence here that these gentlemen, these druggists, knew that they were handling something condemned by the law, not a particle of evidence to that effect. But that does not lessen your duty or mine if you find and believe on this evidence that this was a confection and not a drug. It is not the question of intent on these gentlemen's part at all. It is, What is the article?

Of course there is a law against impure liquors and all that sort of thing. Now, to illustrate: Of course, if liquor that is put on sale is a composite of poison, no pure liquor about it at all, but somebody is making it and sending it out and getting it on the market; of course, if they should find it in a low-down saloon here in Albany and seize it and try to condemn it, nobody would object, unless it were some particular citizens whose stomachs were so hardened that they would not appreciate a good drink and who wanted liquor with a bite and sting like a serpent; that would be the only liquor they would appreciate; they would be the only ones that would object to it being seized and destroyed as offensive to the law. But if by any imposition on you or I, Mr. Dowd, or these other gentlemen, someone should sell you that liquor and you should take it home and the Government officers should come along and see it and find it on your sideboard, however much we might dislike to have it found there and taken away, we would probably thank our Government that it was discovered and removed. But it would be just as much their duty to seize it when found on our sideboard, don't you see, as it would to take it from the lowest saloon in the most degraded hamlet in the land. I merely mention that to illustrate our duty and why the enforcement of this law is not an impugning of the honesty or the integrity of any man or even of the manufacturer of the article necessarily. Of course, if the manufacturer knows and appreciates that he is violating the law and he does that, what he makes is subject to seizure and condemnation, not because he intended to violate the law, however, but because he makes the article which he does. If he were prosecuted criminally, of course, then his knowledge, intent, and purpose would be very material; but when you

proceed simply against the property itself to condemn it, it is not the intent or the purpose—wrongful intent or purpose—of the manufacturer which is in issue, but it is the quality of the article which is made. Is it of a quality and character which violates the statute? If so, then it is not only the right but the duty of the Government to seize it. So that is this case. It is not a question whether these gentlemen who made this—Mulford & Co.—intended to violate the law. Did they violate the law? That is, did they make an article of confection and put it on the market which is forbidden; that is, if this is a confection made up of sugar, with a trace of wintergreen, one half of 1 part mineral oil, a trace of starch, and 5 parts of talc—if they did that and put it on the market and it is an article of confection, then it is an article forbidden by the law and should be condemned in this proceeding. I tell you, gentlemen, it is entirely immaterial, if this is a confection and you so find, whether or not the talc may be injurious to health, because in that regard it is entirely immaterial, so far as the application of the law to this case is concerned, whether the confection is deleterious to health or not, because that section which I have read to you forbids absolutely the putting of talc into an article of confectionery. Of course, I have told you that that means an appreciable amount, and I have told you further that 5 parts in 100 in one of these little tablets is a material amount and sufficient to make it subject to condemnation if you find that is what it is.

Now, then, gentlemen, as to what this is, what it was made for and intended for, quoting the language of the act, "a substance or mixture of substances intended to be used", etc., the Government contends that these tablets were never intended to be used as a drug or a medicine or for the prevention or the cure of disease; that if they had been they would have been listed in this book that you have seen here. But they are not; they were put on a separate little paper, which has not been produced. And then the Government says that Mr. Mulford, the vice president, I think it was, wrote this letter—the vice president of the company, who was there managing it—that he wrote and said, referring to these wintergreens: "Trusting that this information will enable you to bring the matter of shipment of these various confections up to the proper classification bureau", etc., and that that is an admission on his part, made November 14, 1912, that these wintergreens which he specially mentions are confections; that they had been thinking about the law and knew of it; and that when he made that admission he spoke advisedly. It is for you to say. I submit it to you, as part of the evidence in this case, what they were manufactured for. What was that mixture made for and intended to be used for and put on the market for? Was it something to be used for the cure, mitigation, or prevention of disease or for common consumption, to take in your pocket and have one in your mouth because pleasing to the taste and sweet, just as you would have a licorice drop or a piece of candy, or something of that sort, or a gumdrop on your sideboard. These I have mentioned last are confections, it is true.

Then, here, again, gentlemen, the Government calls attention to these shipping bills, etc., made out as you have heard described, and the Government contends that here was a straight admission on the

part of this defendant company February 8, 1913, February 5, 1913, February 28, 1913, and February 7, 1913, when they made shipments of these wintergreens; they had stamped on there "Confectionery in tin, invoice value not exceeding 15 cents a pound." I think the stamp on there is the same; it reads the same in every case, so I do not need to go over that again. That after these dates and prior to April 15, 1913, when these tablets were shipped, that some of these were seized in a cigar store by the Government, and that gave them notice, and they went right on shipping them, but they changed their shipping bill and left off that designation "confectionery in tin", etc., and that accounts for this one shipping bill.

Now, gentlemen, it is for you to say was that an admission? Were those stamps characterizations? Did they speak the truth at the time they were made, and did they show the purpose for which those tablets were actually made, and put upon the market—that is, whether it was a mixture of substances made and intended to be used and put on the market to be used and sold as a confection or as a drug or a medicine?

That is about all there is in this case for you to decide. If you find that it was a confection, then you find for the Government for the condemnation of this property. If you find, on the other hand, it was made and put on the market, manufactured, and sent out and intended to be for the cure or mitigation or prevention of disease of either man or other animals, then, of course, it will be your duty here to find a verdict for this defendant.

Your requests to charge there I have covered, and I give you an exception where I refused to charge as requested.

Mr. HEPBURN. Will Your Honor give me an exception to such requests as you have not charged?

The COURT. Neither of you claim that these tablets were ever put out or intended to be put out or intended to be used as an article of food, do you?

Mr. HEPBURN. Unless you class confectionery under the head of food, as is done in the act.

The COURT. Oh, no; confectionery is not an article of food within the meaning of this law.

Mr. HEPBURN. I think the law says it is an article of food.

The COURT. It does?

Mr. HEPBURN. Yes.

The COURT. It says that it is?

Mr. HEPBURN. Yes.

The COURT. Where?

Mr. HEPBURN. "The term 'food' as used herein, shall include all articles used for food, drink, confectionery, or condiment by man." You see it is mixed up there.

The COURT. That isn't it. This tells when these things are adulterated. In the case of drugs. In the case of confectionery. In the case of food. That is where it makes a distinction.

Mr. HEPBURN. I mean the definition of food covered confectionery.

The COURT. As excluded from that you don't claim that it is a food? You claim it is either a drug within that provision or a confectionery.

Mr. HEPBURN. My claim is that it is a drug, and their claim is that it is confectionery.

The COURT. You don't want me to talk about this question of food. You know what a food is, don't you? Beefsteak would be a food; crackers would be food; chickens would be a food in that sense of food, because there are provisions here: "In the case of food." There is no contention here that any substance has been mixed or packed with it so as to reduce or lower or injuriously affect its quality or strength?

Mr. HEPBURN. No.

The COURT. Because if you want me to come to that and hold it a food I shall direct a verdict against you on the instant.

Mr. HEPBURN. We don't claim it is a food.

The COURT. If you do, then I say that this talc, which is 5 parts to 100, would be just the same as though you had put 5 parts of sand into your sugar. If you want me to I will do it.

Mr. HEPBURN. No; I am speaking of the proposition that this is used for the purpose of——

The COURT (interrupting). I have given my charge on the proposition just as you two gentlemen have tried the case. If the jury find it is a drug, then, of course, their verdict will be for the defendant. If they find it is a confection, then, of course, they have got to find under my charge and instructions for the Government and condemnation. Any further requests?

Mr. DOWD. Nothing; only that the jury be permitted to take these exhibits.

The COURT. Of course.

Mr. HEPBURN. I withdraw the fourth request. I want to ask for an exception to that portion of Your Honor's charge in which you charged the jury to the effect that if they find it to be a confectionery that it was adulterated in the meaning of the act.

The COURT. Yes; I have told them that as a matter of law, that that adulteration was sufficient and brings it within the law and subjects it to condemnation regardless of whether the talc was injurious to health or not. Congress had the right to say that.

Mr. HEPBURN. I don't want to seem fractious [captious?], but will Your Honor give me a general exception?

The COURT. It wouldn't do you any good.

Mr. HEPBURN. Then I would like an exception to that portion of Your Honor's charge in which you charge that the adulteration of 5 parts talc was a material adulteration.

The COURT. Yes; I charged it was sufficient and that it subjected these tablets to condemnation if found to be a confection. I will give you an exception to that.

Mr. HEPBURN. I would like an exception also to that part of Your Honor's charge in which you charge in regard to a dose amounting to 16 minims or 16 drops of wintergreen. You said that to make a dose of wintergreen they would have to take 16 drops.

The COURT. No; I said there was evidence here of that, that the book said that.

Mr. HEPBURN. It was merely a comment on the testimony?

The COURT. It was merely a comment on the testimony. Mr. Dowd called attention to that on the proposition and he claimed that taking that book to show what a dose is that is what he contends here, and I called the jury's attention to that, that in order to get a dose to help your indigestion you would have to eat five boxes of these tablets. Of course they contend on their side that if a man had a little attack of indigestion and he wanted to cure it he would have to eat five boxes of these tablets with the sugar and talc, if he took a dose, and instead of helping his digestion it would be likely to give him indigestion; that is, if he didn't have it before.

Mr. HEPBURN. Will Your Honor grant me an exception to that?

The COURT. I will give you an exception to that.

Mr. HEPBURN. Can the jury take some of the boxes out with them; both with and without the talc?

The COURT. Why do you want them without the talc?

Mr. HEPBURN. So they can see them and examine them?

Mr. DOWD. Are they in evidence? They are not in evidence.

Mr. HEPBURN. We will take those that you put in evidence.

Mr. DOWD. If you will concede that ours have been manufactured for 6 years without talc they may take them. We have produced some of Park & Tilford's tablets without talc.

Mr. HEPBURN. I want to give them tablets both ways, with and without the talc, so that they can see the difference, just how these things are. It gives the jury a clearer idea of what the thing is.

Mr. DOWD. We don't care. They can take all these if they want to.

The COURT. Well, gentlemen, all I can say to you on that is you can take them; some have talc and some don't; I don't know as you can tell which is which.

Mr. HEPBURN. The ones with the word "Mulford" on have talc in and the ones without "Mulford" on have no talc in.

The COURT. Why don't you print your name on those [indicating]?

Mr. HEPBURN. We can't print it on those without the talc. We haven't discovered as yet how to do it.

The COURT. You make them both ways?

Mr. HEPBURN. This is our new construction since the time these were seized. Those without talc have no "Mulford" on the tablet.

The COURT. Well, gentlemen, they want you to see the one they have made since this seizure was made and which don't have any talc in. There [indicating] it is. You will find it in there. It don't have the word "Mulford" on. It has "Mulford" on the box, but not on the tablets; that is the point.

In the condition of my voice, gentlemen, I have made myself plain and clear to you in my charge? If there is any obscurity about any of it tell me, because it has been with an effort that I speak and in a sort of broken way, but I have tried to make it intelligible to you. If I have not, call my attention to it. Anything further?

Mr. HEPBURN. No; that is all.

The COURT. You may retire, gentlemen, and you can simply say here by your verdict: We find for the Government, which will be adequate, and you can add to it.

Mr. HEPBURN. Yes; the necessary condemnation.

The COURT. Or for the defendant. You may retire.

UNITED STATES v. GLASER, KOHN & CO.

(District Court, N.D. Illinois, Apr. 28, 1914)

N.J. No. 3400

Information in six counts alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict directed for defendant on four counts. Of two remaining counts, verdict of guilty on one, verdict of not guilty on other.[80]

The United States attorney filed an information, in six counts, against Glaser, Kohn & Co., a corporation, Chicago, Ill., alleging the sale by said defendant on September 15, 1910, under a written guaranty in the words and figures in substance as follows, to wit:

1/15/07.

STEELE-WEDELES CO., *City.*

GENTLEMEN: Replying to your favor 10th inst., would say we hereby guarantee that all goods as furnished you hereafter will comply with the Food and Drugs Act of June 30, 1906, with the understanding, however, that if we at any time use labels or packages furnished by you, or gotten up as per your instructions, we shall not be responsible for the form or wording of same, but only guarantee that goods covered by same are not adulterated. It is expressly understood that the above shall hold good until notice of revocation be given in writing.

Truly, yours,

GLASER, KOHN & CO.,
(Signed) G. D. GLASER, *Pres.*

Dict. G.D.C.
ML

of a quantity of fruit preserves which was adulterated in violation of said act; which said article was shipped by said purchaser from the State of Illinois into the State of Wyoming. The product was labeled: "Herald Brand Fruit Preserves Blackberry Flavor Apple Preserves 74% Blackberry Preserves 26%."

Adulteration was alleged in the first count of the information for the reason that the article of food consisted wholly of a filthy vegetable substance. Adulteration was alleged in the second count of the information for the reason that the article of food aforesaid consisted in part of a filthy vegetable substance. Adulteration was alleged in the third count of the information for the reason that the article of food aforesaid consisted wholly of a decomposed vegetable substance. Adulteration was alleged in the fourth count of the information for the reason that the article of food aforesaid consisted in part of a decomposed vegetable substance. Adulteration was alleged in the fifth count of the information for the reason that the article of food aforesaid consisted wholly of a putrid vegetable substance. Adulteration was alleged in the sixth count of the information for the reason that the article of food aforesaid consisted in part of a putrid vegetable substance.

The case having come on for trial before the court and a jury, and at the outset of the trial the sufficiency of the guaranty under which the goods were sold having been raised, the question was disposed of as shown by the following ruling by the court:

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[80]Affirmed, *Glaser, Kohn & Co.* v. *United States,* p. 651, *post.*

LANDIS, *District Judge.* Now, in the first place, all that Congress intended by the enactment of this law is to create a situation which as between the parties was a civil liability between the seller and the manufacturer. Congress intended that the man who is selling stuff to the trade, who has not the means of finding out the constituent elements of the things he is putting over his counter, which is in a solid package in nine cases out of ten, that that man, in order to make the pure food law a reliable thing, was to be relieved in some way of finding out the elementary constituents of the thing he sold. Now, what is the way to do it? Not being a manufacturer himself, but being a middleman, why, of course, it readily appeared to Congress that the way to do this thing is to put the onus on the man who puts it up—the man that puts the bad thing up is the man who ought to be punished, anyway—in order to locate the responsibility where it belongs we will let the middleman out if he has got a good-faith guaranty. Now, Congress put it in the law, if he has a guaranty, to let him out. Now, ever since I have heard anything about guaranties, a guaranty may run until canceled. The banking business of Chicago is now being done on the theory that a guaranty given by Jones on the obligations of Brown is good against Jones' estate 20 years from now, if it is not recalled or canceled, anything done in the future between these powers falling within the liability incurred. Now, the idea that each time the retailer buys from the manufacturer a little dab of stuff that he is going to put out over his counter expressely undertakes with respect to that stuff to identify it in a guaranty, all of which, step by step, would have to be proved by legal evidence when your prosecution comes, the idea that Congress ever had that in mind is perfect nonsense, in my judgment.

Whereupon the trial proceeded, and after the submission of evidence and argument by counsel, the following charge was delivered to the jury by the court:

LANDIS, *District Judge.* Gentlemen of the jury: The charges in this case against the defendant originally were in six counts. I have taken out of the case all counts except the third and fourth. The third count charges that the substance in question—the article in question here—consisted wholly of a decomposed vegetable substance. The fourth count differs from the third count in this, that the fourth count charges that the article consisted in part of a decomposed vegetable substance.

The statutes provide that an article is to be considered as adulterated if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance.

Now, this is a criminal case, and we start out with the proposition that the defendant is presumed to be innocent of the charge. By that, as I have already had occasion to say, is meant that the making of this charge against the defendant, the bringing of the accusation, the arraignment of the defendant here on the charge, does not operate to cast any suspicion of guilt against the defendant, and that presumption of innocence continues to abide as a real sub-

stantial thing until a time comes in the case when a situation is created which destroys the assumption—a situation of a character that you no longer indulge the presumption. What is that situation? It is a situation where the guilt of the offense charged has been established beyond all reasonable doubt.

Now, by reasonable doubt is not meant a captious doubt, or the frame of mind that a man may find himself in in an endeavor to invent a way out for somebody accused of an offense. It is a real doubt; the frame of mind that a juror is in, because of something in the proof, or something omitted from the proof, the presence or absence of which puts the juror in a frame of mind where, were he dealing with something of importance to himself personally, [it would] be very hard to act—he would pause and hesitate. If you are in that frame of mind, you have got a reasonable doubt, and your verdict should be "not guilty." On the contrary, if you have no such reasonable doubt—if the defendant's guilt of the offense charged in either counts third or fourth has been established by that degree of proof which I have indicated to you, your verdict should be "guilty."

Now, the term "decomposed", as used, means in a state of decomposition, rotten or decayed, and in this case the charge is against this defendant, which was not the jobber but the manufacturer, that the article was in that condition at the time the defendant turned the article over to Steele-Wedeles & Co., and the thing which the accusation sets out is that when the defendant did turn it over to Steele-Wedeles & Co. it was adulterated within the meaning of the adulteration as I have just given it to you.

Of course, if the evidence, if you find this article to be adulterated, or to have become adulterated, and the evidence fails to show that it was adulterated when the defendant turned it over to Steele-Wedeles & Co., the defendant is entitled to a verdict of "not guilty."

Now, in determining the question—if you find adulteration, that is decomposition—in determining the question when it took place, consider the evidence of the witnesses here, the analysists, who have told you about their analysis, their microscopical examinations; bring to bear in your consideration of that evidence your common-sense judgment. You have heard from them what they found; you have heard from them an expression of their opinion and judgment as to what was meant, what was indicated by what they found, including evidence as to when the thing happened, as indicated by what they found; and so, if you believe on that evidence, within the requirements, as I have indicated them to you, that it has been shown here as a fact, assuming you find decomposition to have been found when the examinations were made, the bad condition existed when the defendant turned the product over to Steele-Wedeles & Co., the case is made out. As I say, bring to bear your common-sense judgment upon the evidence of these witnesses. You will recall what each said as to the extent to which in the product they found the molds and yeast cells, and what that indicated, what it meant.

Now, in this case, as I stated to you, the shipper is not on trial; the manufacturer is on trial. That is because of a provision in the

law which is to the effect that the shipper, that is to say, the dealer, the man that sells things, that people who want to buy things may protect themselves against possible prosecution for violating a pure-food law by exacting from the manufacturer from whom he buys what he sells a guarantee that the product is not adulterated.

In this case there has been offered in evidence a guaranty, what the Government offers as a guaranty, what the defendant contests, alleging it is not a guaranty, but what the court charges you is a guaranty, holding, as I do, that it is a question of law for the court to determine whether the thing offered by the Government as a guaranty, in fact is. That document is in these words, to Steele-Wedeles & Co.:

Gentlemen: Replying to your favor of the 10th inst., would say we hereafter guarantee that all goods we furnish you hereafter will comply with the Food and Drugs Act of June 30, 1906, with the understanding, however, that if we at any time use labels or packages furnished by you or gotten up as per your instructions we shall not be responsible for the form or wording of the same, but only guarantee the goods covering the same are not adulterated. It is expressly understood the above shall hold good until notice of revocation be given in writing. Truly, yours, Glasser, Kohn & Co. (Signed) G. D. Glasser, president.

I charge you that the legal effect of that document handed to the jobber by the defendant in this case, the manufacturer, was to guarantee the product in controversy in this case against being adulterated, and you have no—you have nothing to do with the question of whether or not there has been given a guaranty. The only question before you is whether or not, as charged in the information, at the time the defendant in this case turned the article over to Steele-Wedeles & Co. it was adulterated within the meaning of that term as I have given it to you.

Any exceptions, Mr. Lannen?

Mr LANNEN. I desire to except to that part of the court's instruction instructing the jury that the guaranty in question is a legal guaranty on the grounds heretofore argued.

The COURT. Save your point. Any suggestion on behalf of the Government?

Mr. DICKINSON. None, except that Your Honor suggest to the jury that it is not necessary to find an intent here.

The COURT. I omitted to tell you gentlemen the question of intent or knowledge is not involved here. I should specifically have directed your attention to that point. It is not necessary to make out this case against this defendant, to show that the defendant intentionally put up an adulterated article, or that the defendant knew at the time it turned this article over to Steele-Wedeles & Co. that the article was adulterated in order to make out this case. The only question is whether at that time it was adulterated. The law casts upon the defendant the burden of showing that it was not adulterated. If you find that the article was adulterated wholly, the form of your verdict will be "We, the jury, find the defendant Glaser, Kohn & Co., guilty as charged in the third count of the information." If you find against the defendant on the theory that the article was decomposed only in part, the form of your verdict will be "We, the jury, find the defendant, Glasser, Kohn & Co., guilty as charged in the fourth count of the information", writing in the word "third" or "fourth", whatever you find.

If you find for the defendant, the form of your verdict will be, "We, the jury, find the defendant not guilty."

I send the information with you to the jury room in order that you may refresh your memory as to which count contains the charge.

Mr. DICKINSON. The stipulation is to be offered.

The COURT. All right.

The jury thereupon retired, and after due deliberation returned into court with a verdict of guilty as to the fourth count of the information, and a verdict of not guilty as to the third count of the information, a verdict of not guilty upon the remaining four counts of the information having therefore been directed by the court.

UNITED STATES v. 13 CRATES OF FROZEN EGGS

(Circuit Court of Appeals, Second Circuit, June 3, 1914)

215 Fed. 584; N.J. No. 3411

Appeal from and in error to the District Court for the Southern District of New York. Judgment affirmed; writ of error dismissed.[81]

Before COXE and ROGERS, Circuit Judges, and MAYER, District Judge.

COXE, *Circuit Judge.* The question involved in this controversy is simply this—whether decayed frozen eggs taken from the shell and mixed together are within the prohibition of the act of Congress which prohibits the transportation from one State to another of any adulterated article of food.

We are clearly of the opinion that they are, and that the question of intent of either the shipper or the consignee has nothing to do with the question. The law could not be enforced if the Government is compelled, in the case of articles clearly prohibited from interstate commerce, to establish the wrongful intent of the parties. It is enough that such articles are prohibited. All that is it is necessary for the Government to show is that an adulterated article of food has been transported in interstate commerce, and it has amply shown this in the present case. Judge Ray has found the facts and correctly stated the principles of law applicable.

The judgment is affirmed.

COXE, *Circuit Judge* (dismissing writ of error). In view of our decision in the case of the *United States* v. *13 Crates of Frozen Eggs*, decided at this term, it is hardly to be expected that a conclusion in favor of the plaintiff in error would be reached herein, even if we were permitted to review the questions presented at the argument and in the briefs. But we are not permitted to review these questions, because there is no bill of exceptions. None of the questions discussed is properly before us.

The writ of error is dismissed.

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[81] Affirming *United States* v. *13 Crates of Frozen Eggs*, p. 531, *ante*.

UNITED STATES v. 40 BARRELS AND 20 KEGS OF COCA COLA

(Circuit Court of Appeals, Sixth Circuit, June 13, 1914)

215 Fed. 535; N.J. No. 4032

Error to the District Court of the United States for the Eastern District of Tennessee. Judgment affirmed.[82]

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, *Circuit Judge.* This proceeding was brought by the United States to condemn a quantity of syrup called Coca Cola. Forfeiture was claimed under the Pure Food Law (34 Stat. 768), because the syrup was said to be adulterated and misbranded. The case was tried at great length before a jury; at the conclusion of the trial, the Government withdrew certain issues, and upon the two remaining matters the court instructed a verdict for the Coca Cola Company, the claimant of the property. The sole question presented by this writ of error is whether there was any evidence tending to show that the article was either adulterated or misbranded within the prohibition of the act. The facts presented and the questions involved are so well set out by the district judge in his carefully prepared opinion (191 Fed., 431) that we refrain from further preliminary statement. The sections and clauses of the act which it seeems may have some bearing on the question before us are given in the margin.[83]

In applying a statute to particular facts and where it becomes necessary to construe language to which opposing sides give different

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[82] Affirming *United States* v. *40 Barrels and 20 Kegs of Coca-Cola,* p. 239, *ante.* Judgment of Circuit Court of Appeals reversed by Supreme Court, *United States* v. *Coca Cola Co.,* p. 741, *post.*

[83] SEC. 6. * * * the term "food," as used herein, shall include all articles used for food, drink, confectionery, or condiments, by man or other animals, whether simple, mixed, or compound.

SEC. 7. That, for the purposes of this act, an article shall be deemed to be adulterated * * * in the case of food * * * third, if any valuable constituent of the article has been wholly or in part abstracted * * * fifth, if it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health.

SEC. 8. That the term "misbranded," as used herein, shall apply to all drugs or articles of food or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular * * * that for the purposes of this act an article shall also be deemed to be misbranded * * * in the case of food: First, if it be an imitation of or offered for sale under the distinctive name of another article. Second, if it be labeled or branded so as to deceive or mislead the purchaser * * * or if it fail to bear a statement on the label of the quantity or proportion of any morphine, opium, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilid, or any derivative or preparation of any such substances contained therein * * * Fourth, if the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided,* That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following case: First, in the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactureed or produced. Second, * * * *And provided further,* That nothing in this act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except insofar as the provisions of this act may require to secure freedom from adulteration or misbranding."

meanings, it is vital to have in mind the essential scope and purpose of the act. The present case well illustrates the importance of this consideration. Much of the Government's contention as to the extent of the prohibitions here found rests upon the theory that Congress intended to protect the public health by preventing (to the extent of the constitutional power resting in the commerce clause) the sale or transportation of deleterious foods. The opposing contention denies this broad purpose and concedes only the intent to prevent any fraud or deception in the sale of foods. The title to the act is broad enough to support the Government's utmost claim as to general purpose. It is " An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods ", etc. If there was nothing in the body of the act expressly prohibiting the sale of deleterious food, *qua* deleterious, this title would furnish some reason for expanding in that direction any terms of prohibition there might be ambiguous enough to permit the implication (*Goodlet* v. *L & N. R.R.*, 122 U.S. 391, 408) ; but we find in section 11, which relates solely to importations from foreign countries, an express direction that such importation shall be wholly forbidden if the food is adulterated or misbranded " or is otherwise dangerous to the health of the people of the United States." We have therefore a provision which responds to the call of the title in this particular and makes it unnecessary to resort to any otherwise unjustifiable construction for the mere purpose of giving some effect to all parts of the title. With the exception of this clause of section 11, every other directly or indirectly prohibitory clause of the act relates to articles which carry the taint of deception and fraud by being adulterated or misbranded. Section 2 prohibits interstate commerce in any article " which is adulterated or misbranded within the meaning of this act ", and subsequent clauses of the same section refer to " any such articles so adulterated or misbranded within the meaning of this act ", and to " any such adulterated or misbranded foods." The expert examination provided for by section 4 is to determine " whether such articles are adulterated or misbranded." Section 7 defines when, for the purposes of the act, an article shall be deemed to be adulterated, and section 8 defines the term " misbranded " as used in the act, and specifies when, for the purposes of the act, an article shall be deemed to be misbranded. Section 9 prescribes a certain immunity from prosecution when there is a guaranty to the effect that the article is not adulterated or misbranded within the meaning of the act. Section 10 provides for the seizure and forfeiture of the offending articles, but its effect is limited to an article which is adulterated or misbranded within the meaning of the act. A subsequent clause of section 10 furnishes some superficial support for the broader theory of the purpose of the act by providing for the disposition of the offending article, if it " is condemned as being adulterated or misbranded or of a poisonous or deleterious character within the meaning of this act "; but this support is only superficial, because the power to condemn, given by the first part of section 10, rests on the finding that the article is " adulterated or misbranded." This general reference to a poisonous or deleterious character as ground of condemnation must be to

instances where that character, by incorporation into the article, causes the fatal adulteration or misbranding. Considering all these parts of the act, together with its title, we cannot doubt that, so far as its general purpose and intent furnish any aid for interpretation, that general purpose and intent must be deemed to be the prevention of fraud and deception, so that the purchaser can get the thing he has a right to suppose he is getting, rather than the protection of the public health to the extent of prevening the purchaser from deliberately and intentionally buying a particular food which is what it purports to be, even though a jury might think it "deleterious." If argument were needed to sustain this conclusion, it could be found in the provisions as to drugs. Foods and drugs are put on the same basis throughout, save as to matters of definition and some detailed requirements. There can be no room to suppose that the act was intended to prohibit broadly the sale of all deleterious foods and not to prohibit with equal breadth the sale of all poisonous drugs. The latter supposition is impossible; and so the former cannot be accepted. Further support will be found in the provisions which, by necessary implication, permit the sale of foods containing cocaine, morphine, and the like, provided the purchaser is properly advised of the contents. These views of the general purpose of this act have been accepted by the decisions, so far as they go *Savage* v. *Jones*, 225 U.S. 501, 533, 535; *McDermott* v. *Wisconsin*, 228 U.S. 115, 131; *United States* v. *Lexington Co.*, 232 U.S. 399, 409.

The general language of the court in the last-cited case that "the statute was intended to protect the public health from possible injury" is not at all inconsistent with the view we have expressed, because that language is used with reference to adulterations and the addition to known foods of injurious elements. The very last word "adulterated" imports fraud and deception; it implies that the article is not what it purports to be.

Under the statement of facts it is clear that the only question arising under section 7 is whether the caffeine in the Coca Cola is an "added poisonous or other added deleterious ingredient which may render such article injurious to health"; and, under the assumption made by the district judge, of which the Government cannot complain, and which we here adopt, but only for the purposes of this opinion—i.e., that there was evidence requiring submission to the jury to the effect that caffeine is a poisonous or deleterious ingredient which may render the Coca Cola injurious to health—it is equally clear that the turning point is whether it can be said or whether a jury could be permitted to say that the caffeine was "added" within the meaning of this clause.

It is impossible intelligently to conceive the meaning of "added", unless we suppose a base upon which the addition is placed, and we at once meet the question: If caffeine is the addition, what is the base? For 15 years before the passage of the act, Coca Cola has been an existing article of food (within the statutory definition of "food") and in the latter 10 years of that period it had been one of the most widely known and used articles of its general class. It was a compound; it had no distinctive base (unless water, by reason of its larger proportions); it was made up of water, sugar, caffeine, phosphoric acid, glycerine, lime juice, coloring matter, flavoring matter, and

"merchandise No. 5." Each of these elements is more or less important; there seems to be no method of determining their relative importance; but if any one may be rejected as comparatively negligible or secondary or noncharacteristic, that one is not caffeine. In the manufacturing process, water and sugar are boiled to make a sirup; this boiling is repeated; then caffeine is "added" and then the sirup is boiled once or twice more; the sirup is then put into a cooling tank and then into a mixing tank in which the remainder of the process is carried on and in which the other elements become part of the ultimate combination. It is plain as may be that without caffeine the mixture would not be Coca Cola, and the purchaser who had been using it in its standard form 15 years when the act was passed and who might then buy an article of the same name which did not contain any caffeine would rightfully think that he was deceived; and yet it is said that the act intended to prevent misleading the public is violated unless the public is thus misled.

It is another form of the same thought to say that the mere use of the word "adulterate" or "added" implies the existence of a standard, and it is a contradiction in terms to say that the use of an element necessary to constitute the standard is an adulteration of or addition to the standard; but, to this contradiction, the argument for the Government necessarily leads. So, further, we find that clause 3 of that division of section 7 relating to foods declares adulteration if any valuable constituent has been abstracted. Caffeine is a valuable constituent. If it is omitted, the article is adulterated and if it is included the article is adulterated. We must break clause 3 to keep clause 5.

It is urged that in case of a compound article each element is, in a proper sense, "added", and so, if any element is deleterious, it is an "added deleterious ingredient." This position not only depends in part upon what we have thought an erroneous view of the general purpose of the statute, but it destroys all force in the word "added" and gives clause 5 of that part of section 7 relating to food precisely the same meaning as if it read "if it contain any poisonous or other deleterious ingredient", etc. The deliberate and careful insertion of the word "added" before the word "poisonous", and again before the word "deleterious", while the word is omitted in the preceding almost identical clause relating to confectionery, cannot be treated as accidental or meaningless. So to do would violate the settled rule of construction which requires us to "give full effect to all the words in their ordinary sense." (*Bend* v. *Hoyt*, 13 Pet. 263) and requires that "signification and effect shall, if possible, be carried to every word" (*Washington Co.* v. *Hoffman*, 101 U.S. 112, 115), and declares it the "duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed" (*Montclair* v. *Ramsdell*, 107 U.S. 147, 152).

Again, it is urged that the true test whether the deleterious ingredient is "added" is whether this ingredient is in its natural or in an artificial form. This criterion is supposed to find support in statements made during the congressional debates and in the well-known fact that many natural articles of food, like fruits, contain elements

which in the combination formed by the complete fruit are not materially harmful, but which, when extracted and administered separately, may be injurious. This criterion may often be a useful aid in applying and interpreting the statute, but to apply it as a hard and fast rule where artificially compounded foods are under consideration comes to saying, in the case before us, that if coffee berries or tea leaves, or, we take it, the complete extract of coffee berries or tea leaves, containing the amount of caffeine now in question, were put into the compound in its manufacture, there would be no violation of the law; but that if the caffeine, and that only, which was in these same coffee berries or tea leaves, or in some other natural product, is put into the sirup, the law is broken. Alcohol surely might be considered a "deleterious ingredient" if caffeine may be; but can we suppose that a compound food would be obnoxious to this law if it contained 5 percent of alcohol purchased in the market ready distilled, and yet that a compound otherwise the same would be within the approval of the law, though it contained 25 percent of alcohol distilled from grain during the process of making the compound? There has been much controversy whether "blended whisky" could be sold under that name, but it has never been thought to be forbidden merely because its alcohol was an "added" ingredient. Many wines are "fortified" by adding alcohol, and these may be obnoxious to the law for other reasons; but if the theory now under consideration is correct, they could not be sold at all, no matter how labeled. This theory must even lead us to say that if a ground or pulverized coffee or a coffee extract is so deficient in caffeine as to be below standard the law is violated by adding from another source caffeine enough to make the coffee of full normal strength, or to say that it is a vital distinction whether the citric acid contained in any familiar and popular acid beverage is at the time of compounding squeezed from a lemon or poured from a bottle. We cannot follow the argument which brings us to those results. Not only is it without basis in the statute, but it lacks inherent cogency.

We get from section 8 some help on the proper meaning of the phrase "added poisonous or deleterious ingredient", because unquestionably the two sections must be construed together and the same phrase should have the same construction in each. The proviso of the fourth paragraph of that part of section 8 relating to food seems to be drawn with express reference to situations like the present. Congress must have known that many proprietary articles of food and drugs were upon the market under proprietary or trade names, and Congress thought fit to provide that these things should not be deemed to be adulterated unless any deleterious ingredient contained therein was "added." This recognizes somewhat more expressly than is done by section 7 the thought that the necessity of a standard before there can be any adulteration applies as well to compounds as to simple foods, and then avoids future difficulties in application by providing that the compound article in its distinctive and known form should be the standard.

We do not overlook the argument that the act makes no distinction between compounds known at its date and those thereafter devised, and so that the construction which prevents an inherent element from being considered as "added" leaves the manufacturer at liberty to

use any poison he pleases in making up his compound "food", provided only he gives to it and sells it under a distinctive name. This conclusion must, to some extent, be granted; yet it loses most of its apparent force when we remember the real purpose of the act and observe the express direction of the law that the maker of a proprietary food need not disclose its contents if he states the place of manufacture. It would seem a proper provision that if a proprietary food contains any ingredient fairly subject to be called deleterious, the maker should disclose on the label its presence and its extent, just as is required in numerous specific instances; but we cannot make such a law. On the other hand, it is difficult to suppose that Congress intended absolutely to forbid the use in any compound of any element that a jury might later call "deleterious"; but it must be one thing or the other. The prohibition is either absolute or nonexistent. The best known habit-forming drugs are selected, and implied permission is given to allow their use in compounding products for sale, provided they are named on the label; but as to the great mass of other food and drug elements which are undoubtedly deleterious if used to excess, there is no provision for naming them on the label. If they are within the definition of "added deleterious ingredient", they may never be used under any conditions or in any quantity that may be injurious to health, even though they are described in the largest of letters on the outside of the package. This way of reading the statute would practically greatly impede the progress of synthetic chemistry in foods, and we think it distinctly more unreasonable than it is to suppose that Congress, having selected and regulated the use of those things known to be particularly dangerous, thought best not wholly to forbid at that time other things from which no serious danger need be anticipated.

There is a middle view which is sufficient for the purposes of this case and which will recognize the composite meaning of "added deleterious" rather than the separate meaning of each word. This view is that in using the word "added" with reference to a possibly deleterious food ingredient, Congress had in mind an addition above and beyond the quantity in which such ingredient was normally found in usual and customary articles of food, and that no such ingredient should be considered as "added" if it was present only in the quantity in which it existed in these common articles of food with which every Member of Congress was familiar, and which had generally been thought wholesome. For example, creosote and other products of destructive wood distillation are, independently considered, injurious, but they have always been present in smoked hams. Can the addition of the same preservatives to the same extent to the same meat be something that Congress intended to prohibit? The boric acid found in apples is a preservative. If certain apples which are to be preserved are not up to the maximum in this element, did Congress intend to forbid supplying the deficiency by the same element from another source? Acetic acid may, of course, be injurious, but if, by its use, an artificial vinegar is made which is chemically and in every way equivalent to the natural vinegar familiar to the Members of Congress in many compounds, would they have thought of it as a deleterious addition? No example is so clear as the very one here involved. Every Member of Congress had been familiar

from childhood with tea and coffee; perhaps most of them drank it. The average cup of coffee contains more than 2 grains of caffeine; the average cup of tea 1½ grains. A glass of Coca Cola, as consumed, contains 1⅕ grains of caffeine. The chemical qualities and the physiological effects of the caffeine which is in the tea or coffee and of the caffeine which is in the Coca Cola are precisely the same. We are quite convinced that the use in an artificial beverage of a certain element which had been one of its characteristic elements for many years, and when such use was in a less proportion than the same element was known to make up in different natural beverages then in universal use and generally thought wholesome—that such an element so employed could not have been within the meaning of Congress when it chose the words "added deleterious ingredient."

The question arising under section 8—the misbranding section—is to be determined by the proviso under the fourth clause relating to food. Separate reference to the first clause which forbids sale "under the distinctive name of another article", is unnecessary, because the same prohibition is repeated in the proviso under clause four. We have reached the conclusion that Coca Cola does not contain any "added poisonous or deleterious ingredients", and it is undisputed that the labels carry a statement of the place of manufacture. Hence this proviso declares that Coca Cola shall not be deemed to be adulterated or misbranded if it was or is known as an article of food under its own distinctive name and if it is not in imitation of or offered for sale under the distinctive name of another article. It is an article of food under the definition of the statute. That it was, at the time of the passage of the law and ever since has been, known under its own distinctive name is too clear for question, except as it is said that the adopted name cannot be its distinctive name because it is the distinctive name of another article. Neither is it said to be an imitation of another article, except as these words also raise the same question whether it is sold under the distinctive name of another article. Coming to that question, and just as on the subject of adulteration we must first find the standard, we here first meet the inquiry: What is the "distinctive name of another article" under which name Coca Cola is sold? The record makes it very clear to us that there is no such other article. No article except plaintiff's compound is or ever has been sold "under the distinctive name," Coca Cola. These words constitute and are the distinctive name of plaintiff's product, and they are the distinctive name of nothing else. "Coca" is indicative of one article; "cola" is indicative of another, very distinct; but "Coca Cola" was not, in 1892, and (save for the general knowledge of plaintiff's article) is not now, intelligently descriptive of any combination of the two. It might be medicine, food, or drink; it might be to swallow, smoke, or chew. These associated words as the distinctive name of any substance or combination of substances were unknown until adopted by plaintiff; that "distinctive name" is still unknown as an appellation for any other substance on the market.

The burden put upon the Government to show that Coca Cola is masquerading under the distinctive name of another article is surely more exacting than the burden on one attacking the trade mark to show that the name is sufficiently misleading as indicating the make-

up of the product so that it is an improper trade-mark. We consider the latter question in our opinion, this day filed, in *Nashville Syrup Co.* v. *Coca Cola Co.*, and conclude that the name carried no forbidden deception. We need not here repeat that discussion. If that conclusion is correct, it is even more certain that Coca Cola is not guilty of posing "under the distinctive name of another article."

It follows that the judgment below must be affirmed.

WEEKS v. UNITED STATES

(Circuit Court of Appeals, Second Circuit, June 18, 1914)

216 Fed. 292; N.J. No. 3497

In error to the District Court for the Southern District of New York. Judgment affirmed.[84]

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, *Circuit Judge.* The defendant has been convicted of a crime committed in violation of the Pure Food and Drugs Act, approved June 30, 1906. The information charged the defendant with having shipped from New York City to St. Louis, Mo., a certain article of food, labeled in part as follows:

> Cream thick—Serial No. 2049—Manufactured by O. J. Weeks & Co., New York, New York. It is guaranteed to contain no gelatine, gum arabic, egg albumen or similar article.

This label, it was charged, was false and misleading and calculated to mislead and deceive purchasers in that the article of food contained as one of its ingredients an article similar to gum arabic, to wit, Indian gum. The information was signed by the United States attorney, but was not verified, nor were any affidavits filed or submitted to the court. The defendant appeared and demurred to the information, and in specification of points under his demurrer alleged "that the said information is not supported by a verification or oath showing personal knowledge or probable cause." His demurrer was overruled, and being required to plead he pleaded not guilty. At the close of the trial his counsel renewed his motion that the information be dismissed for reasons before stated, but his motion was denied and the case was submitted to the jury and a verdict of guilty was rendered.

The question we have to decide, therefore, is whether an attorney for the United States can proceed in the courts of the United States by information to prosecute one who is alleged to have committed a misdemeanor, where the information is not verified or supported by an affidavit showing personal knowledge or probable cause.

There can be no conviction or punishment for a crime without a formal and sufficient accusation. A court can acquire no jurisdiction to try a person for a criminal offense unless he has been charged with the commission of the particular offense and charged in the particular form and mode required by law. If that is wanting his

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[84] Affirming *United States* v. *Weeks*, p. 485, *ante*.

trial and conviction is a nullity, for no person can be deprived of either life, liberty, or property without due process of law. The forms or modes of accusation which the law recognizes are: Indictment or presentment by a grand jury; and information by the public prosecutor.

The colonists who came to this country from England brought with them the common and statute laws of England as they existed at the time of their emigration and insofar as they were applicable to the local circumstances of the colonies which they established. Among the principles of the common law which they brought were those which regulated the mode of proceeding in criminal cases—the law relating to indictments and informations and the right to trial by jury—although in the Colonies as well as in England various statutes had abolished, prior to the Declaration of Independence, a number of the oppressive provisions of English law relating to criminal trials. Among the principles which had thus been abrogated, for example, was that which denied to a person accused of a capital crime the right to have compulsory process for his witnesses and that which withheld from him the right to examine on oath those witnesses who voluntarily appeared for him, as well as that which forbade him the aid of counsel in his defense, except only as regarded questions of law. See *United States* v. *Reid*, 12 How. 360, 363 (1851).

The proceeding by information is said to have been unpopular in England and to some extent in the colonies. But it has never been abolished in England, although in some of our States it has been abolished. At the time of the Declaration of Independence it was a familiar mode of criminal procedure in all the colonies.

When the statute of 3 Henry VII extended the jurisdiction of the Court of Star Chamber and informations became restricted in practice to that court, the members of which were the sole judges of the law, the fact, and the penalty, a very oppressive use was made of them for something more than a century, " so as continually to harass the subject and shamefully enrich the Crown." 4 Blackstone Comm. p. 310. And when the Court of Star Chamber was abolished in the time of Charles I, and proceedings by information were again used in the Court of King's Bench, the prejudice which had arisen from the long abuse of this process was so strong that it was strenuously contended that all proceedings by information were illegal as being contrary to the nature of English laws and to Magna Charta. But the objections were overruled, Sir Matthew Hale saying:

> That although in all criminal cases the most regular and safe way, and most consonant to the statute of Magna Charta, is by presentation or indictment of 12 sworn men, yet, for crimes inferior to capital ones, proceedings might be by information, and this, from long and frequent practice, was certainly established as the law of the land. 5 Mod. 463; Show. 106; Bacon's Ab., Information, A; 2 Hawk. P.C. 260; 4 Black. Com. 310; 1 Ersk. Speeches, 275; *State* v. *Dover*, 9 N.H. 468 (1838).

And the unpopularity of informations were not restricted to the mother country, but, as we have already said, existed to some extent in this country. Mr. Justice Wilson, of the Supreme Court of the United States, and who was also a member of the Constitutional Convention of 1787, in the lectures which he delivered as professor of law in the University of Pennsylvania in 1790–92, after calling

attention to the two kinds of informations—those filed ex officio by the public prosecutor and those carried on in the name of the Commonwealth or Crown, but in fact at the instance of some private person or common informer—said:

> The first have been the source of much; the second have been the source of intolerable, vexation; both were the ready tools, by using which Empson and Dudley and an arbitrary star chamber fashioned the proceedings of the law into a thousand tyrannical forms. Neither, indeed, extended to capital crimes; but ingenious tyranny can torture in a thousand shapes without depriving the person tortured of his life.

After calling attention to the fact that in England restraints had been imposed upon informations at the instance of private persons but not upon those filed ex officio by the public prosecutor, he went on to say:

> By the constitution of Pennsylvania, both kinds are effectually removed. By that constitution, however, information are still suffered to live; but they are bound and gagged. They are confined to official misdemeanors; and even against those they cannot be slipt but by leave of the court. By that constitution, "no person shall, for any indictable offense, be proceeded against criminally by information," "unless by leave of the court, for oppression and misdemeanor in office." 2 Wilson's Works (Andrews ed.), p. 450.

There seems to be no doubt that prosecution by information is as ancient as the common law itself. The subject had no reason to complain because this method of prosecution was adopted, for, as Blackstone (4 Commentaries, p. 310) states:

> The same notice was given, the same process was issued, the same pleas were allowed, the same trial by jury was had, the same judgment was given by the same judges, as if the prosecution had been by indictment.

Moreover, it seems to have always been the rule that the substantial parts of the information had to be drawn with as much exactitude as the corresponding parts of an indictment for the same offense.

In the early days of the Federal Government informations were principally used, if not exclusively used, for the recovery of fines and forfeitures. And Mr. Justice Story, in his Commentaries on the Constitution, section 1780, published in 1833, said, in speaking of informations:

> This process is rarely recurred to in America; and it has never yet been formally put into operation by any positive authority of Congress under the National Government, in mere cases of misdemeanors, though common enough in civil prosecutions for penalties and forfeitures.

But within the last 50 years prosecutions by informations have increased greatly in the Federal courts. (See *Ex parte Wilson*, 114 U.S. 417, 425.)

It appears, as Stephens states in his History of the Criminal Law, volume 1, page 295, that from the earliest times the law officers of the king accused persons of offenses not capital in his own court without the intervention of a grand jury. But the right to prefer a criminal information is at common law restricted to misdemeanors.

> At common law an information will lie for any misdemeanor, but not for a felony. 22 Cyc. 187, and cases there cited.

The offense charged in the information now under consideration was plainly a misdemeanor, and for more than 200 years the right has been established in England to prosecute by information, and,

without the sanction of a grand jury, a person charged with having committed a misdemeanor.

Bacon in his Abridgment, volume 3, page 635, after stating that an information differs principally from an indictment in that "an indictment is an accusation founded by the oath of 12 men, whereas an information is only the allegation of the officer who exhibits it", goes on to explain that there were two kinds of criminal informations in use in England under the common-law procedure. The first, which was for offenses more immediately against the king, was filed, he says, by the attorney general ex officio and without leave of court. The second, which was for offenses against private individuals, was exhibited by masters of the crown, and, as matter of course, prior to the statute of 4 and 5 William and Mary, ch. 18. But after that statute was enacted informations of the second class, he declares, could not be filed except upon leave of court, and all such informations had to be supported by the affidavit of the person at whose suit it was filed.

In the United States it has been suggested that informations brought by the prosecuting officers answer to the informations filed by the masters of the crown, and which, as said, had to be supported by affidavit, and not to the informations of the first class or those which related more immediately to the king and which could be filed without affidavit. Those who make this suggestion rely upon the statement found in Blackstone's Commentaries, volume 4, page 309, where that distinguished commentator says:

> The objects of the King's own prosecutions, filed ex officio by his own Attorney General, are properly such enormous misdemeanors as peculiarly tend to disturb or endanger his Government, or to molest or affront him in the regular discharge of his royal functions. For offenses so high and dangerous, in the punishment or prevention of which a moment's delay would be fatal, the law has given to the Crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal; which power, thus necessary not only to the ease and safety, but even to the very existence of the executive magistrate, was originally reserved in the great plan of the English constitution, wherein provision is wisely made for the due preservation of all its parts. The objects of the other species of informations filed by the master of the Crown office upon the complaint or relation of a private subject, are any gross and notorious misdemeanors, riots, batteries, libels, and other immoralities of an atrocious kind, not peculiarly tending to disturb the Government (for those are left to the care of the Attorney General), but which, on account of their magnitude or pernicious example, deserve the most public animadversion.

Now this statement may seem to imply that the Attorney General's right to file information for misdemeanors was not unlimited, but was restricted to misdemeanors which tended to disturb or endanger the Government. But, if this was his meaning, it is evident that he was mistaken in his understanding of the law.

Chitty, in his great work on the Criminal Law, page 384, says:

> Informations may be filed by the Attorney General for any offense below the dignity of felony, which tends, in his opinion, to disturb the Government or immediately interfere with the interests of the public or the safety of the Crown. He most frequently exercises this power in cases of libels on Government or high officers of the Crown, etc. He seems, indeed, at his option to exact it when any offense occurs which may thus be prosecuted in the Crown office. He may file an information against anyone whom he thinks proper to select, without oath, without motion or opportunity for the defendant to show cause against the proceeding.

And Cole, in his work on Criminal Informations, page 9, says that—

> The Attorney General may exhibit an ex officio information for any misdemeanor whatever.

And Hawkins, in his Pleas of the Crown, volume 2, page 369, says:

> As to the first of these particulars, viz: In what cases such informations lie, it hath been holden that the King shall put no one to answer for a wrong done principally to another without an indictment or presentment, but that he may do it for a wrong done principally to himself. But I do not find this distinction confirmed by experience; for it is everyday's practice, agreeable to numberless precedents, to proceed by way of information, either in the name of the Attorney General or of the master of the Crown office, for offenses of the former kind, as for batteries, cheats, seducing a young man or woman from their parents in order to marry them against their consent, or for any other wicked purpose, spiriting away a child to the plantations, rescuing persons from legal arrests, perjuries and subornations thereof, forgeries, conspiracies, whether to accuse an innocent person or to impoverish a certain set of lawful traders * * * and other such like crimes done principally to a private person, as well as for offenses done principally to the King.

In Clark on Criminal Procedure, pages 128 and 129, it is said:

> By an early English statute (4 and 5 William and Mary, ch. 18), however, which is old enough to have become a part of our common law, if applicable to our conditions, it was provided that information by masters of the Crown office could only be filed by leave of court and that they should be supported by the affidavit of the person at whose suit they were preferred. The law remained that informations filed by the Attorney General (and, as already stated, he could file them for any misdemeanor) need not be verified, and that he was the sole judge of the necessity or propriety of filing them. * * * There is some authority for the proposition that the kind of information to be used at common law in this country is that which in England was filed by the masters of the Crown office. * * * But, by the better opinion, the other kind of information is the one in use with us.

In Bishop's Criminal Procedure, section 144, it is said:

> In our States the criminal information should be deemed to be such, and such only, as in England is presented by the attorney or solicitor general. This part of the English common law has plainly become common law with us. As with us the powers which in England were exercised by the attorney or solicitor general are largely distributed among our district attorneys, whose office does not exist in England, the latter officers would seem to be entitled, under our common law, to prosecute by information, as a right adhering to their office and without leave of court.

If it is true, and it seems to be, that the district attorneys exercise the powers which in England were exercised by the attorney or solicitor general, then they are entitled to proceed upon information and that without leave of the court and without affidavit.

It is necessary to keep in mind what Mr. Stephen in his General View of the Criminal Law of England, page 156, calls the "most characteristic principle of the law of England" on the subject of criminal procedure, namely, that in that country "everyone, without exception, has the right to use the Queen's (King's) name for the purpose of prosecuting any person for any crime." The statute (4 and 5 William and Mary, ch. 18) was intended to restrict the right of prosecution by private and not public prosecutors. Prior to that act it had been within the power of any individual to file an information without disclosing to the court the grounds upon which it was exhibited (4 T.R. 290). And the meaning of the

statute was that the clerk of the Crown should thereafter file no information of a private prosecutor without leave of the court, and that the fact that there was probable cause for filing it should be disclosed in order that the court might know whether to grant leave; and it was further intended to preclude the issuance of process on such informations without recognizance. Comyn's Digest, vol. 4, p. 558, note " d." But there was no intention to limit the right of the Attorney General to prosecute by information, as he always has done. It was not necessary in England either before or after the statute that he should obtain leave of the court before filing his information, and there was, therefore, not the same reason why he should verify any information which he filed. Moreover, he was acting throughout under his oath of office, and it was not assumed that he would proceed upon information without probable cause.

We think that the weight of authority is that in this country, as the text writers assert, the informations used by the prosecuting officers are the informations used by the Attorney General in England and not those exhibited by masters of the Crown and which were governed by 4 and 5 William and Mary, ch. 18. And as at common law an information could be filed by the Attorney General simply on his oath of office and without verification, it has been held in this country that verification of an information by a prosecuting attorney is unnecessary unless required by some constitutional or statutory provision. *Long* v. *People*, 135 Ill. 435; *People* v. *Graney*, 91 Mich. 646; *State* v. *Pohl*, 170 Mo. 422, 22 Cyc. 281.

We pass, therefore, to inquire whether there is anything in the Constitution of the United States or in the acts of Congress which in any way alters the common law respecting the right of the prosecuting officers of the Government of the United States to proceed by information in criminal cases in the Federal courts.

The Constitution of the United States leaves all offenses against the United States open to prosecution by information except those which are capital or infamous. The restriction as to those offenses is contained in the fifth amendment:

> No persons shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger.

The Supreme Court in *Ex parte Wilson*, 144 U.S. 417 (1885), authoritatively decided what meaning is to be attached to the word " infamous " in this connection. The court held that a crime punishable by imprisonment for a term of years with hard labor is an infamous crime. In the constitutional sense it is not the character of the crime but the nature of the punishment which renders the crime infamous. The offense with which the defendant in this case is charged is not an infamous one but one upon which he might be tried upon information.

The acts of Congress not only have not prohibited the use of informations but have, on the contrary, expressly authorized their use in certain cases. See section 1022 of the Revised Statutes.

The fourth amendment to the Constitution of the United States provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated; no

warrant shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

Mr. Justice Story, in his Commentaries on the Constitution, volume 2, section 1902, in speaking of this amendment, states that:

It is little more than the affirmance of a great constitutional doctrine of the common law.

If that be true, and if it also be true that at common law the Attorney General could file an information without verification or affidavit of probable cause, his oath of office being regarded as sufficient, then this particular amendment should not be regarded as altering the rule upon that subject. In *United States* v. *Maxwell*, 3 Dill. 275 (1875), in an opinion written by Judge Dillon, it is said:

We are of the opinion, therefore, that offenses not capital or infamous may, in the discretion of the court, be prosecuted by information. We cannot recognize the right of the district attorney to proceed on his own motion and shall require probable cause of guilt to appear by the oath of some credible person before we will allow an information to be filed and a warrant of arrest to issue. But with these safeguards there is no more reason to fear an oppressive use of information than there is reason to fear an abuse of the powers of a grand jury.

The facts in that case were that prior to the term complaint on oath had been made before a United States commissioner charging the defendant with several violations of the internal revenue laws, and the defendant was arrested upon a warrant issued by the commissioner and held to answer to the district court. At the term, the district attorney, upon the said complaint, warrant, and recognizance, moved the court for leave to file criminal information against the defendant charging him with said offenses, which leave was granted and the information accordingly filed. The defendant appeared and pleaded guilty. Afterwards his counsel made a motion in arrest of judgment upon the ground that the defendant could only be punished criminally upon an indictment and not upon an information. The motion in arrest of judgment was overruled, the court using, in the course of its opinion, the language already quoted. The case cannot be regarded as holding that an information must be verified. The court, in a dictum, announced that it would not permit an information to be filed and a warrant of arrest to issue without some evidence being presented under oath that probable cause of guilt existed.

In *United States* v. *Smith*, 40 Fed. 755 (1889), in a case which arose in the Circuit Court for the Eastern District of Virginia, Judge Hughes said:

A preliminary question raised in the argument was whether the district attorney may, of right, by virtue of his official prerogative, file informations charging citizens with offenses brought officially to his knowledge. This cannot be done, under the rules and practice of this court, except upon previous complaint under oath, after opportunity has been given the accused to appear before the examining officer, and to confront the witnesses testifying in support of the complaint. This requisite makes it necessary that the district attorney shall have leave from the court to file an information; and, if it is within the discretion of the court whether to grant the leave or not, then the right to file is not a prerogative of the prosecutor's office, and the court may require him, before granting leave, to bring the accused, by rule or other proceeding, before the court, to show cause, if cause there be, against the filing of the information.

The decision does not hold that an information must be verified.

The case most frequently cited in the Federal courts on this subject is that of *United States* v. *Tureaud* (C.C.), 20 Fed. 621, decided in

1884 in the Fifth Circuit by Judge Billings, of the Eastern District of Louisiana. It was decided in that case that informations must be based upon affidavits which show probable cause arising from facts within the knowledge of the parties making them. And the court quashed an information which was based on an affidavit which read:

George A. Dice, being duly sworn, says: All the statements and averments in the foregoing information are true, as he verily believes.

It was conceded—

that under the usages of the Government of Great Britain this information belongs to the class of formal accusations which could be made by the King in his courts without any evidence and against all evidence.

The opinion then continued:

But the adoption of the fourth amendment affected all kinds and modes of prosecution for crimes or offenses, for there can be no legal pursuit of accused persons without apprehension. All prosecutions require warrants. An information, a suggestion of a criminal charge to a court, is a vain thing unless it is followed by a capias. The procedure by information, therefore, after it was acted upon by this amendment, lost its prerogative function or quality. It could not thereafter be the vehicle of preferring any arbitrary accusation—not by kings—because we have in the department of criminal law no successor to him, so far as he represented a right to institute, if it pleased him, unsupported incriminations, nor by the district attorney, nor any other officer of the United States, for the Constitution has said, in effect, that in no way nor manner shall magistrates or courts issue warrants, except upon proofs, which are to be upon oath and make probable excuse.

What is said as to the necessity for a verification of the information we think is correct in any case where the application for the issuance of a warrant of arrest is based on the information. In the *United States* v. *Polite*, 35 Fed. 58 (1888), in the District Court for the District of South Carolina, it is said that—

Informations must be based upon affidavits which show probable cause arising from facts within the knowledge of the parties making them, and that mere belief is not sufficient.

In this case the information was not sworn to, but accompanying it were the papers of the commissioner who held the preliminary examination, including the sworn testimony of the witnesses taken in the presence of the accused. It was held that this was sufficient and a motion to quash was refused.

In *Johnston* v. *United States*, 87 Fed. 187 (1898), in the Circuit Court of Appeals for the Fifth Circuit, the two preceding cases are referred to and approved. The information was not sworn to, but was accompanied by an affidavit. The court said:

The affidavit on which the information was based was wholly insufficient *to warrant the arrest and trial* of the plaintiff in error, and is altogether too general in terms as to the offense against the United States said to have been committed; and it shows no knowledge, information, nor even belief on the part of the affiant as to the guilt of the party charged, beyond the bare statement that "there is probable cause to believe that the said offense has been committed by P. T. Johnston." However false the affidavit may be, it would be next to impossible to assign and prove perjury upon it.

In the *United States* v. *Baumert*, 179 Fed. 735, 742 (1910), District Judge Ray in a carefully prepared opinion said:

Under the common law the information was not necessarily verified; but, as stated, this led to abuses and the adoption of the fourth amendment to the Constitution, which in legal effect demands that no warrant shall issue upon

an information filed by the United States attorney, unless it states facts, a crime, etc., and is supported by the oath of the officer filing it, who must speak from personal knowledge or by the oaths or affirmations of others who speak from personal knowledge.

There is nothing in the opinion rendered which holds that an information must in all cases be verified or supported by an affidavit showing probable cause. But only that an information must be so verified or supported when an application for the issuance of a warrant is based on it. The sole question before the court was as to the issuance of a warrant and the court declined to direct its issuance on an information made on the information and belief of the district attorney alone.

In *United States* v. *Morgan*, 222 U.S. 274, 282 (1911), the Supreme Court, in the case of one prosecuted for a violation of the Pure Food and Drugs Act, said:

A further answer is that as to this and every other offense the fourth amendment furnishes the citizen the nearest practicable safeguard against malicious accusation. He can not be tried on an information unless it is supported by the oath of some one having knowledge of facts showing the existence of probable cause. Nor can any indictment be found until after an examination of witnesses, under oath, by grand jurors, the chosen instruments of the law to protect the citizen against unfounded prosecutions, whether they be instituted by the Government or prompted by private malice.

This statement as to the necessity of the information being supported by the oath of some one having knowledge of facts showing the existence of probable cause is obiter dictum. The court has certainly never decided that under such circumstances as exist in the case now before us no trial could be had.

In Foster's Federal Practice, fifth edition, section 494, page 1659, this usually accurate writer states the rule as follows:

An information can not be filed without leave of the court. * * * An information must be supported by an affidavit showing probable cause for the prosecution arising from facts within the knowledge of the affiant, or by the depositions of witnesses taken upon a preliminary examination or affidavits upon which a warrant of arrest against the accused was previously issued, which may be sufficient.

The limitation imposed by this amendment is a limitation solely upon the powers of the Federal Government and not upon the powers of the State governments. This principle of construction was settled as early as 1833 by a decision written by Chief Justice Marshall in the leading case of *Barron* v. *Baltimore*, 7 Pet. 243, and has been adhered to by the Supreme Court in numerous cases which have subsequently arisen. But in the constitutions of some of the States a provision exists similar to that embodied in the fourth amendment. And we may briefly inquire as to the effect given to it, as respects informations, by the decisions of the State courts. They have held in a number of cases that a constitutional provision similar in terms to that embodied in the fourth amendment to the Constitution of the United States is violated if proceedings are had under an information which is not supported by the oath or affirmation of any person. (*Lustig* v. *People*, 18 Colo. 217 (1893); *State* v. *Gleason*, 32 Kans. 245 (1884); *Myers* v. *People*, 67 Ill. 503 (1873); *Eichenlaub* v. *State*, 36 Ohio St. 140 (1880); *DeGraff* v. *State*, 2 Okl. Cr. 519 (1909); *Thornberry* v. *State*, 3 Tex. App. 36 (1877); *State* v. *Boulter*, 5 Wyo. 236 (1894).) But the State courts are not agreed in this view, some

of them having reached a contrary conclusion. (See *State* v. *Smith*, 114 La. 322 (1905); *State* v. *Guglielmo*, 46 Oreg. 250 (1905); *Territory* v. *Cutinola*, 4 N.Mex. 160 (1887).

In the case at bar the information was not verified, neither was it supported by any affidavit. The information begins:

> Now comes Henry A. Wise, United States attorney for the Southern District of New York, leave having been first had and obtained, and respectfully informs this court that, etc.

It does not appear, however, that, in obtaining leave of the court to file the information, there was ever presented to the court any complaint under oath or any affidavit showing probable cause to believe that the person accused in the information had ever committed the offense charged against him.

If the fourth amendment makes it necessary that under all circumstances an information must be verified or supported by an affidavit showing probable cause, then proceedings had in the prosecution of the defendant cannot be sustained. But the right secured to the individual by the fourth amendment, as we understand it, is not a right to have the information by which he is accused of crime verified by the oath of the prosecuting officer of the Government or to have it supported by the affidavit of some third person. His right is to be protected against the issuance of a warrant for his arrest, except "upon probable cause supported by oath or affirmation", and naming the person against whom it is to issue. If the application for the warrant is made to the court upon the strength of the information, then the information should be verified or supported by an affidavit showing probable cause to believe that the party against whom it is issued has committed the crime with which he is charged. But, if no warrant has issued, no arrest been made, and the person has voluntarily appeared, pleaded to the information, been tried, convicted, and fined, we fail to discover wherein any right secured to him by the fourth amendment has been infringed. The fact that in the case at bar the defendant demurred to the information because it was not verified, and then pleaded not guilty only after his objection to the demurrer was overruled, does not affect the matter. There was nothing in the ruling of the court that deprived him of his constitutional right to have no warrant issued for his arrest "but upon probable cause supported by oath or affirmation." No such warrant has been at any time issued and no application for its issuance has ever been so much as requested.

The Pure Food and Drugs Act makes it a crime against the United States if any part of the label on goods sent in interstate commerce is false and misleading. The label used on the goods shipped by the defendant guaranteed that the goods contained "no gelatine, gum arabic, egg albumen, or similar article." The claim of the Government is that while the goods contained no gum arabic they did contain India gum, and that India gum was "similar" to gum arabic. The jury found that this was so after being instructed that, if they had a reasonable doubt on the subject, they must find for the defendant. There was sufficient evidence to warrant the submission of the case to the jury, and we find no error in the rulings of the court.

Judgment affirmed.

UNITED STATES v. SCHALLINGER PRODUCE CO.

(District Court, E.D. Washington, Oct. 5, 1914)

N.J. No. 4061

Information alleging violation of section 2 of the Food and Drugs Act. Motion to quash. Motion sustained.

RUDKIN, *District Judge.* Section 2 of the act of Congress of June 30, 1906, declares:

That the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this act, is hereby prohibited; and any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded foods or drugs, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor, and for such offense be fined not exceeding two hundred dollars for the first offense, and upon conviction for each subsequent offense not exceeding three hundred dollars or be imprisoned not exceeding one year, or both, in the discretion of the court. * * *.

Section 3 declares:

That the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this act, including the collection and examination of specimens of foods and drugs manufactured or offered for sale in the District of Columbia, or in any Territory of the United States, or which shall be offered for sale in unbroken packages in any State other than that in which they shall have been respectively manufactured or produced, or which shall be received from any foreign country, or intended for shipment to any foreign country, or which may be submitted for examination by the chief health, food, or drug officer of any State, Territory, or the District of Columbia, or at any domestic or foreign port through which such product is offered for interstate commerce, or for export or import between the United States and any foreign port or country.

Section 4 declares:

That the examinations of specimens of foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of such bureau, for the purpose of determining from such examinations whether such articles are adulterated or misbranded within the meaning of this Act; and if it shall appear from any such examination that any of such specimens is adulterated or misbranded within the meaning of this Act, the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such sample was obtained. Any part so notified shall be given an opportunity to be heard, under such rules and regulations as may be prescribed as aforesaid, and if it appears that any of the provisions of this Act has been violated by such party, then the Secretary of Agriculture shall at once certify the facts to the proper United States district attorney, with a copy of the results of the analysis or the examination of such article duly authenticated by the analyst or officer making such examination, under the oath of such officer. After judgment of the Court, notice shall be given

by publication in such manner as may be prescribed by the rules and regulations aforesaid.

Section 5 declares:

That it shall be the duty of each district attorney to whom the Secretary of Agriculture shall report any violation of this act, or to whom any health or food or drug officer or agent of any State, Territory, or the District of Columbia shall present satisfactory evidence of any such violation, to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States, without delay, for the enforcement of the penalties as in such case herein provided.

Section 12 declares, among other things, that—

The word "person" as used in the act shall be construed to import both the plural and the singular, as the case demands, and shall include corporations, companies, societies, and associations.

The information filed in this case by the United States attorney under the foregoing provisions recites that the information is filed with leave of court first had and obtained, and

gives the court here to understand and be informed, upon the oath of Abraham L. Knisely and Duncan A. McIntyre, of Fred Nelson, and of Daniel N. Walsh, whose affidavits are hereto attached and made a part hereof as follows, to wit: * * *.

The information then charges that the defendant, a corporation organized under the laws of the State of Washington, with its principal office and place of business in the city of Spokane, did, on or about the 22d day of November 1912, contrary to the provisions of the foregoing act, ship and deliver for shipment in interstate commerce from the city of Spokane, State of Washington, to the city of Coeur d'Alene, in the State of Idaho, consigned to Nelson Bros. at Coeur d'Alene, in the State of Idaho, certain cases containing eggs, and that the article of food so shipped was misbranded.

To the information are attached the four affidavits therein referred to. The first two were taken before a notary public in the State of Oregon; the third before a notary public in the State of Idaho, and last, before the clerk of the District Court of the United States for the Northern District of West Virginia. The defendant has appeared specially and moved to quash the information on the grounds, first, that the affidavits thereto attached fail to show probable cause for the prosecution and are insufficient to support the information, and second, because the information does not charge a crime under the act of Congress in question.

At common law an information might be filed by the Attorney General simply on his oath of office and without verification; and it has generally been held in this country, following the common-law rule, that verification of an information by the prosecuting officer is unnecessary unless required by some statutory or constitutional provision. There is no law of the United States requiring verification of informations by the prosecuting officer, but a verification of some kind is no doubt indispensable under the fourth amendment to the Constitution where a warrant of arrest is sought or applied for. See *Weeks* v. *United States*, decided by the Circuit Court of Appeals for the Second Circuit June 18, 1914, where this question is fully considered. Inasmuch as this prosecution is against a corporation where no warrant of arrest is applied for or can be issued,

I am of opinion that an information filed by the United States attorney under the sanction of his official oath, and without verification, would be sufficient. But the information under consideration was not so filed, for it expressly states upon its face that it is upon the oath of the several parties named in the annexed affidavits. Unless I am at liberty to consider these affidavits, therefore, the information has no sanction whatever. As already stated, the three principal affidavits were taken before notaries public in other States, and the fourth, standing alone, is of no avail. The question, therefore, arises, can these affidavits, taken before notaries, be considered by the court? I am of the opinion that they cannot.

In *United States* v. *Curtis*, 107 U.S., 671, 673, the court said:

> So that the underlying question is whether the notary public, whose commission is from the State, was, at the respective dates of the oaths taken by Curtis, authorized by the laws of the United States to administer such oaths.
>
> This question we are constrained to answer in the negative. We are not aware of any act of Congress which gave such authority to notaries public in the different States at the several dates given in the indictment. The Assistant Attorney General insists that such authority may be found in section 1778 of the Revised Statutes, which declares: "In all cases in which, under the laws of the United States, oaths or acknowledgments may now be taken or made before any justice of the peace of any State or Territory, or in the District of Columbia, they may hereafter be also taken or made by or before any notary public duly appointed in any State, district, or Territory, or any of the commissioners of the circuit courts, and, when certified under the hand and official seal of such notary or commissioner, shall have the same force and effect as if taken or made by or before such justice of the peace."
>
> The authority of the notary to administer these oaths to Curtis cannot be derived from that section, unless, at the dates in question, they could, under the laws of the United States, have been taken before justices of the peace in Missouri. But the latter officers had no such authority by any Federal statute to which our attention has been called, or which we are able to find. Section 1778, so far as notaries public are concerned, embodies the substance of similar provisions in the acts of September 16, 1850, chapter 52, and July 29, 1854, chapter 159, and section 20 of the act of June 22, 1874, chapter 390. But nothing in these acts, even if they remained in force after the adoption of the Revised Statutes, supports the authority exercised by the notary public who administered these oaths to defendant.
>
> Counsel for the United States further insists that a proper construction of section 1778 will authorize a notary public in *any* State to administer oaths to officers of national banking associations, when making reports to the Comptroller of the Currency, if justices of the peace may lawfully do so in this District. But in our judgment no such interpretation of that provision is admissible. What Congress intended by that section was to give notaries public in their respective States the same authority, in the administration of oaths, as is given, under the laws of the United States, to justices of the peace in the same States; and to notaries public in this District the same authority, in administering oaths, which, under the laws of the United States, might be exercised by justices of the peace in this District. We have seen, however, that to justices of the peace, in the several States, such authority had not been given by any provision in the Revised Statutes or by any act of Congress prior to their adoption.
>
> Nor can any support for the indictment be derived from the act of August 15, 1876, chapter 304, which declares "that notaries public of the several States, Territories, and the District of Columbia, be, and they are hereby, authorized to take depositions, and do all other acts in relation to taking testimony to be used in the courts of the United States, take acknowledgments and affidavits in the same manner and with the same effect as commissioners of the United States Circuit Court may now lawfully take or do."
>
> The power of commissioners of the Circuit Court did not, at the passage of that act, extend to the taking of oaths to reports by officers of national banks. They could take affidavits when required, or allowed in any civil cause in a circuit or district court (Rev. Stat. sec. 945; act of February 20, 1812, ch. 25;

act of March 1, 1817, ch. 30); or administer oaths where, in the same State, under the laws of the United States, oaths, in like cases, could be administered by justices of the peace (Rev. Stat. sec. 1778); or they could take evidence, affidavits, and proof of debts in proceedings in bankruptcy (Rev. Stat. secs. 5003, 5076; act of March 2, 1867, ch. 176; sec. 3 of the act of July 27, 1868, ch. 258; sec. 20 of the act of June 22, 1874, ch. 390). But the authority of commissioners did not extend to such oaths as were administered to Curtis.

It follows from this decision that a notary public has no authority under the laws of the United States to administer any oaths in connection with criminal prosecutions. The United States attorney frankly conceded this on the argument, but contended that inasmuch as this is a prosecution against a corporation, commenced by summons, it must be deemed to be a civil action. To this proposition I cannot yield assent. All persons, whether natural or artificial, stand upon an equal footing before the criminal laws of the country. True a corporation, by reason of its inherent nature, cannot commit certain crimes, and may not be arrested or imprisoned; but a proceeding against it for the violation of a criminal statute is, and must be, in its very nature, a criminal proceeding with all the incidents of such a proceeding until the legislature has declared otherwise. Believing, therefore, that the information in itself is insufficient because not under the sanction of the official oath of the United States district attorney, and that I may not consider the affidavits of notaries thereto attached, the motion to quash must be granted, and it is so ordered.

Thereafter, on October 7, 1914, a judgment was entered dismissing the case in accordance with the foregoing decision.

UNITED STATES v. LOWENTHAL

(District Court, S.D. New York, Oct. 29, 1914)

N.J. No. 3573

Three informations charging violations of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

The following charge was delivered to the jury:

Van Fleet, *District Judge.* Gentlemen of the jury: Give me your attention for a few moments.

There are three informations against this defendant on trial, which have been consolidated, for your determination, and they are based upon the provisions of the so-called Food and Drugs Act of June 30, 1906. That act makes it a misdemeanor for one to ship in interstate commerce, that is, transport from one State to another, any article of food or drugs which is adulterated or misbranded. An article under that act is adulterated if any substance is substituted wholly or in part for the genuine article in its make-up. It is misbranded if it be labeled or branded so as to deceive or mislead the purchaser as to its real character.

Now, the informations are couched in four separate counts, and one charges, in three several counts, the defendant with shipping from the city of New Rochelle in the State of New York to the city of Union Hill in the State of New Jersey, to one Joseph Deschner, an article designed and intended to be used as an article of food

which was invoiced by the defendant as vanilla and it charges it was not in fact vanilla, but it was an adulteration of an aqueous solution of coumarin artificially colored with caramel. The second count is substantially the same, charging that the aqueous solution was artificially colored with caramel. The third count, substantially the same, charging that it was adulterated and colored with caramel. The fourth count charges that the shipment was misbranded. The second information charges the defendant with shipping a like article from the city of New Rochelle in the State of New York to the Yonkers Bakery in the city of Keyport in the State of New Jersey, and the first three counts are precisely similar as to their legal import and intent as the first three counts I have just explained to you, and the fourth count is of like import, relating of course to the shipment to the Yonkers Bakery. The third information charges the defendant on the date in question with shipping from the city of New Rochelle in the State of New York to the city of Perth Amboy in the State of New Jersey, consigned to the Eagle Candy Kitchen, two barrels of an article substantially and precisely the same as charged in the first information, the first three counts being charges that it was adulterated and the last count, that it was misbranded.

Now, under the course that the evidence in this case has taken and in view of the admissions that have been made by the defendant, there really is but one material question for you gentlemen to determine in order to reach a verdict in this case. It is conceded that these shipments were made; it is conceded that the article shipped was not vanilla but a substitute for it, an article made to represent vanilla extract, but which was not vanilla. Now, the defense made by the defendant in each instance is that he did not violate the act because, while the article was not genuine vanilla but was a substitute for vanilla, he not only sold, but distinctly labeled it, in making each shipment, as being precisely what it was.

Now, under this act, which I have sufficiently defined to you, if you believe the evidence in favor of the defendant in that regard, or if you have no reasonable doubt as to the truth of it, the defendant cannot be convicted. The informations constitute in their nature criminal charges, and under the law, in order to convict one of a criminal offense it is essential, under a plea of not guilty such as has been interposed to each one of these charges, for the Government to establish the truth of these facts to your satisfaction beyond a reasonable doubt for you to return a verdict of guilty. It is not sufficient to show mere probability of guilt. The facts must establish the guilt of the defendant to a moral certainty beyond what is termed in the law a reasonable doubt. That term means substantially what its language implies. It must be a reasonable doubt, it must be a doubt resting in reason and arising upon the evidence and no mere fanciful conjecture on your part that possibly he may not be guilty. It is a statement of the case, which after a fair and impartial consideration of all the evidence in the case leaves your mind in a state in which you are unable to say you feel an abiding conviction of the defendant's guilt and any proof that does not go to this extent is not proof beyond a reasonable doubt. This does not mean that the Government is bound to prove the facts that would indicate the guilt of the defendant beyond demonstration, that is, where there

would be no doubt. Such proof is never required. But it must satisfy you to that degree of moral certainty which would induce you to act in the important affairs of life. If it satisfies you to that extent, then the Government is entitled to a conviction. If it does not satisfy you to that extent and there is left in your minds such a reasonable doubt as I have defined, the only thing for you to do is to give the defendant an acquittal.

The facts in a criminal case are solely for the consideration of the jury. The court has neither the province nor disposition to interfere with the determination of the facts. Its duty rests and concludes with conducting the trial and endeavoring to see that nothing but proper evidence finds its way to the jury, and when it has done that then the case rests with the jury to determine what facts have been established by the evidence. In order to determine what the facts are in a case necessarily the jury are made under the law the arbiters of the credibility of the witnesses. They are to say what evidence they will believe that has been produced on the witness stand and what they will not believe. Now the law presumes that every witness will go upon the witness stand when he is put under oath and tell the truth, but this does not mean that he will tell the truth necessarily, nor does it mean that because that presumption exists the jury is bound to believe he is telling the truth. It simply means that, other things being equal, and there being nothing in the character of his testimony or his relations to the case or the other evidence in the case to cast suspicion on his testimony, the jury are not arbitrarily to say they won't believe him. That is what that presumption means, but it does not deter you from using your reason and common sense in determining how far you may believe a witness. If a witness goes on the stand and testifies to facts which do not accord with your reason and observation in the ordinary experiences and affairs of life you are not bound to believe that witness. If his testimony does not accord with your own observation and reason in the light of all the evidence in the case, then you are not required to believe the witness's statements that do not measure up to that standard.

Now, during the progress of the trial I have taken occasion to ask questions of witnesses in various instances. As I say, it is your province to pass upon the facts, and I do not want you to get any idea from any question that I have asked a witness as to my views of the truth or falsity of the statements of the witness. It is my duty, equally with that of counsel, to endeavor to elicit the truth to lay before the jury, but it is only for that purpose. When I have thought that some statement from a witness required elucidation or should be cleared up I have frequently asked him questions, but that is not to be taken as casting discredit upon his statements because no matter what I may think of the witness's credibility the obligation rests nevertheless upon you to pass upon it in reaching your verdict and you would be abdicating your function if you were to base your judgment upon what you believed to be my view as to a witness's credibility, or any fact in the case, rather than your own. You can not escape the responsibility. The facts are to be determined by you.

Now in this case if you find beyond the reasonable doubt that I have defined to you that this defendant committed the act which

is charged in these various counts and under each one of these informations it will be your imperative duty, no matter what your inclinations may be, to find him guilty. On the other hand, if there rests in the minds of the jury such a reasonable doubt as I have defined, under any of these counts of these informations, it is equally your duty to find the defendant not guilty. There being three separate informations here they constitute three separate cases and there must be a verdict upon each one of these informations. The Government and the defendant are entitled under the law to have them consolidated for trial but that merely means that they are to be tried before one jury, but they constitute separate offenses. Each one of these acts, if it was unlawful, constituted a separate offense and there must be a separate verdict under each count. When you retire to your jury room you will take with you these several informations and you will prepare a verdict in the light of the law as I have given it to you as you may find the facts to be as to each one of these informations and return it accordingly.

Mr. CONTENT. I call the attention of the court to the fact that the fourth count charges that it was sold under another name from that which it really was.

The COURT. That is true substantially.

Mr. BERGER. I ask the court to charge that the witnesses—Marshall, Shaw, and Boos—are disinterested witnesses.

The COURT. I would be invading the province of the jury to do that. They are to determine whether they are disinterested. In passing upon the credibility of the witnesses, in view of the suggestion of counsel, gentlemen, you will bear in mind that you are the sole judges as to the disinterested character of any testimony given before you here. You are to say how the witnesses happened to come here and what actuated their testimony if it was actuated by anything but the truth. That is part of your duty in passing upon the evidence.

Gentlemen of the jury: Let me suggest to you that I think it would be a convenient way in framing your verdicts to say "We find in case number 2686"—you see these are all numbered at the top—"we find in the case of the United States against David Loewenthal in case number 2686, so and so; we find in case 2685, so and so." Just designate them by the numbers and that will distinguish them.

The jury thereupon retired and after due deliberation returned into court with a verdict of guilty, and the court imposed a fine of $100 on each information, or $300. In passing sentence the court spoke in part as follows:

I am entirely satisfied that while there is a conflict in the evidence, the jury were quite justified in finding the facts as they did. Had I been called upon to find the facts myself I would have been compelled to find the facts the same way. I do not think the evidence adduced on behalf of the defendant did away with that of the prosecution showing that it was a fraudulent manipulation. The cases involved seem to me to show a fraudulent transaction of a most contemptible character. Yet they are distinctly a violation of the act and must be punished. It is an act of very essential value to the public health, and it cannot be permitted that it be

violated. The violations were so contemptible in their character, I mean in the amount, that it seems a despicable thing for a man to be engaged in that sort of business. At the same time there was nothing against him heretofore, and I will take that into consideration. Let the judgment in each one of these instances be that the defendant pay a fine in the sum of $100.

UNITED STATES v. 267 BOXES OF MACARONI

(District Court, W.D. Pennsylvania. Feb. 17, 1915)

225 Fed. 79; N.J. No. 3799

Libel by the United States for the seizure and condemnation of 267 boxes of macaroni, because misbranded, in which claimants filed answer. Judgment for the United States.

On December 11, 1914, the United States attorney for the Western District of Pennsylvania, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel for the seizure and condemnation of 267 boxes of macaroni, remaining unsold in the original, unbroken packages at Pittsburgh, Pa., alleging that the product had been shipped on or about November 7 and 14, 1914, and transported from the State of New York into the State of Pennsylvania, and charging misbranding in violation of the Food and Drugs Act. The product was labeled: "Gusto Igiene Nettezza Pastificio Moderno Elletrico Con Prosciugazione Artificiale Vitello Brand Torre Annunziata (Italy Method) Mfg. U.S.A." In addition, the label bore pictorial representations of three persons, a dining scene, etc. Boxes were also branded by means of rubber stamp "20 lb. net artificially colored." Misbranding of the product was alleged in the libel, for the reason that it was labeled and branded so as to deceive and mislead the purchaser; that is to say, the appearance and construction of the label conveyed the impression that the goods were of foreign manufacture, and this effect was not cured by the statement in minute type on the bottom of the label, "Mfg. U.S.A."

On December 28, 1914, Thomas Monico and August E. Alles, partners, doing business as Monico-Alles Company, New Castle, Pa., claimants, filed their answer, denying the material allegations in the libel. On February 17, 1915, the case having come on for trial before the court, after the submission of evidence and argument by counsel, the court found the product misbranded and ordered its condemnation, but provided that the same might be released to said claimants upon filing of bond, in conformity with section 10 of the act, and the payment of costs.

THOMSON, *District Judge*. The libel in this case was for the seizure and condemnation of 267 boxes of macaroni, remaining unsold in the original, unbroken packages at Pittsburgh, Pa. The libel alleges that the product was shipped by the Dunkirk Macaroni & Supply Company of Dunkirk, N.Y., and transported from the State of New York, and charges that the same was misbranded, in violation of section 10 of the Pure Food and Drugs Act, as defined in subsection 2, which defines what usually may be considered as misbranding of foods under the act of Congress. The said food product was seized by the United States marshal in the possession of certain parties in Pittsburgh, Pa., and was claimed by Thomas Monico and August E. Alles, partners, doing business as Monico-Alles Company, who answered, and were made parties to the proceedings by the execution of bond in accordance with section 26 of the admiralty rules of this

court. The libel sets forth a copy of the label on each of the boxes of macaroni so seized, as follows:

> Gusto Igiene Nettezza Pastificio Moderno Elettrico Con Prosciugazione Artificiale Vitello Brand Torre Annunziata (Italy Method) Mfg. U.S.A.

In addition the label bears pictorial representations of three persons, a dining-room scene, etc.; and boxes are branded by means of a rubber stamp, "20 lb. net artificially colored." The libel also points out specifically the respect in which the product was misbranded as follows:

> That said product, so designated as aforesaid, as analyzed by the Bureau of Chemistry, Department of Agriculture, United States of America, is shown to be misbranded in violation of said act of Congress, commonly known as the Food and Drugs Act, in that it is labeled and branded so as to deceive and mislead the purchaser; that is to say, the appearance and construction of the label conveys the impression that goods are of foreign manufacture, and this effect is not cured by statement in minute type on bottom of label, "Mfg. U.S.A."

The answer filed admits the material facts and allegations contained in the libel, except that it is denied that the macaroni is misbranded. The question thus raised is whether the product was misbranded; i.e., labeled so as to mislead the purchaser by conveying the impression that the goods are of foreign manufacture. The language of section 8, subsection 2 [in case of food (?)], of the act of Congress, is: "If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so." Some testimony was offered on behalf of the Government, by persons familiar with the trade, to the effect that the label would mislead the average purchaser by conveying the impression that it was a foreign product. Some evidence was also offered by the respondents that it would not convey that impression.

The court must determine the issue mainly by an inspection of the label itself. It has been held that it is not important whether the manufacturer did or did not intend to deceive. The purpose of the act is to protect the people from deception by selling him one thing when the purchaser desires to purchase another. The intention of the maker is therefore not an element in the case. *United States* v. *36 Barrels of London Dry Gin*, 210 Fed. 271, 127 C.C.A. 119; *McDermott* v. *Wisconsin*, 228 U.S. 115, 33 Sup. Ct. 431, 57 L.Ed. 754, 47 L.R.A. (N.S.) 984, Ann. Cas. 1915A, 39.

Turning to the label itself, we find from its appearance that it is very distinctly Ialian. The label proper is of the dimensions of 8½ inches by 6¼ inches, bearing pictorial representations of three persons, a dining scene, etc., with a very narrow white margin, from one eighth to one sixteenth of an inch in width. The name of the manufacturer and the place where the macaroni is made do not appear. Nearly all of the wording on the label proper is in the Italian language. The exceptions are in the use of the words "Vitello Brand" and "Italy Method." Between the words "Vitello" and "Brand" is the picture of a cow or calf. The testimony shows that the words "Vitello" is the Italian word for calf. The words "Torre Annunziata" are the name of a city in Italy where it appears macaroni is extensively manufactured. There is no doubt that the general purchaser, looking at that label, with its distinctly Italian cast and written in

the Italian language, with nothing whatever thereon to indicate that it was of American manufacture, would at once conclude that it represented a foreign, and, in this case, an Italian product.

It is claimed that the letters "Mfg. U.S.A." in small type within less than an inch of space, on the very narrow white margin on the lower edge of the label, would be notice to the purchaser of the fact that the product was manufactured in America. It seems clear to the court that the makers did not intend bona fide to convey such notice to the purchaser by the use of these letters, but rather that they were endeavoring to protect themselves from the charge of violating the act of Congress. If it was intended that the purchaser should be informed as to where the food product was manufactured, certainly some words sufficiently conspicuous would be placed upon the label to strike the eye of the purchaser and convey the desired information.

I do not think that the letters on the margin which I have quoted save the label or brand from the charge that it deceives and misleads the purchaser and purports to be a foreign product when not so.

In accordance with the foregoing opinion, the product was thereafter released to said claimants.

UNITED STATES v. RIGNEY & CO.

(District Court, E.D. New York, Feb. 20, 1915)

220 Fed. 734; N.J. No. 4057

Information for violation of the Food and Drugs Act. On motion to quash or dismiss the information. Motion denied.

Chatfield, *District Judge.* This information was filed against the defendant corporation for shipping by interstate commerce a quantity of syrup in a package labeled "24 quarts com.," and also another quantity of syrup in a package bearing a label "12 half gallons com."

The shipments were alleged to have been an offense against the provisions of the Food and Drugs Act of June 30, 1906 (34 Stat. 771), as contained in section 8, which prohibits a false or misleading statement upon a package or label regarding the article contained therein, and under subdivision 3 of the portion of that section relating particularly to food, which provides (as amended March 3, 1913):

Third. If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count, etc.

The defendants subsequently withdrew their plea and sought to raise a question of fact as to the meaning of their label, and to contend that, under the law, this meaning was neither misleading to the public or their customers, nor false in statement when considered from the point of view of those who should be held responsible for knowledge as to ordinary trade practices.

The defendants therefore interposed a motion to dismiss or quash the indictment, based upon affidavits showing that the packages in

question contained, in the one case bottles, substantially of the size in exterior dimensions of the ordinary quart bottle, and in the other case cans, again in general external size and appearance of a half-gallon or 2-quart size, but the *labels* upon the bottles and cans themselves contained no statement of quantity. The price for which the articles were sold depended (of course) upon the wholesale price charged therefor, as the ordinary downward limit under competition.

These bottles and cans were, as shown by the affidavits, packed in wooden boxes, upon which a stencil was used to mark in black letters the sirup label and also the words complained of in the information, in one case "24 quarts 17 com.", and in the other case "12 half gallons 19 com." The affidavits also show, and these matters are not disputed by the Government, that the shipments were to wholesalers, and not to retail customers, and were all made upon prices quoted for the quantity shown in the circulars, and were billed to the wholesalers by the same description, as, for instance:

No. 1 com'l half pts. (7 oz.)
No. 4 square qts. (5 to gal.)
No. 19 half gallons commercial measure 1 dozen to case gross wt. 70 lbs.
No. 21 gallons, commercial measure, ½ dozen to case 63 lbs.
No. 23 5 gallons, cased full measure gross weight 60 lbs.

The only points contested by the Government upon this motion are the meaning of the words and the allegation that the trade understood the meaning of the words "quarts", "one half gallon", etc., when used under what is alleged by the defendants to be a well-known practice of selling packages containing smaller quantities, but labeled in a so-called descriptive way to state approximately the quantity in liquid or solid measure nearest the general size of the package. The Government produced certain affidavits in which wholesalers deny that such meaning of the words, "commercial quart", or "commercial half gallon", was well known and commonly used in this descriptive sense in the trade.

It is unnecessary to consider whether the practice of attracting trade by apparent intimation of cheap prices, but in reality by a saving of the actual quantity sold, and by holding out to the public or advertising misleading statements, by which the customer may be deceived, but which the wholesaler and retailer, or those initiated into the trade secrets, understand are false, should be treated as reprehensible, nor need we consider whether Congress has the power to pass a statute prohibiting such practices, in interstate commerce, when the injury to the public demands. The mere queries answer themselves.

In the present case we have only to do with the question whether the labels (interpreted from the price lists or from custom, by the persons to whom the goods were shipped) were false and misleading in their statements of the quantity contained in the package, and whether the contents were plainly and correctly stated on the outside thereof.

If the label used would allow the deception of the public and unfair methods of advertising, through the complicity of the retail dealer, it becomes evident that this is one of the evils which the statute was intended to prevent, and that Congress did not pass this law for the protection of the retailer alone.

There is nothing before the court, and no authority in dictionary, textbook, or statute, to vindicate or uphold the establishment of a different system of liquid and weight measures than those sanctioned by law and general use, even though a lax and vicious reduction in quantity, as a matter of trade practice, is frequently found when no legal prohibition exists.

It has appeared upon the argument of the motion that the defendant ceased the use of these labels and has made its measures and literature correspond to the requirements of the Department, under the Pure Food Law, since its attention has been called thereto, and now disclaims any desire to be a party to violations of the statute or acts tending to deceive the public. This is what would be expected from any person or house in reputable business, and goes only to the question of mitigation, for an act which at the time, even though not appreciated, was a violation of the Pure Food Law.

The motion to dismiss or quash will be denied, and the defendants will be directed to plead over.

SLIGH v. KIRKWOOD [85]

(United States Supreme Court, Apr. 5, 1915)

237 U.S. 52

In error to the Supreme Court of the State of Florida. Affirmed.

The facts, which involve the constitutionality under the commerce clause of the Federal Constitution of a statute of Florida prohibiting the sale or shipment of citrus fruits which are immature or otherwise unfit for consumption, are stated in the opinion.

Mr. Justice DAY delivered the opinion of the court.

A statute of the State of Florida undertakes to make it unlawful for anyone to sell, offer for sale, ship, or deliver for shipment, any citrus fruits which are immature or otherwise unfit for consumption.

Plaintiff in error, S. J. Sligh, was charged by information containing three counts in the Criminal Court of Record in Orange County, Florida, with violation of this statute. One of the counts charged that Sligh delivered to an agent of the Seaboard Air Line Railway Company, a common carrier, for shipment to Winecoff & Adams, Birmingham, Alabama, one car of oranges, which were citrus fruits, then and there immature and unfit for consumption. Upon petition for writ of *habeas corpus* in the Circuit Court of Florida for Orange County, the court refused to order the release of Sligh, and remanded him to the custody of the sheriff. Upon writ of error to the Supreme Court of Florida that judgment was affirmed (65 Florida, 123), and the case is brought here.

The single question is: Was it within the authority of the State of Florida to make it a criminal offense to deliver for shipment in interstate commerce citrus fruits—oranges in this case—then and there immature and unfit for consumption?

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[85] Not arising under Food and Drugs Act of June 30, 1906.

It will be observed that the oranges must not only be immature, but they must be in such condition as renders them unfit for consumption; that is, giving the words their ordinary signification, unfit to be used for food. Of course, fruits of this character, in that condition, may be deleterious to the public health, and, in the public interest, it may be highly desirable to prevent their shipment and sale. Not disputing this, the contention of the plaintiff in error is that the statute contravenes the Federal Constitution in that the legislature has undertaken to pass a law beyond the power of the State, because of the exclusive control of Congress over commerce among the States, under the Federal Constitution.

That Congress has the exclusive power to regulate interstate commerce is beyond question, and when that authority is exerted by the State, even in the just exercise of the police power, it may not interfere with the supreme authority of Congress over the subject; while this is true, this court from the beginning has recognized that there may be legitimate action by the State in the matter of local regulation, which the State may take until Congress exercises its authority upon the subject. This subject has been so frequently dealt with in decisions of this court that an extended review of the authorities is unnecessary. See the *Minnesota Rate Cases*, 230 U.S. 352.

While this proposition seems to be conceded, and the competency of the State to provide local measures in the interest of the safety and welfare of the people is not doubted, although such regulations incidentally and indirectly involve interstate commerce, the contention is that this statute is not a legitimate exercise of the police power, as it has the effect to protect the health of people in other States who may receive the fruits from Florida in a condition unfit for consumption; and however commendable it may be to protect the health of such foreign peoples, such purpose is not within the police power of the State.

The limitations upon the police power are hard to define, and its far-reaching scope has been recognized in many decisions of this court. At an early day it was held to embrace every law or statute which concerns the whole or any part of the people, whether it related to their rights or duties, whether it respected them as men or citizens of the State, whether in their public or private relations, whether it related to the rights of persons or property of the public or any individual within the State. *New York* v. *Miln*, 11 Pet. 102, 139. The police power, in its broadest sense, includes all legislation and almost every function of civil government. *Barbier* v. *Connolly*, 113 U.S. 27. It is not subject to definite limitations, but is coextensive with the necessities of the case and the safeguards of public interest. *Camfield* v. *United States*, 167 U.S. 518, 524. It embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health. *Chicago &c. Railway* v. *Drainage Commissioners*, 200 U.S. 561, 592. In one of the latest utterances of this court upon the subject, it was said:

> Whether it is a valid exercise of the police power is a question in the case, and that power we have defined, as far as it is capable of being defined by general words, a number of times. It is not susceptible of circumstantial precision. It extends, we have said, not only to regulations which promote the public health, morals, and safety, but to those which promote the public

convenience or the general prosperity * * * And further, "It is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government." *Eubank* v. *Richmond*, 226 U.S. 137, 142.

The power of the State to prescribe regulations which shall prevent the production within its borders of impure foods, unfit for use, and such articles as would spread disease and pestilence, is well established. Such articles, it has been declared by this court, are not the legitimate subject of trade or commerce, nor within the protection of the commerce clause of the Constitution.

Such articles are not merchantable; they are not legitimate subjects of trade and commerce. They may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life. The self-protecting power of each State, therefore, may be rightfully exerted against their introduction, and such exercises of power cannot be considered regulations of commerce prohibited by the Constitution. *Bowman* v. *Railway Company*, 125 U.S. 465, 489.

Nor does it make any difference that such regulations incidentally affect interstate commerce, when the object of the regulation is not to that end, but is a legitimate attempt to protect the people of the State. In *Geer* v. *Connecticut*, 161 U.S. 519, a conviction was sustained of one who was charged with having in his possession game birds, killed within the State, with the intention of procuring transportation of the same beyond State limits. This law was attacked upon the ground that it was a direct attempt to regulate commerce among the States. After discussing the peculiar nature of such property, and the power of the State over it, this court said (p. 534):

Aside from the authority of the State, derived from the common ownership of game and the trust for the benefit of its people which the State exercises in relation thereto, there is another view of the power of the State in regard to the property in game, which is equally conclusive. The right to preserve game flows from the undoubted existence in the State of a police power to that end, which may be none the less efficiently called into play, because by doing so interstate commerce may be remotely and indirectly affected. *Kidd* v. *Pearson*, 128 U.S. 1; *Hall* v. *De Cuir*, 95 U.S. 485; *Sherlock* v. *Alling*, 93 U.S. 99, 103; *Gibbons* v. *Ogden*, 9 Wheat 1.

In *New York, ex rel. Dilz* v. *Hesterberg*, 211 U.S. 31, it was held that the State might punish the sale of imported game during the closed season in New York notwithstanding such game was imported from abroad, and was thus beyond the control of the State, the law being sustained upon the ground that, while foreign commerce was incidentally affected, the State might prohibit the sale of such game in order to protect local game during the closed season; and to make such regulations effective required the prohibition of the sale of all game of that kind.

So it may be taken as established that the mere fact that interstate commerce is indirectly affected will not prevent the State from exercising its police power, at least until Congress, in the exercise of its supreme authority, regulates the subject. Furthermore, this regulation cannot be declared invalid if within the range of the police power, unless it can be said that it has no reasonable relation to a legitimate purpose to be accomplished in its enactment; and whether such regulation is necessary in the public interest is primarily within the determination of the legislature, assuming the subject to be a proper matter of State regulation.

We may take judicial notice of the fact that the raising of citrus fruits is one of the great industries of the State of Florida. It was

competent for the legislature to find that it was essential for the success of that industry that its reputation be preserved in other States wherein such fruits find their most extensive market. The shipment of fruits, so immature as to be unfit for consumption, and consequently injurious to the health of the purchaser, would not be otherwise than a serious injury to the local trade, and would certainly affect the successful conduct of such business within the State. The protection of the State's reputation in foreign markets, with the consequent beneficial effect upon a great home industry, may have been within the legislative intent, and it certainly could not be said that this legislation has no reasonable relation to the accomplishment of that purpose.

As to the suggestion that the shipment of such fruit may be legitimately made for commercial purposes, for the purpose of making wine, citric acid, and possibly other articles, it is sufficient to say that this case does not present any such state of facts, and of course the constitutional objection must be considered in view of the case made before the court, which was a delivery for shipment of oranges so immature as to be unfit for consumption. Whether such a case, as supposed, of shipment for commercial purposes, would be within the statute, would be primarily for the State court to determine, and it is not for us to say, as no such case is here presented.

It is pointed out in the opinion of the Supreme Court of Florida, and we repeat here, that no act of Congress has been called to our attention undertaking to regulate shipments of this character, which would be contravened by the act in question. As the Florida court says, the sixth subdivision of the Food and Drugs Act, if citrus fruits should be held to be within the prohibitions against vegetable substances, includes only such as are in whole or in part filthy, decomposed, or putrid. Green or immature fruit, equally deleterious to health, does not seem to be within the Federal act. Therefore until Congress does legislate upon the subject, the State is free to enter the field. *Savage* v. *Jones*, 225 U.S. 501.

In the *Vermont Case*, referred to by counsel for plaintiff in error, *State of Vermont* v. *Peet*, 80 Vermont, 449, the act made it unlawful to ship without the State veal less than 4 weeks old when killed, and it was held to run counter to the Federal act and regulation upon the same subject.

We find no error in the judgment of the Supreme Court of Florida, and it is affirmed.

UNITED STATES v. R. C. BOECKEL & CO. ET AL.

(Circuit Court of Appeals, First Circuit, Apr. 6, 1915)

221 Fed. 885; N.J. No. 3871

In error to the District Court for the District of Massachusetts. Judgment reversed.[86]

Before PUTNAM, BINGHAM, and ALDRICH, Circuit Judges.

BINGHAM, *Circuit Judge.* This is an information by the United States against 131 boxes of confectionery, a part of which had been

[86] Reversing *United States* v. *307 Cases of Confectionery*, p. 353, *ante*.

transported into Massachusetts from New York and a part from Pennsylvania. The proceeding is under section 10 of the Food and Drugs Act of June 30, 1906 (34 Stat.L., p. 768, ch. 3915), for the purpose of seizing and condemning the confectionery on the ground that it contained talc and was therefore adulterated within the meaning of section 7 of the act. A warrant having been issued, the marshal seized 104 boxes of the confectionery, that being all that could be found. R. C. Boeckel & Co. appeared as claimants of 30 boxes and Henry Heide as claimant of 73 boxes of the property seized.

There was a trial by jury and a verdict that the confectionery was not adulterated.

It is conceded by the claimants that the confectionery was shipped in interstate commerce; that it was in the original and unbroken packages when seized; that it was treated with talc during the process of rolling in order to impart a polish and to prevent adhering; that minute quantities of talc may have adhered, but, if so, the quantity was so small as to be almost incapable of measurement. They deny that the talc was used as an adulterant or that the confectionery was adulterated within the meaning of the act. Talc is a mineral compound, not an article of food, and is known as hydrated silicate of magnesia. There was no evidence that it exists naturally in any form of confectionery.

Evidence was introduced which tended to prove that a little less than a pound of the confectionery taken as a sample from the boxes claimed by Heide contained talc to the amount of one tenth of 1 percent, or about one-half as much as you could heap on a 10-cent piece; that a like sample of that claimed by Boeckel & Co. contained a little more than 1 one-hundredth of 1 percent of talc; and that, if all the mineral matter found in the outer portion of the confectionery tested was talc it would be a mere trace, which would be detected only by chemical examination.

The court refused to charge the jury that, if they found the confectionery contained talc, it was adulterated within the meaning of the statute; and instructed them, in substance, that it would not be adulterated if it contained a mere chemical trace of talc, and only if it contained a quantity of talc large enough to be significant or important for some possible practical purpose; that a mere chemical trace, only to be detected by a skillful chemist, would not be sufficient; that there must be enough to show some purpose of deception on the manufacturer's part; enough to show a want of that extreme care exhibited by the manufacturer in guarding the purity of his product. The errors assigned are to the refusal to give the requested instruction and to the instructions given.

The provisions of the statute material for our consideration in passing upon the questions raised by the assignments of error are as follows:

> An Act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes.
>
> * * * * * * *
>
> SEC. 2. That the introduction into any State * * * from any other State * * * of any article of food or drugs which is adulterated or misbranded,

within the meaning of this Act, is hereby prohibited; and any person who shall ship or deliver for shipment from any State * * * to any other State * * * any such article so adulterated or misbranded within the meaning of this Act * * * shall be guilty of a misdemeanor, etc.

SEC. 6. * * * The term "food," as used herein, shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound.

SEC. 7. That for the purpose of this Act an article shall be deemed to be adulterated * * *.

In the case of confectionery:

If it contain terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredients deleterious or detrimental to health, or any vinous, malt or spirituous liquor or compound or narcotic drug.

* * * * * * *

SEC. 10. That any article of food * * * that is adulterated * * * within the meaning of this Act, and is being transported from one State, * * * to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, * * * shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation.

It is apparent from the language of section 7 that confectionery which contains any one of certain things there specified, to wit, terra alba, barytes, talc, chrome yellow, or any vinous, malt, or spirituous liquor or narcotic drug, is deemed to be adulterated, and that, under section 2, its transportation in interstate commerce is prohibited. If the language of the statute is ambiguous in regard to what the standard is for determining adulteration on account of the use of the general terms—"or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health"—there is none where the specific terms above mentioned are employed. Congress, knowing that terra alba, barytes, and talc were commonly used as adulterants in confectionery, to increase its weight and cheapen its quality, in its wisdom provided that confectionery containing any of these substances should be deemed adulterated and be excluded from transportation in commerce without regard to whether the quantity contained in a given article of confectionery was such as to increase its weight or cheapen its quality so as to deceive and mislead.

Chrome yellow is a metal which is widely used as a yellow pigment, and is an active poison. The consumption of vinous, malt, and spirituous liquors leads to pauperism and crime. In declaring that confectionery containing this pigment or any of the liquors named should be deemed adulterated, Congress likewise refrained from making the question of adulteration depend upon the quantity which the confectionery contained, and plainy manifested an intention that confectionery containing any of these things should be deemed to be adulterated. The language of the statute being unambiguous, so far as it relates to the particular adulterants mentioned, its words must be given their ordinary meaning. When so construed, confectionery which contains any of the specific substances or liquors named is adulterated, without regard to the question whether in the particular case the amount of added adulterant indicates an intention to deceive, or is liable to injure health or morals.

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This construction of the statute is recognized in the case of *French Silver Dragee Co.* v. *United States*, 179 Fed. 824, 828, where the court said:

> We think that the history of the act, the object to be accomplished by it, and the language of all its provisions require that it should be so interpreted that in the case of confectionery, as in the cases of food and drugs, the Government should establish, with respect to articles not specifically named, that they either deceive, or are calculated to deceive, the public or are detrimental to health.

In that case the confectionery in question was coated with pure silver, which was not one of the substances specifically named in section 7, and in order to render it an adulterant within the meaning of the general provisions—"other mineral substance," or "other ingredient deleterious or detrimental to health"—it was held that it must be shown that the silver coating was either deceptive or injurious to health, and that, as there was no proof of those facts, the confectionery could not be found to be adulterated within the meaning of the statute.

In many of the States laws have been passed prohibiting the sale of adulterated milk, and standards for determining adulteration have been fixed, such as that milk shall be regarded as adulterated "to which water or any foreign substance has been added," or when it is "shown upon analysis to contain more than 87 percent of watery fluid, or less than 13 percent of milk solids." And it has been uniformly held that milk to which water has been added, or milk to which water has not been added, but which contains more than 87 percent of watery fluid or less than 13 percent of milk solids, is adulterated, without regard to the quantity of water added or the extent to which an analysis showed the milk contained more of watery fluid or less of milk solids than the standard required; and these laws have been upheld as constitutional. *State* v. *Schlenker*, 112 Iowa, 645; *Commonwealth* v. *Waite*, 11 Allen (Mass.), 264; *Commonwealth* v. *Gordon*, 159 Mass. 8; *Commonwealth* v. *Schaffner*, 146 Mass. 512; *Commonwealth* v. *Wetherbee*, 153 Mass. 159; *State* v. *Campbell*, 64 N.H. 402; *State* v. *Smythe*, 14 R.I. 100; *People* v. *West*, 106 N.Y. 294. See also *State* v. *Griffin*, 69 N.H. 1; *State* v. *York*, 74 N.H. 125; and *Reyfelt* v. *State*, 73 Miss. 415.

It is also to be noted that in section 7 the word "contain", taken in connection with the words "terra alba, barytes, talc, chrome yellow", "color", flavor", "vinous, malt, and spirituous liquors", is used in a general and not in a restricted sense, and that confectionery may be found to contain any of the prohibited substances if they are used as a compound, a filler, a flavor, a pigment to color it internally or externally, a coating, or other similar purpose, and especially if they are purposely used, even in minute quantities, for these or other similar purposes.

As the confectionery here in question was adulterated within the meaning of the act, if it contained any talc, and as there was evidence from which it could have been found that it contained talc, we are of the opinion that the court erred in declining to give the instruction requested, and in those that were given.

The judgment of the district court is reversed, the verdict set aside, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

UNITED STATES v. AMERICAN LABORATORIES

(District Court, E.D. Pennsylvania, Apr. 27, 1915)

222 Fed. 104; N.J. No. 2962

Conviction of violation of the Food and Drugs Act. On motions in arrest and for new trial. Denied.

DICKINSON, *District Judge.* The prosecution in this case began with an information filed under the Food and Drugs Act and the amendment thereto. The first three counts of the indictment are under the original act, and charge different acts of misbranding, or false and misleading statements respecting the composition of a medicine put out by the defendant under the trade-name of "Bad-Em Salz." The fourth count is under the Sherley amendment to the original act, and charges the offense of making false and fraudulent statements as to the curative properties of the salts manufactured by the defendant.

The case was fully and exhaustively tried and defended, resulting on April 7, 1915, in a verdict of guilty. The motions may be treated as one, and are planted upon four propositions:

The first is an attack upon the constitutionality of the Sherley Amendment. The position is taken that it is beyond the power of Congress to make a crime of the act of a defendant in proclaiming his belief in the curative properties of a medicine. The argument upon which this is based is so fully met by the opinions accompanying the ruling in *United States* v. *Johnson*, 221 U.S. 488, 31 Sup.Ct. 627, 55 L.Ed. 823, that we do not feel called upon to give it further discussion.

The second ground of complaint is that the defendant has not received the notice required by the fourth section of the Food and Drugs Act. This complaint is disposed of by the case of *United States* v. *Morgan et al.*, 222 U.S. 274, 32 Sup. Ct. 81, 56 L.Ed. 198.

The third complaint is that the indictment was found and tried, and a conviction thereunder had, without other authority for the institution of the prosecution than an information emanating from from the office of the United States district attorney, without affidavits in support of it appearing. The facts are that an information, with suporting affidavits, was filed September 3, 1914. This involved two counts. Another information was filed March 17, 1915. This was the basis of the four counts involved in the indictment upon which the defendant was convicted. The information was based upon the affidavits previously on file. No affidavits were physically attached to the second information. The discussion of the legal consequences flowing from this is for the moment reserved.

The fourth complaint is that the whole trend of the charge was toward conviction, in that it kept the attention of the jury faced in the direction of the guilt, and not the innocence, of defendant. It must be conceded that a reading of the charge affords some ground for this complaint. It is, however, more seeming than real. The circumstances which gave the framing to the charge brought this about. Before the charge was delivered the attention of the court was called to the fact of certain newspaper publications and dis-

cussion of the case. The best method of dealing with the situation was made the subject of a conference between counsel and the trial judge. It was not known whether any of the jury had seen the publication referred to. If they had not seen it, a direct reference to it might do more harm than good. It was thought that the condition could be best met by instructing the jury as to the presumption of innocence, and bringing before their minds the responsibility resting upon them to find the facts from the evidence in the case, and to acquit unless the proofs brought home to them a conviction of defendant's guilt beyond all reasonable doubt. The trial judge complied with the suggestion made, and charged the jury at length, and, if anything, at undue length, in emphasizing the defendant's rights of trial. This was done with such fullness at the commencement of the charge that we cannot find that the effect of it was lost upon the jury by anything subsequently said, nor that the defendant was prejudiced by the later features of the charge.

Over and beyond these specific grounds of complaint lies the broader one that there was no evidence in the case to justify the defendant's conviction of a crime. The situation in this view of it may be voiced in the phrase that the defendant, if punished, will have been punished for the crime of medical heterodoxy, and not for any offense against the law. In other words, the president of the defendant company, who is himself a physician, advanced a theory, advocated by others as well as by himself, for the treatment of cases commonly known as "gall-stone cases." In opposition are eminent physicians and surgeons, and, as the argument might concede, the weight of scientific medical opinion is against him. Inasmuch, however, as the treatment is the subject of controversy, and its efficacy within the domain of opinion, the minority cannot be convicted of crime merely because they are outnumbered.

It is certainly true that a man should not be convicted of fraud merely because he advocates a theory of medicine which at the time had not received the sanction of the endorsement of the medical profession. It is equally true that a fraud or a fakir cannot escape the consequences of his fraud by the mere fact that some one may honestly believe in the theory which he fraudulently and dishonestly exploits. The broad distinction between things which are frauds and things which are not frauds is clear. It would be difficult, and indeed seems to be impossible, to give a definition of such frauds in words. Suppositious cases illustrating the distinction could be multiplied beyond number. The essential difference is a fact, and in the administration of the criminal law is a fact to be found by a jury. As applied to the evidence in this case, the statement is easily credible that a man believes in and honestly advocates a course of taking the waters of certain springs as a specific for the prevention of gallstones, in the sense of ameliorating the conditions to which the formation of gallstones are due; it is conceivable that a man may give a like advocacy to the theory that gall stones, when once formed, may be dissolved, and there may be other persons of like opinions with himself.

The views thus expressed and the treatment advocated may be groundless in fact and unsupported by respectable professional opinion, and yet the holder of them would not be the proper subject of

criminal prosecution. By the very same token, however, another man might advocate a remedy and put out a medicine to be purchased by the sufferers from ailments or diseases, real or imaginary, and the act itself be so clearly false and fraudulent that the mind would not hesitate to reach a conviction of his criminal guilt. The fact that there was a widely spread disposition among people to give credence to the statement because of a superstitious belief in its efficacy, or indeed such a reputation for the remedy itself as to make people prejudiced in its favor, would not diminish, but would increase, the guilt of him who sought to make money by false statements and fraudulent devices. It is difficult, and indeed practically impossible, to draw a line in the abstract other than a broad line between these two things. There would seem to be no other way of dealing with the subject than to submit to the common-sense judgment of a jury to find whether in a given case the acts of a defendant have been honest, however mistaken, or whether they have been false and fraudulent.

The present case may well be considered a test case. There is a widespread belief, whether well or ill founded, in the curative properties of the waters of many of the springs which issue out of the earth. The predisposition to believe in their efficacy may have its foundation in the search for the fountain of youth. Certain words have become polarized with this meaning, and excite a feeling of hope or expectation in the minds of sufferers, particularly those who suffer from certain ailments. The word "Spa" and the word "Bad" are of this kind. The result of the use of such words is very much akin to the thoughts which, from the principle of the association of ideas, are called up by the use of certain widely advertised proprietary words.

In order to determine what basis of merit lies at the bottom of the fame of certain springs, the knowledge and skill of the chemist have been called into exercise, and the waters have been analyzed, and the ingredients which are believed to have contributed chiefly to their efficacy have been determined. It is a short step from this knowledge to the expedient of artificially reproducing the waters, or to the more direct method of bottling and transporting the waters themselves, or to facilitate the transportation by the process of evaporation and then reproducing a water from the residuum salts. Starting with this widely spread belief in the efficacy of certain natural waters, and following this with the thought of reproduction, either in fact or in equivalents, the defendant put on the market the medicine which it widely sells. Indeed, the president of the company in his testimony gave this history of the evolution of the idea of putting these salts upon the market. The idea began with the recommendation of patients suffering from certain ailments to go to Carlsbad, or to Ems, or to certain other springs, and there take the waters.

The next development of the idea was that a treatment would be given which is the medicinal equivalent of what could be had at the springs themselves. The standard formula for effervescent artificial Carlsbad salts given in the National Formulary was not believed to be the best combination of salts for the purpose. To vary from this, and yet put out the substitute as artificial Carlsbad salts, was thought to be inimical to the provision of the statute. The fully developed

thought was to put out another combination of salts, believed to be a reproduction, and in that sense a representation, and in another sense an equivalent, of the medicinal properties of the Carlsbad waters. The embodied thought was therefore put into this product under the name of "Bad-Em Salz." This put behind this proprietary medicine the widespread belief of people in the efficacy of these natural spring waters, and the thought that they could get the same benefit from a treatment in their own homes which they would receive directly from the Carlsbad or Bad-Em waters. The further thought was to give the sale of these salts the additional boost of a statement of their curative or therapeutical properties. Had this been fairly done, it could not be said that there was involved in it any infraction of any criminal statute.

The charge against this defendant, however, was that the medicine was misbranded in the respect that it was put out under certain false and misleading statements, the essence of which were that the impression was conveyed to the users of the medicine that they were getting the benefit of the very salts which are contained in the natural waters of the springs which had acquired a world-wide fame, and that false and fraudulent statements were made as to the curative effects or results which would flow from the use of this medicine. Right here is the fulcrum on which the lever for the argument on behalf of the defendant is sought to be placed.

As to the misbranding features of the indictment, the defensive position is taken upon the fact that the statements put out by the defendant were neither false nor misleading, and, with respect to the curative features, that, inasmuch as the result claimed to follow from the use of the medicine was a matter of opinion, there was no basis for a finding of guilt.

The answer made to these propositions by counsel for the United States is the only answer to which they are open, and that is that the statement of fact upon which the first proposition turns is one to be determined by a jury. It is not a necessary condition of a finding of guilt that the statement of what the drug is should be a statement flatly and baldly false, but that the word "misleading", in the act, has its function, which is to bring the statement within the inhibition of the statute if it is such as to create or lead to a false impression in the mind of the reader as to what the ingredients or the composition of the drug are. This is the charge made in the first three counts of the indictment, and this is the fact which the jury has found against the defendant.

With respect to the charge under the Sherley amendment, the answer of the United States is that a man who has in fact made false and fraudulent statements as to the curative properties of the drug which he is selling cannot, when pursued by justice, take refuge in the statement that he was expressing his opinion, or in being able to find others who honestly believe in the statements made. Here again the question of guilt or innocence turns upon the fact, and here again the fact is one which must be determined by the jury, and here again the jury has determined the fact against the defendant.

The charge of the court in this feature or aspect of the case was heard by the jury, and therefore must be read in the light of the argument which had been addressed to them. The president of the

company, when upon the witness stand, testified to the honesty of the statements made and to the truth of the claims made for the results of the treatment advocated. This was impressively supported by counsel for the defendant in his argument that the defendant was not to be convicted because the statements made were not believed in by the witnesses called for the United States and that a defendant could not be convicted because he entertained an opinion, even if that opinion was a mistaken one, and that the fact that the claims made were within the domain of opinion entitled the defendant to a verdict of acquittal.

These propositions were all affirmed by the court, unless the jury had been convinced by the evidence in the case that the statements as to what the drug was were in fact false and misleading, and unless the statements of what it would do were both false in fact and were fraudulently made.

The feature of the charge complained of, that the illustrations "were all illustrations of guilt, and none of innocence", could not have prejudiced the defendant, for the reason that, following the course of the argument made by counsel for the defendant, they enforced his argument and reinforced his position by impressing upon the jury that there could be no conviction unless the defendant had been guilty of an arrant fraud, such as those embodied in the illustrations given.

This brings us back to the only undiscussed complaint now made. That no one can be called upon to defend to a criminal charge which is not based upon reasonable grounds appearing from statements of fact authoritatively made and sanctioned by the oath of someone who has a knowledge of the facts, or its legal equivalent in solemnity and responsibility, is a proposition having behind it the highest sanction of the law. The forms of practice in making criminal accusations which have grown out of this are the outer protections which are thrown around every citizen, and there can be no departure from them.

We have not had the opportunity to examine the record in this case with respect to the fulfillment of these conditions preliminary to a trial. We understand the fact to be, however, and it is stated without denial, that the action of counsel for the United States in bringing this prosecution was based upon affidavits made by those having a knowledge of the facts and upon the probable cause which was disclosed by the affidavits. These affidavits are of record. The first information brought home to the defendant charges which would have taken the form of two counts in an indictment. Counsel for the United States subsequently amplified the form of the charges by putting them into the shape of the four counts of the present indictment. The information in the present prosecution was based upon the affidavits which were of record. The complaint now made, as we further understand it, is merely to the feature that the affidavits upon which the information was based are not physically attached to the information itself. We do not think this to afford any legal reason for interfering with the verdict, although we have no wish to lessen the protection thrown around defendant. *United States* v. *Gruver* (D.C.) 35 Fed. 59, and *United States* v. *Baumert* (D.C.) 179 Fed. 735, dispose of this phase of the case.

The motive and policy of the law which lies behind legislation of this general kind is highly promotive of public good. The evils sought to be removed and prevented spring out of conditions requiring tactful, and even delicate, treatment. Such laws, if arbitrarily enforced, may easily take the form of an unwise dictatorial interference with the pursuits of others. There is a natural temptation to overdo by trenching upon the domain which properly belongs to the ethics of the medical profession. There is danger, also, that the public will come to rely upon the protection promised by such laws, and therefore relax individual watchfulness. Such laws, therefore, should be administered in such a way as that honest and well-intentioned business may not be hampered, but the detection of frauds and cheats will be made sure, and their conviction and punishment rendered certain. The temptation even to those who cannot fairly be termed unscrupulous is to yield to the suggestions of greed and come as close to the forbidden line as they safely can. The only sure course in the administration of laws of this kind is to leave the determination of guilt or innocence in a given case to the sound judgment of a jury, supervised by the wisest scrutiny which the trial judge can give to make sure that no one is convicted without guilt. As has already been stated, this case discloses acts that are not far over the line of what the defendant might lawfully have done. The jury found, however, that it has transgressed that line, and we are not able to convict the jury of having misjudged the real facts in the case.

The motion in arrest of judgment, and that for a new trial, are therefore both denied.

WEEKS v. UNITED STATES

(Circuit Court of Appeals, Second Circuit, May 13, 1915)

224 Fed. 64; N.J. No. 4047

In error to the District Court for the Southern District of New York. Judgment affirmed in part, reversed in part.[87]

Before Lacombe, Ward, and Rogers, Circuit Judges.

Lacombe, *Circuit Judge.* This cause comes here upon writ of error to review a judgment convicting plaintiff in error, who was defendant below, of violation of the Food and Drugs Act of June 30, 1906. There were three informations, and two counts under each. The first information dealt with an article of food called "Fruit Wild Cherry Compound." The first count on this information was quashed before trial. The second count charged shipment of such an article, which was misbranded, because it was labeled "Fruit Wild Cherry Compound", whereas it consisted chiefly of imitation wild cherry essence artificially colored.

The second information, in its first count, charged the shipping of the article which "was adulterated in that it was artificially colored with a coal-tar dye in such manner as to simulate a fruit wild cherry

[87]Affirming in part, reversing in part, *United States* v. *Weeks,* p. 519, *ante.* Affirmed, *Weeks* v. *United States,* p. 867, *post.*

and in a manner whereby its inferiority was concealed." The second count charged the selling and offering for sale of the article under the distinctive name of another article. The article and the label in all these counts were the same.

The third information in its fruit [first] count charged the shipment of an article of food labeled "Special Lemon. Lemon Terpene and Citral." This label was charged to be false and misleading because the statement in it would indicate that the article was a product derived from lemon, whereas it was in fact not a product derived from lemon, but was a mixture containing alcohol and citral derived from lemon grass and was an imitation of lemon oil. The second count charged the offering of such article for sale under the distinctive name of another article—to wit, a product derived from lemon.

Defendant was convicted under all five counts.

The case calls for the construction of sections 7 and 8 of the Pure Food and Drugs Act. Prior sections forbid in general terms the manufacture and shipment in interstate commerce of any article of food or drugs which is adulterated or misbranded. Those two sections (7 and 8) undertake to define the words "adulterated" and "misbranded" as used in the statute. Had they been phrased in general terms it might not be difficult to construe and apply them to the concrete facts of each case as they are developed on a trial. But the draftsman apparently thought that the more words he used the more plainly would he express the meaning intended. Not unnaturally an opposite result has been accomplished. The sections are most difficult of construction; possibly the phrasing of some of their provisions may operate to defeat the object probably intended. But we can not rewrite the sections; if amendment be needed to make the act effective that will be a matter for the consideration of Congress.

Considering now the charges as to the "Fruit Wild Cherry Compound", the labeling of which it is contended violates the provisions of section 8, subhead "In the case of food." The label indicates, we should suppose, to any intelligent mind that the article is a compound into which "Fruit Wild Cherry" has entered at least in sufficient quantity fairly to warrant the use of these quoted words. The testimony of defendant's own witness shows that the article contains absolutely no "Fruit Wild Cherry." It is therefore clearly within section 8, "Food" subdivision, paragraph second, because it is "so labeled as to mislead the purchaser", and also within paragraph fourth, because its label bears "a statement regarding the ingredients or the substances contained therein, which statement [is] false or misleading in [the particular] that the compound contains Fruit Wild Cherry." If this were all, one might leave the subject with a conviction that the statute, in its application to this case, had accomplished its apparent object. But the act contains an important proviso, apparently tacked on to the bill to protect various combinations on the market at the time. In order to appreciate the full force of this proviso, which concludes section 8, it is here quoted:

Provided, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word "compound," "imitation," or "blend," as the case may be, is plainly stated on the package in which it is offered for sale: *Provided*, That the term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only: *And provided further*, That nothing in this act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding.

Now there is not a scintilla of evidence in the case to show that defendant's article contains "any added poisonous or deleterious ingredients"; therefore it is covered by the proviso (second clause), because it is "labeled to plainly indicate that it is a compound", and the word "compound" is plainly stated on the package. In consequence it cannot, under the proviso, "be deemed to be misbranded."

In the second information the charge is brought under section 7 of the act, which enumerates the conditions which will constitute adulteration of an article for the purposes of the act. The charge is that "Fruit Wild Cherry Compound" was adulterated, in that it was "artificially colored with a coal-tar dye in such a manner as to simulate a true fruit wild cherry and in a manner whereby its inferiority was concealed." Section 7 contains this clause:

Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

The shipment is the same as that covered by the first information. The label is the same "Fruit Wild Cherry Compound." Manifestly the label does not state that the article is "Fruit Wild Cherry", but only that it is a *compound* which contains fruit wild cherry. Defendant's witness, who was familiar with the manufacture of the compound, testified that they soak wild cherry bark in water, filter the infusion, dilute it with alcohol, add benzaldehyde or oil of bitter almonds, fruit juice of raspberries, and some extract of orris and oil of rose. No fruit wild cherry enters into the compound. There was testimony from which the jury might find that the compound also contained a coal-tar color known as amaranth; that genuine fruit wild cherry has a red color; that the compound described by defendant containing fluid extract of wild cherry bark would not have this color; and that the amaranth gave to the mixture the genuine color of wild cherry juice. The testimony seems to indicate that the bark infusion of wild cherry is inferior to the fruit juice, and we should be inclined to sustain the verdict were it not for the proviso as to "compounds" above quoted.

That proviso is found at the close of section 8, which section undertakes exhaustively to define "misbranding." Under ordinary rules of construction the operation of the proviso might be restricted to the section in which it appears, and it might be held not to qualify section 7, which defines "adulterations." But the draftsman of the

act has been careful not thus to restrict it, because the proviso begins:

> That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be *adulterated or misbranded* in the following cases.

Then follows the enumeration above set forth. The article in question is an article of food, and the information does not charge, nor does the testimony show, that there have been added to the compound "poisonous or deleterious ingredients." The proviso therefore requires a reversal of the conviction under this count.

The second information deals with a different article, labeled "Special Lemon. Lemon Terpene and Citral." The first count charged that the article was misbranded; that the label was misleading, in that the statement would indicate that the article was a product derived from lemon, whereas the product was not a product derived from lemon, but was a mixture containing alcohol and citral derived from lemon grass and an imitation of lemon oil. The article seems not to be covered by the proviso, because the *word* "compound" is not "plainly stated on the package in which it is offered for sale."

The question is: Was the label false and misleading? It obviously indicated that the so-called "Special Lemon" was a compound of which lemon terpene and citral were components. The words "Special Lemon" do not, of course, import that the article was "lemon," a word which in ordinary speech denotes the fruit of a well-known citrus tree. There is no testimony that this word, standing by itself, has any distinctive trade meaning; there are lemon oils, lemon extracts, lemon juice, lemon essence, etc. The use of the words "special lemon" does not import any representation that the article is a variety of lemon oil. The testimony shows that lemon terpenes are the oily part—the hydrocarbon oils of the lemon, of the lemon peels; they are a by-product from the manufacture of lemon flavor. Citral is derived from lemon grass, a grass that grows in the East Indies. Where we have a label which indicates that the contents of the package consists of a compound of lemon terpene and citral, which compound the manufacturer designates as "Special Lemon," and the contents agree with the designation, we do not see how it can be held that there has been a misbranding within the meaning of the act.

The second count charges that the same article was offered for sale as a product derived from lemon. A witness called by the Government, who was engaged in the manufacture of crackers at Atlanta, Ga., testified that he was visited there by a salesman of defendant; that the salesman showed him a sample in a bottle and told him it was pure lemon oil, which he was able to sell at a low price because it was "second pressing." The witness ordered some of it, which was sent to him by defendant. The salesman, called by defendant, denied the making of any statements as to the article being lemon oil. Upon this conflict of evidence the finding of the jury that the representations were made is controlling here, and it must be held that there was a misbranding under the statute, because section 8 defines misbranding as, inter alia, "offering an article for sale" under the distinctive name of another article, even though no label describing it as such other article be actually affixed to it.

Since intent is not an element of the offense, defendant must be held liable for the act of his sales agent, although he had told him not to misdescribe the article.

The judgment under this count is affirmed.

WEEKS v. UNITED STATES

(Circuit Court of Appeals, Second Circuit, May 13, 1915)

224 Fed. 69; N.J. No. 4055

In error to the District Court for the Southern District of New York. Judgment affirmed.[88]

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, *Circuit Judge.* A much simpler case is here presented than that considered in action No. 1, opinion in which is filed herewith. There is but one information in a single count. Concededly defendant shipped an article of food labeled "Grain Alcohol Varnish"; it was shellac dissolved in alcohol and was used for a glazing on cheap candies. Shellac is a resinous material derived from a secretion caused by an insect biting the bark of certain trees in India and southern Asia. This resinous material is separated from the twigs and other refuse material by being warmed in bags. Arsenic is added to it for the purpose of brightening its natural orange color, making it, in the opinion of the trade, more desirable. All shellac imported into this country during the year in question contains this added article, defendant so concedes. The shellac is dissolved in alcohol to produce the varnish; no arsenic is added here.

The act provides (sec. 7) that an article of food is adulterated if it "contain any added poisonous or other added deleterious ingredients, which may render such article injurious to health." The amount of this arsenic which could possibly be consumed by a person eating the candy glazed with the varnish would be minute. The only question is: Was there sufficient arsenic in the varnish to make it an article which "may be injurious to health?"

Upon this point there was conflicting testimony. In accordance with the holding of the Supreme Court in *United States* v. *Lexington Mill Co.*, 232 U.S. 399, the question whether the added ingredient would "reasonably have a tendency to injure health" was left to the jury. We see no reason to disturb their finding; it makes no difference whether the arsenic was added to the shellac or to the varnish, nor whether it was added by the defendant or by some one else. He testified with commendable frankness that he understood at the time that one "could not buy shellac commercially, I mean outside of a laboratory, that was arsenic free." He supposed undoubtedly that the amount consumed with varnished candy would be too minute to injure any one. Of course he could sell this varnish, with its added arsenic for use in the arts, but he admitted, with entire frankness, that he sold it to be used in glazing confectionery. We regret to have to sustain a conviction, where the defendant has been

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[88] Affirming *United States* v. *Weeks*, p. 528, *ante*.

so entirely frank and honest in giving his testimony and had no reason to suppose he was likely to injure anyone's health by selling his varnish for the indicated purpose; but intent so to do is not an element of the offense charged, and the evidence as to what effect the added arsenic may have was such that this question had to go to the jury for decision. Had they decided that question contrary to the contention of the Government experts we certainly could not set their decision aside, nor can we do so when they find such contention persuasive. We are not the triers of the facts.

It seems unnecessary to discuss various technical points which have been argued. We cannot see that it makes any difference whether the package shipped was labeled "Grain Alcohol Varnish" or "White Shellac Varnish Grain Alcohol." It is proved that shellac varnish was sent by defendant to the candy manufacturer in Providence, R.I., and that what the Government experts tested was a sample from the can. We do not understand that defendant disputes the fact that he sent the can.

Judgment affirmed.

GLASER, KOHN & CO. v. UNITED STATES

(Circuit Court of Appeals, Seventh Circuit, May 20, 1915)

224 Fed. 84; N.J. No. 4036

In error to the District Court for the Northern District of Illinois. Judgment affirmed.[89]

On or about January 15, 1907, plaintiff in error executed and delivered to Steele-Wedeles Company, of Chicago, Ill., a guaranty in writing signed by it, which guaranty reads:

STEELE-WEDELES Co., City.

GENTLEMEN:

Replying to your favor 10th inst., would say we hereby guarantee that all goods as furnished you hereafter will comply with the Food and Drugs Act of June 30, 1906, with the understanding, however, that if we at any time use labels or packages furnished by you or gotten up as per your instructions, we shall not be responsible for the form or wording of the same but only guarantee that goods covered by same are not adulterated. It is expressly understood that the above shall hold good until notice of revocation be given in writing.

Truly yours,

GLASER, KOHN & Co.,
G. D. GLASER, *Pres.*

Afterwards, and on or about September 15, 1910, and while said guaranty, by its terms, was in full force, plaintiff in error sold and delivered to said Steele-Wedeles Company two dozen jars of preserves, described as "Herald Brand Fruit Preserves Blackberry Flavor Apple Preserves 74%, Blackberry Preserves 26%," which jars of preserves Steele-Wedeles Company shipped in interstate commerce from Chicago to Rock Springs, in the State of Wyoming, on or about October 14, 1910. On or about October 20, 1910, an inspector of the United States Bureau of Chemistry purchased a sample of these preserves and sent the same, properly sealed, to the Bureau of Chemistry of the Department of Agriculture, where it was duly examined by experts on or about December 8, 1910, who pronounced the sample analyzed to contain mold, and to be

[89] Affirming *United States* v. *Glaser, Kohn & Co.*, p. 601, *ante*.

partly decomposed and made from partly decomposed fruit. Thereafter the United States filed its information, containing six counts, against plaintiff in error, of which only the fourth count is here involved, which charges plaintiff in error with unlawfully knowingly selling and delivering to Steele-Wedeles Company the said jars of preserves, contrary to the provisions of the so-called Pure Food Law of the United States, approved June 30, 1906, entitled "An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes," in that said jars of preserves, when and where they were so sold and delivered, were an adulterated article of food within the meaning of the act, and consisted in part of decomposed vegetable substance, and further charging that Steele-Wedeles Company shipped said jars contrary to law, by way of a common carrier in interstate commerce to Rock Springs, Wyoming, as aforesaid, basing said information upon said guaranty as having been given and received under the terms of section 9 of said act of June 30, 1906.

On the trial the formal facts were stipulated into the record and evidence of the condition of the preserves when delivered to Steele-Wedeles Company was introduced. This evidence consisted of the opinions of experts, based on the conditions found at the time of the Washington analysis, that the fruit was partly decomposed not only at that time, but also at the time of the sale and delivery by defendants to Steele-Wedeles Company. Plaintiff in error offered no evidence, but saved exceptions to the introduction of the said letter of guaranty and to the sufficiency of the expert testimony. At the close of the evidence plaintiff in error moved the court to direct the jury to find plaintiff in error not guilty, which motion the court denied, and an exception was taken. Exception was also taken to that part of the court's instruction which charged the jury that the said guaranty was a legal guaranty. The jury found plaintiff in error guilty, and the court assessed a fine of $200 and costs, to reverse which sentence this writ of error was sued out.

The errors relied on are: (1) the court held that the alleged guaranty was legal and sufficient to hold plaintiff in error under said section 9; (2) the evidence was insufficient to show that the preserves were adulterated at the time they were delivered to Steele-Wedeles Company.

Before Baker, Kohlsaat, and Mack, Circuit Judges.

Kohlsatt, *Circuit Judge*. Section 9 of the act approved June 30, 1906, reads as follows, viz:

Sec. 9. That no dealer shall be prosecuted under the provisions of this act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this act, designating it. Said guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines, and other penalties which would attach, in due course, to the dealer under the provisions of this act.

It will be seen that this section does not, in terms, seem to comprehend a general continuing guaranty, but seems to apply to the specified articles contemplated at the time. Such, indeed, is plaintiff in error's contention. That construction, however, is narrow and not in accord with the spirit of the act, which should be construed in the light of its purpose, as said by the Supreme Court in *McDermott* v. *Wisconsin*, 228 U.S. 115–128, "and of the power exerted in its passage." This purpose the court, in *United States* v. *Antikamnia Co.*, 231 U.S. 654–665, declares "is to secure the purity of food and drugs and to inform purchasers of what they are buying. Its provisions are directed to that purpose and must be construed to effect it." As between a dealer to whom the purity of the goods

is guaranteed and the manufacturer who has the better opportunity of ascertaining the facts, the act aims to throw the ultimate responsibility on the latter and it should therefore be interpreted, if reasonably possible, so as to carry out this purpose to the fullest extent. In our judgment it is, therefore, not only a fair, but the most reasonable, construction of the act to include within the scope of section 9 continuing guaranties, as well as those given at the time of the sale in reference to specific goods. The belated position of plaintiff in error as to the meaning of the statute with regard to a continuing guaranty comes to us undermined with its earlier construction contained in the letter wherein it says, "We hereby guarantee that all goods as furnished you hereafter will comply", etc., and "It is expressly understood that the above shall hold good until notice of revocation be given in writing." There is no reason in law for the claim that a continuing guaranty is invalid.

When by the terms of a written guaranty it appears that the parties look to a future course of dealing for an indefinite time, or a succession of credits to be given, it is to be deemed a continuing guaranty. Am. & Eng. Ency. of Law (2d Ed.), vol. 14, p. 1139. Letters of guaranty should receive a liberal, fair, and reasonable interpretation, so as to attain the object for which the instrument is designed and the purpose to which it is applied. *Lawrence* v. *McCalmont*, 2 How. 425–449.

We are clearly of the opinion that the letter of January 15, 1907, constituted a good, valid, and sufficient guaranty under the provisions of said section 9, and that said guaranty attached to every item of sale made by plaintiff in error to Steele-Wedeles Company, after the sale thereof until revoked in accordance with the terms thereof, and that it furnished a basis for the filing of the information against plaintiff in error herein.

With regard to the sufficiency of the proof to sustain the verdict of the jury to the effect that the preserves in question were adulterated at the time they were delivered to Steele-Wedeles Company, and not prepared in accordance with said act of June 30, 1906, we find no such situation as would warrant us in substituting our opinion for that of the jury. While expert opinion evidence should be received with caution, it is solely within the province of the jury to determine its weight. They saw and heard the witnesses. In cases such as this much of the evidence must necessarily be opinion evidence. In the present case there is nothing in the evidence inherently impossible or even improbable. The error is not well assigned.

With regard to the objection that the transaction does not, so far as plaintiff in error is concerned, come within interstate commerce, plaintiff in error does not in its brief include it among the errors relied on. We are, however, satisfied that the point is not well taken. Steele-Wedeles Company was a wholesale grocer engaged in interstate commerce, as plaintiff in error well knew. By selling and delivering the preserves to that corporation upon the terms of the guaranty, it deliberately placed them in interstate commerce channels.

The judgment of the district court is affirmed.

F. B. WASHBURN & CO. v. UNITED STATES

(Circuit Court of Appeals, First Circuit, July 16, 1915)

224 Fed. 395; N.J. No. 4034

In error to the District Court for the District of Massachusetts. Decree reversed in part, affirmed in part.[90]

Before PUTNAM, BINGHAM, and ALDRICH, District Judges.

BINGHAM, *Circuit Judge.* This is an information brought by the United States under sections 2, 7, and 8 of the Food and Drugs Act of January 30, 1906 (34 Stat. at Large, p. 768, ch. 3915). It contains two counts. In the first count the Government charges that, on August 1, 1910, the respondent, at Brockton, in the district of Massachusetts, unlawfully and knowingly shipped and delivered to a carrier for shipment and carriage from said Brockton to Greensburg, in the State of Pennsylvania, certain food called "macaroons", which food was adulterated within the meaning of the act of Congress approved June 30, 1906,

> in that a substance, to wit, glucose, had been mixed and packed with said food so as to reduce and lower and injuriously affect its quality or strength.

In the second count it was charged that the food shipped as aforesaid was misbranded within the meaning of the act,

> In that the label on said food and its containers, and the package containing the same, did bear a certain statement regarding said food which was false and misleading in certain particulars; that is to say, the statement, in substance and effect, following: 'Macaroons', whereas in truth and in fact said food was not macaroons.

There was a trial by jury, and a verdict of guilty was rendered on each count. The case is now here on the respondent's bill of exceptions, and the errors assigned are to the refusal of the court to direct verdicts for the respondent at the close of all the evidence, to its refusal to give certain requested instructions, and to the admission of certain evidence.

The provisions of the statute relied upon to sustain the first count read as follows:

> SEC. 7. That for the purposes of this act an article shall be deemed to be adulterated: * * *
> In the case of food:
> First, if any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

It was stipulated between the parties, and the stipulation was put in evidence, that the food in question was shipped by the respondent in interstate commerce, as set forth in the information, that it contained 29.44 percent of commercial glucose, and that the package containing the food was labeled as the information alleged. There was also evidence that the food contained 42.76 percent of cane sugar.

At the trial the principal question in dispute was as to what the article of food known as a "macaroon" consisted. There was evidence tending to show that it consisted: (1) Of ground almonds, sugar,

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[90] Revising in part, affirming in part *United States* v. *F. B. Washburn & Co.*, p. 434, *ante*.

and the white of eggs; (2) of coconut, sugar, and the white of eggs; and (3) of coconut, sugar, the white of eggs, and glucose. On the count for adulteration one of the Government's positions was that a macaroon was an almond cake, but whether it was a cake of almond or coconut it was adulterated if glucose was added. The respondent's position was that a macaroon was a cake made of coconut, sugar, the white of eggs, and glucose, and it requested the court to charge the jury, in substance, that if they found a cake so made was a macaroon they should acquit the defendant of the charge of adulteration. The court refused to give this instruction, and charged the jury that the question for them to consider on this count was whether the cakes which the respondent admitted having shipped in interstate commerce were adulterated, in that glucose had been mixed and packed with them so as to reduce or lower or injuriously affect their quality or strength, and that in considering that question they need not determine whether the cakes shipped by the defendant were properly called "macaroons" or not, but should consider that they were macaroons notwithstanding they had coconut in them. It thus appears that the court in its charge did not permit the jury to determine, on the first count, of what the article of food known as a macaroon consisted, but charged them, as a matter of law, that it consisted of coconut, sugar, and the white of eggs, and that they might find the product adulterated if the glucose, which the respondent admitted it put into its cakes, reduced or lowered or injuriously affected their quality or strength. The respondent, in view of the evidence, was entitled to have the jury, before reaching a conclusion upon the question of adulteration, determine what a macaroon was. Indeed, it was essential, in view of the theory on which this branch of the case was tried, for them to do so in order to reach a correct result. If the jury found that it consisted of ground almonds, sugar, and the white of eggs, the respondent was entitled to be discharged, for there was no evidence that it shipped in interstate commerce macaroons made of almonds to which glucose was added. Then, again, if the jury found that a macaroon consisted of coconut, sugar, the white of eggs, and glucose, the respondent was entitled to be discharged, for the evidence disclosed that the article which it shipped in interstate commerce was so composed. There was only one contingency presented by the evidence and the allegations of this count on which the respondent could be found guilty, and that was in case the jury found that a macaroon consisted of coconut, sugar, and the white of eggs, and that the respondent, by adding glucose, thereby reduced or lowered or injuriously affected its quality or strength. This requested instruction should have been given, and the refusal to do so was error.

As to whether the food product of the respondent was adulterated by the addition of glucose—it being assumed that the article known as a "macaroon" was made of ground coconut, etc., without glucose—the evidence tended to show that commercial glucose or corn sirup was a corn product chemically produced; that it was a white, sweet sirup, and in no way injurious to health; was about three fifths as sweet as cane sugar, and contained greater food properties than cane sugar; that it was a viscid or sticky substance, and gave to the

macaroon and caused it to retain a chewy quality; that a macaroon containing glucose was less pleasing to the taste, but whether this was due to a difference in the degree of sweetness between it and cane sugar, or because of the character of the taste, the evidence did not disclose. The only evidence on this point was that some of the witnesses said that they did not like a macaroon made with glucose as well as they did one made with cane sugar.

The respondent requested the court to charge the jury that the law fixed no standard for sweetness in a macaroon, and also that they were not to consider, in determining the innocence or guilt of the respondent on the question of adulteration, the sweetness of corn sirup as compared with the sweetness of cane sugar. It is true that the law fixes no standard for sweetness of a macaroon; it is also true that the evidence disclosed that the degree of sweetness in a macaroon, whether made of coconut or almond, varies with different makers; that they use a greater or less amount of sweetening as their fancy dictates. The court declined to charge the jury, as requested, in these respects, and simply told them that there was no dispute as to glucose not being as sweet as sugar—that it was only three fifths as sweet as sugar—and that, while the defendant's evidence was that this loss in sweetness was compensated for by other advantages in the use of glucose, so that, on the whole, the cakes were not reduced or lowered or injuriously affected in quality or strength by its addition, that was for the jury to determine. From this it appears that the court told the jury they might find that a macaroon made of coconut in which glucose was used was adulterated, because glucose was less sweet than cane sugar, unless they found that other advantages derived from the use of glucose so made up for the loss of sweetness as, on the whole, not to reduce or lower or injuriously affect its quality or strength. As the law fixed no standard of sweetness for macaroons, the respondent was entitled to have the jury so instructed, and, as the evidence was such as not to warrant the jury in finding that there was, in fact, any standard of sweetness for a macaroon, they could not consider the question of the degree of sweetness in arriving at a verdict on the question of adulteration; and, if the evidence would warrant no other conclusion than that of a difference in the degree of sweetness, then a verdict should have been directed for the respondent on this count. If, however, in view of the fact that the jury were permitted, in the course of the trial, to eat macaroons made according to the formula of the respondent, and macaroons made with sugar without glucose, it can be said that they had evidence before them as to the character of the taste of macaroons produced with sugar as compared with those made of sugar and glucose, and that, because of this difference, macaroons made with sugar and glucose were less palatable than those made with cane sugar alone, then there may have been some evidence on which to submit the question to the jury. But this view of the evidence was not presented to the jury by the charge, and the verdict was based apparently upon the evidence showing a difference in the degree of sweetness. For these reasons we are of the opinion that the verdict on this count must be set aside.

Furthermore, it seems to us that the trial on the first count proceeded upon a wrong theory, and that the allegations and proofs

offered would not warrant a conviction for adulteration within the meaning of the act. The evidence discloses that a macaroon is a mixed food composed of certain ingredients; that the name by which it is known is distinctive; and that the added ingredient (glucose) which the respondent used in its cakes was not poisonous or deleterious to health. It is provided in section 8, subdivision 4 (1), that a mixture known by a distinctive name shall not be regarded as adulterated if it does not contain any added poisonous or deleterious ingredient. The added ingredient here in question was neither poisonous nor deleterious, and, as the mixture or compound was known by a distinctive name, it was not adulterated within the meaning of the act. *United States* v. *Forty Barrels of Coca Cola*, 215 Fed. 535; Id. (D.C.) 191 Fed. Rep. 431.

Upon the second count the contention of the Government was: (1) That a macaroon, as commonly understood, was made of ground almonds, sugar, and the white of eggs, and if an article made of ground coconut was labeled and shipped as a "macaroon", it was misbranded; and (2) that whether, on the evidence, a macaroon should be found to consist of ground almonds or coconut, sugar, and the white of eggs, as those branded and shipped by the respondent, also contained glucose, they were not macaroons, and were misbranded.

As there was evidence on this count from which the jury could have found that a macaroon, as commonly understood, was made of ground almonds, sugar, and the white of eggs, and that those shipped by the respondent contained coconut, but were branded "Macaroons", the Government was entitled to go to the jury on this count as to this matter.

There was also evidence on this count, from which the jury could have found that a macaroon, as commonly understood, was made of ground coconut, sugar, and the white of eggs, and that those shipped by the respondent in interstate commerce were thus made up, except that glucose was added; and the question is suggested whether the jury would be warranted in finding that, by the addition of glucose, the articles ceased to be macaroons, so that the respondent misbranded them by labeling them "Macaroons." In the first count the court charged the jury that a cake made of coconut, sugar, and the white of eggs was a macaroon for the purpose of adulteration, and that, if they found those shipped by the respondent in interstate commerce contained glucose, they might find that they were adulterated if their quality or strength was thereby lowered. The respondent urges that this produces this dilemma: That a cake made of coconut, sugar, and the white of eggs is a macaroon which may be adulterated by the addition of glucose, and also that it may be found not to be a macaroon, for the purpose of misbranding, if glucose is added. But, in view of the conclusions reached with reference to the first count, we find it unnecessary to consider this contention. If the jury found that a macaroon consisted of coconut, sugar, and the white of eggs, then, inasmuch as those shipped by the respondent contained glucose and were branded "Macaroons", they were misbranded within the meaning of section 8, subdivisions 1 and 4 (1), for they were "an imitation of or offered for sale under the distinctive name of another article", and were labeled so as to

deceive and mislead the purchaser. *United States* v. *Forty Barrels of Coca Cola, supra.*

We do not find it necessary to consider the question of evidence to which the exception was taken, as it relates solely to the first count.

The decree, so far as it relates to the count for misbranding, is affirmed, but so far as it concerns the count for adulteration it is reversed, the verdict is set aside, and the case is remanded to the district court for further proceedings not inconsistent with this opinion.

UNITED STATES v. 60 BARRELS OF WINE

(District Court, W.D. Missouri, Sept. 16, 1915)

225 Fed. 846; N.J. No. 3529

Libel under section 10 of the Food and Drugs Act. Trial before the court. Decree in favor of the United States.

Van Valkenburgh, *Circuit Judge.* Succinctly stated, the libel of the Government charges that the wine in question was misbranded, in that the brands and labels on the barrels represented and stated the contents thereof to be "Ohio Claret Wine", when, in truth and in fact, it was not Ohio claret wine, but was a pomace wine, either in whole or in part, by substitution or otherwise. The defense is that the wine is Ohio claret wine and denies that said barrels contained pomace wine, or that pomace wine has been substituted, in whole or in part, for claret wine, in said barrels, or any of them. Claimant further asserts that said wine was made from red grapes, that a sugar solution was added, and also a small amount of artificial coloring, all in conformity to Food Inspection Decision 120 of the United States Department of Agriculture. Both the Government and the claimant rely upon said Decision 120 in connection with the general provisions of the act in support of their variant contentions.

A great amount of testimony, expert and otherwise, was taken at the hearing. The issue framed is, however, not a complex one. It is incumbent upon the Government to establish, by a fair preponderance of the evidence, to the satisfaction of the court, first, that the contents of the barrels libeled were not Ohio claret wine within the purview of the law and of the definition established by the food department, and accepted and invoked by the claimant; second, that the contents of said barrels were a pomace wine outright or that a pomace wine had been substituted, in whole or in part, for Ohio claret wine. It will be readily seen, therefore, that the determination of the controversy must depend upon what the court finds the article to be, and it is to the solution of this disputed question that the evidence is directed. It follows that it is first necessary to determine what a legitimate claret wine must be; second, what the contents of these barrels have been shown to be. Great prolixity of statement on the part of witnesses and the pronounced technicality which characterizes the expert chemical testimony introduced render impracticable an extended analysis, in this memorandum, of the evidence produced at the trial. It will be sufficient if the court adverts

with sufficient exactness to the essentials disclosed which control the conclusions reached.

Decision No. 120, above referred to, permits the addition of a sugar solution to grape must before fermentation. If the resulting product by complete fermentation of the must under proper cellar treatment does not contain less than five parts per thousand acid and not more than 13 percent of alcohol after complete fermentation, that product may be labeled " Ohio Wine ", qualified by the name of the particular kind or type to which it belongs. Respecting pomace wine, said Decision No. 120 has this to say:

> The product made in Ohio and Missouri by the addition of water and sugar to the pomace of grapes from which the juice has been partially expressed, and by fermenting the mixture until a fermented beverage is produced, may be labeled as " Ohio Pomace Wine " or " Missouri Pomace Wine " as the case may be. If a sugar solution be added to such products for the purpose of sweetening after fermentation they should be characterized as " Sweet Pomace Wines." The addition to such products of any artificial coloring matter or sweetening or preservative other than sugar must be declared plainly on the label to render such products free from exception under the Food and Drugs Act.

We have then comprehended within the same decision the definition of Ohio claret wine and of Ohio pomace wine, which must govern this discussion, and to which in fact both parties appeal for justification. It will be noted that the permission to add artificial coloring matter is necessarily confined, by construction and context, to pomace wine. It appears in view of the earlier clauses of the decision, to wit:

> It has been decided after a careful review that the previous announcement is correct and that the term " wine " without further characterization must be restricted to products made from untreated must without other addition or abstraction than that which may occur in the usual cellar treatment for clarifying and aging.

That with the exception of the addition of the sugar solution thereafter expressly permitted, all other additions and abstractions are excluded. Claret wine made from the entire content of the grape is conceived to require no addition of artificial coloring. Pomace wine made from the impoverished content remaining after the partial expression of the juice requires such coloring to render it merchantable, and to such the use of harmless coloring matter is restricted. No offense is charged because of the addition of the coloring matter if the product should be held to be a claret wine; but this state of the law is pertinent as bearing upon the identity of this product. It is a matter to be considered by the court whether parties familiar with the law would be presumed to add coloring matter to a product from which, by the terms of the act, it is, at least inferentially, excluded, and whether they would not, in like manner, be presumed to add coloring to a product for which it is expressly permitted.

A pomace wine then, under this act and within the designated territory, is any product made by the addition of water and sugar to the pomace of grapes from which the juice has theretofore been partially expressed and by fermenting the mixture until a fermented beverage is produced. Under this definition it is immaterial to what extent the juice has been partially expressed—whether to a limited degree or almost entirely. The resulting product, made in other

respects as it is contended and admitted that this article was made, would be a pomace wine, and if such a situation is established by the evidence, then the charge in the libel is sustained; as also, if a product thus falling within the definition of pomace wine has been added to or substituted for an unimpeachable Ohio claret wine.

It is necessary, as well as desirable, then, at the outset, to determine, if possible, some characteristic of Ohio claret wine which stamps and identifies it as the legitimate product, and the absence of which condemns the product as spurious in the eye of the law. The Government, in this case, takes the positive ground that that essential characteristic is total tartaric acid, whether free or in the form of cream of tartar or both; that in the finished wine, made in accordance with the law, that constitutent must not fall below a minimum fixed as 0.2 per mille. If it is found in appreciably less quantity than that, its absence indicates that a part of the total grape content has been withdrawn. In other words, that the product has been made from a pomace of grapes from which the juice containing the missing percentage of this characteristic acid has been partially expressed. This contention is, of course, combated by the claimant.

The so-called wine under discussion was made by the claimant company at Sandusky, Ohio, from red grapes alleged to have been of Concord and Ives varieties in about equal proportions. These grapes were said to be not quite up to the standard, in that they were a little light in color, with a few berries, on some of the bunches, evidencing a slight effect of hail. They were, however, of fair quality and were up to the standard in that particular district for that year. They were delivered at the winery in the early part of October, 1912, and were treated, and are alleged to have been made into wine that fall. About one year thereafter, to wit, October 13, 1913, claimant shipped 60 barrels of this product to Antonio Basile & Co., Italian wine merchants, located in the north part of Kansas City, Mo. It was sold for 32 cents per gallon, being 5 or 5½ cents less than the average price of Ohio claret wine at that time, and 4 cents more than the average price of pomace wine. This shipment was received in Kansas City 10 days thereafter, and, before storage by the purchaser, a food and drug inspector drew from one of the barrels 4 full quart bottles; these bottles were securely corked and the seal of the Bureau of Chemistry placed thereon. An analysis was made of two parts of this sample by Mr. Ingle, a chemist of the Bureau of Chemistry, on the 23d day of November, 1913. This analysis resulted, December 2, 1913, in the seizure upon which this libel is based. This chemist Ingle was not at the trial, and after some debate between counsel his analysis was not introduced in evidence. However, on January 27, 1914, another chemist of the department, named Hartmann, analyzed one of the four bottles thus taken. He testifies that this bottle was full, well corked, and in good condition when his analysis was made. The samples taken had been carefully packed and forwarded by express to the Bureau of Chemistry of the United States Department of Agriculture at Washington. One of these bottles was, in like manner, delivered to the claimant company, and by it transmitted to its chemist Robinson. Dr. Robinson also made his analysis thereof on April 2, 1914. He testifies that this bottle, when he received it, had leaked and that,

from the condition of the cork, air had been admitted. The bottle itself when produced bore evidences of this condition.

The final result of the testimony was that Dr. Hartmann's analysis is, and is substantially conceded to be, correct. Dr. Robinson, on behalf of claimant, stated that he had no reason to criticize it; that such differences as existed between [Dr. Hartmann's analysis] and his own, aside from those due to the usual differences in computation by different analysts, would be naturally accounted for by what might be presumed to be the difference in condition of the bottles when received by the respective chemists. So that we may start with the presumption that the analysis made by Dr. Hartmann, on behalf of the Government, was substantially correct. This analysis showed that the product contained a total acidity of 0.649 and total tartaric acid of 0.05. It will be noted that the total tartaric acid was but one fourth of the amount fixed by the Government as the necessary minimum of a true wine product. The total acid agrees substantially with that testified by the claimant as having been shown at the winery by the acidimeter test. The wine left Sandusky presumably properly prepared for transportation by experienced dealers. The railroad company presumably handled it in accordance with approved methods. These presumptions stand uncontradicted in the record. But 10 days had elapsed between the date of this shipment and that on which the analyst's samples were taken. It may fairly be assumed that on the latter date it was in substantially the same condition as when it started; and the analysis, as respects the total acid content, confirms this presumption. Of that total acid content but 0.05 was tartaric acid in any form. The Government regards this as determinative of the controversy. The defense minimizes its importance.

All of the chemists finally agree, substantially, that tartaric acid is the characteristic acid of the grape. It is that which distinguishes it from other fruits. This fruit alone contains this type of acid in marked degree. It is the predominant and identifying acid of the grape. Dr. Alwood, on behalf of the Government, states that tartaric acid in no less percentage than 0.2 must be found in any authentic Ohio claret wine. Dr. Robinson says that the presence of tartaric acid in any fixed amount is no test of purity. The experience and qualifications of Dr. Alwood are fully set forth in the record and will not be repeated here. It may be sufficient to say that he has been for many years attached to the Bureau of Chemistry; that he is an expert in viniculture of international reputation; he has spent approximately 7 years at the head of the Government's experimental station for the express purpose, among other things, of determining the exact characteristics of authentic wines, particularly in the Sandusky, Ohio, district. This service had no commercial object in view. The purpose was to establish, by unimpeachable experimentation, the exact qualities and characteristics of true wines, such as the food and drugs department has to deal with. He has made a vast number of experiments under conditions calculated to produce exact and practical results. From these he states with great positiveness that no true Ohio claret wine can possibly contain less than 0.2 [percent] of tartaric acid even when aged to the extent of 3 years and under exacting filtration; that in the wines he has

made he has never found it so low as that, but usually about 0.3, and even as high as 0.5; that in no condition, here shown to exist, or which we are justified in assuming, in connection with this discussion, can that tartaric acid disappear to any appreciable extent. The minimum of 0.2 is placed arbitrarily as a matter of extreme concession in the interest of justice, although he freely states that he does not believe it can fall that low in an authentic wine. In addition to his own manufacture of wines he has examined a large number of commercial samples and finds that the great majority corroborate his own experiments. It is true that in some a smaller percentage of tartaric acid is found, but they were, as has been said, from commercial samples not authenticated and subject to legitimate suspicion as to the methods employed in their manufacture.

Dr. Robinson, the chemist employed by claimant, has analyzed a great many samples of the wines of commerce bought in the usual manner upon the market and otherwise unauthenticated and of unknown history. From such experiments he draws the deduction that the presence of tartaric acid is too inconstant to serve as a dependable test of purity. He also cites textbooks, compilations, etc., which do not affirmatively prescribe this test, and some of which do not disclose the presence of the percentage insisted upon by the Government. Dr. Alwood, in his rebuttal testimony, has to a very large extent explained and reconciled this apparent discrepancy. It may be sufficient to observe that none of the text writers submitted are shown to have been wine experts. Moreover, nearly all the data collected come from widely separated territories and involve conditions and methods which differ greatly from those to be found in the Ohio district. They also very greatly antedate the passage of the Food and Drugs Act. They concern a period when the objects to be obtained by that act were not prominently in mind and when the very practices may be presumed to exist which that law was enacted to remedy. We may likewise not ignore the possibility, if not the probability, that practices still exist, as exemplified in commercial products, that are in conflict with the provisions of the Food and Drugs Act. Experiments made from such products can in no sense compare with those made by Dr. Alwood with the sole object of establishing dependable scientific standards. As has been said, Mr. Krudwig testified that the grapes used were not quite up to the standard, in that they were a little light in color with a few berries on some of the bunches evidencing a slight effect of hail. They were, however, stated to be of fair quality and were up to the standard for that particular district for that year. This being so, their inferiority, if they were appreciably inferior, could not account for the low tartaric acid content, and it conclusively appears from the testimony that grapes a little underripe carry even a higher percentage of that acid. It must be remembered also that this wine was but a year old and had not been subjected to the severer processes of filtration applied by Dr. Alwood in his tests, which were made with wine at least 3 years old. A higher percentage of the characteristic fruit acid should be found in the younger wine.

Dr. Robinson, on behalf of claimant, having stated it to be his opinion that tartaric acid in claret wine varied so greatly in amount that it should be disregarded as a test of purity, proceeded to detail

other chemical properties by which the character of wine could be determined. The following questions and answers were propounded and returned:

The COURT. Doctor, in view of the matters which you have eliminated as proving nothing respecting the contents of the product and its relation to whether it was or was not a fruit juice, what have you left there in chemical analysis which stamps the product as the pure product of the grape?

Answer. Well, the total solids, the non-sugar solids, the ash and the character of the ash, the natural color, flavor, and aroma.

The COURT. Laying aside the color, the aroma and that sort of thing, might not those other abstract properties which you have referred to be produced from other than grape or fruit products?

Answer. Well, that is possible to some extent.

By Counsel:

Question. Do you have any reason to question the accuracy of the Governments chemists' analysis of this wine?

Answer. No, sir; not in the least.

Question. Have you ever found a single instance in which said grape juice did not contain tartaric acid?

Answer. Grape juice, as I said before, I never found a single instance in which tartaric acid was entirely out of grape juice.

If we accept the contention of the claimant in this regard these anomalies are presented: Tartaric acid is the characteristic acid of the grape; it is the predominant acid distinguishing the grape from other fruits. Nevertheless, we are told that it is not necessarily found in any marked degree in a grape wine product. We are left, in the matter of chemical analysis, to other abstract properties which may be found as well in other than grape or fruit products. In other words, we may and must disregard the characteristic, distinctive, and predominant ingredient—the very essence, as it were, of the grape. This is to say, that we are left without the most obvious and convincing means of identifying a true claret wine. I cannot accept such a paradox. Other matters were dwelt upon in the testimony; notably, the pentosans and the alkalinity of the ash. I do not base my decision upon this branch of the testimony. It is sufficient to say, however, that its ultimate effect tends strongly to corroborate and confirm the conclusion based upon the crucial tartaric acid test. Wine experts were produced who applied the tests of taste and smell to the libeled product. The consensus of their testimony was that that product was not a claret wine. Claimant's explanation of this was that the wine had spoiled; that destructive acetic acid fermentation had set in to such an extent as to render such tests untrustworthy. This, so far as the court can perceive, is the full effect of what has been spoken of as the defense of acetic acid. The testimany does not justify the inference that the wine differed materially in acetic acid content at the time the first samples were withdrawn, compared with its condition on the date of shipment. The cooperage of the barrels from which the latter samples were taken was unimpaired. This subject, as dealt with by the chemists, requires no elaboration here. In view of all the circumstances, nothing in that defense accounts for the absence of the predominant acid of the grape as shown by the analyses.

In further defense claimant produced two witnesses, Mr. Krudwig, a member of the claimant company, and Mr. Crathwal, its foreman, who testified positively that the contents of the barrels are Ohio claret wine and not pomace wine, in whole or in part. With respect

to these witnesses, the court, in all kindness, must point out that their claim of scrupulous personal attention to every detail affecting this wine from the time the grapes went into the press until the shipment a year later, presents a remarkable departure from the ordinary and usual course of business, even at their own winery. Their recollection of each step taken, at a time so far removed from the actual occurrences, is not less remarkable. Their interest is, of course, conceded, and the fact that there were at that time in the winery at least 25,000 gallons of pomace wine, used, among other things, for blending purposes. To reject or in any sense to discredit the positive testimony of an individual witness is never a pleasant duty for the court; but it is the settled rule of the Court of Appeals of this circuit, and, I believe, in practically all Federal and State jurisdictions, that where the testimony of a witness is positively contradicted by the physical facts, neither the court nor a jury can be permitted to credit it. (*Missouri, Kansas & Texas Ry. Co.* v. *Collier* (C.C.A.), 157 Fed. 437.) If these barrels, otherwise shown to be intact, had been found to contain pork, no witness could be indulged in the statement that he personally packed them with beef. To my mind, the proof that the contents of these barrels are not an Ohio claret wine, as concededly defined, is not less positive and convincing. The testimony of Dr. Alwood and Dr. Hartmann as to the contents of these barrels, chemically considered, is not opinion testimony. It is scientific testimony based upon actual facts. By exhaustive experimentation they have determined, as other facts are determined, that grapes in this district produce a certain reasonably definite wine product. On the other hand, when they pronounced this to be a pomace wine, in the state of the record, they entered the realm of opinion testimony. The court accepts it as such, persuasive and conclusive in its effect as the circumstances may warrant. I am firmly of the opinion that the contents of these barrels, as shown by the analysis, are not and cannot be Ohio claret wine. That they are pomace wine, in whole or in part, as defined in Food Inspection Decision No. 120, seems clearly established; because, in no other manner than by partial expression of the juice and subsequent fermentation, as described in that decision, can the absence of the characteristic grape content be explained. If the product has been reduced in quality by the addition of pomace wine, the charge in the libel is equally sustained. The Government has established its case in every substantial particular by a fair preponderance of the testimony, which must be credited by the court, and a decree will be entered accordingly.

UNITED STATES v. MATUSOW

(District Court, E.D. Pennsylvania, Sept. 22, 1915)

N.J. No. 4190

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

THOMPSON, *District Judge* (charge to jury). Gentlemen of the jury: The defendant is charged by the Government in this case with the violation of an act which prohibits the shipping in interstate com-

merce of certain articles of food and drugs. The specific charge in the case is that he shipped from the State of Pennsylvania into the State of Maryland certain drugs which, within the meaning of the act of Congress, the Government charges were misbranded. The specific charge of misbranding consists, in the charge of the Government, that the package or labels bore or contained statements regarding the curative or therapeutic effect of the article, or of its ingredients, which were false and fraudulent. So that in order to sustain the Government's charge in the case, the fact of shipment from one State to another being admitted, the Government must satisfy you, beyond a reasonable doubt, from the evidence, that the statements contained in the label and on the package were false and fraudulent with regard to their curative or therapeutic effects.

In a criminal case the defendant is presumed to be innocent, and that presumption follows him throughout the case. In other words, the fact that the Government has made a charge against a man and the district attorney has filed an information against him, or the fact that he is on trial, is not to be regarded by the jury as having any weight in determining the guilt or innocence of the defendant. The presumption is that he is innocent, and the jury must be satisfied from the evidence beyond a reasonable doubt of his guilt, before they are justified in rendering a verdict of guilty.

The charge is that there were statements on the labels and in the pamphlet contained in the packages containing these goods, which were false and fraudulent with regard to their curative or therapeutic effects. So that it is not sufficient for the Government to prove merely that the statements are false, but it must also prove that they are fraudulent, and if the jury are satisfied beyond a reasonable doubt that the statements referred to, which I will refer to in a minute, not only are false, but that the defendant knew them to be false, and that he stated them falsely with the intent to deceive the purchaser, then they would be justified in finding that the statements were false and fraudulent. But if, on the other hand, the jury are not satisfied that the statements are not only false, but that they are fraudulent, beyond a reasonable doubt, then it would be their duty to acquit. So that the mere falsity of a statement would not be sufficient to justify the jury in convicting unless they are satisfied that in stating the falsity the defendant did it knowingly and with intent to deceive and defraud.

The packages are charged in this information with containing certain statements which the Government claims are false and fraudulent. After setting out these statements in the information, the Government charges that the statements were false and fraudulent in that they stated, among other things, that the article contained in the packages was, in whole or in part, composed of or contained ingredients or medicinal agents effective, among, other things, as a remedy for paralysis, gout, liver, kidney, bowel, bladder, and stomach troubles, and effective as a blood purifier, when, in truth and in fact, said article was not in whole or in part composed of, and did not contain, ingredients or medicinal agents effective, among other things, as a remedy for paralysis, gout, or liver, kidney, bowel, bladder or stomach troubles, or effective as a blood purifier.

The other statements are alleged to be false and fraudulent in that they are alleged to have intended to create in the minds of the pur-

chaser the impression and belief that it was an article or drug in whole or in part composed of or containing ingredients or medicinal agents effective, among other things, as a remedy for locomotor ataxia; or effective as a remedy for Bright's disease, diabetes, dropsy, hydrocele, stone in the kidney, or all stomach troubles; or effective as a remedy in the treatment of gall stones; or effective as a remedy for or preventive of, appendicitis; or effective in the treatment of all skin diseases; whereas in truth and in fact these statements are alleged to have been false and fraudulent.

Gentlemen, you have heard the evidence on the part of the Government. The packages with the labels thereon and the pamphlets contained therein, containing the statements which are said to be false and fraudulent, have been offered in evidence before you. The Government has produced witnesses who have analyzed the contents of the packages, and stated what they found upon the analysis of the packages. The Government has called physicians who testified, as you have heard, that in their opinion, the ingredients found in the package were not effective as a remedy for the disorders which it is stated upon the label they are effective for, and that, in their opinion, there are not substances, drugs, which would be effective as remedies, according to the broad statement made on the labels and in the pamphlets. On the other hand, the defendant has called witnesses to show that in the instances in which they have been treated the drug has been effective as a remedy for the disorders for which they stated they were afflicted. Counsel for the defendant also called your attention to the fact that the chemists who put up this article stated that there were nine ingredients in it, which have not been disclosed to you, but six of which, I believe, were not mentioned by the Government's chemists.

You will take all of this evidence into consideration, and determine first whether the statements which are referred to by the Government with regard to the therapeutic and curative properties of this preparation were false. You will take into consideration the evidence of the Government and the expert physicians as opposed to that of the defendant and his witnesses and determine whether the statements were false. If they are false, then it would be necessary for you to go further and be satisfied beyond a reasonable doubt, in your mind, not only of their falsity, but that the defendant when he made them, knew them to be false and intended by making false statements to deceive and defraud. If you are satisfied beyond a reasonable doubt that the statements upon the package as to the therapeutic and curative properties were false and fraudulent, then it would be your duty to return a verdict of guilty. Upon the other hand, if you are not satisfied beyond a reasonable doubt that they were not only false but fraudulent and made with an intent to deceive and defraud the public, then it would be your duty to return a verdict of not guilty. You will bear in mind the general principles that I have called to your attention. In the first instance the presumption of innocence is in favor of the defendant. It follows him throughout the trial, and the burden is upon the Government to overcome that presumption of innocence by proof which satisfies your minds beyond a reasonable doubt.

The defendant has asked me to charge you upon certain points, which are as follows:

1. The jury are not entitled to convict the defendant unless they are satisfied beyond a reasonable doubt that the statements used by the defendant are false and fraudulent.

That is affirmed.

2. If the jury find that the defendant used the statements, the subject of the charge, in good faith and believing such to be true, the verdict should be "not guilty."

That is affirmed.

3. The jury should be satisfied beyond a reasonable doubt as to the guilt of the defendant, and if, upon consideration of the evidence the jury have a reasonable doubt as to the guilt of the defendant, the verdict should be "not guilty."

That is affirmed.

4. Before the jury are entitled to consider the guilt of the defendant, the prosecution must have established, beyond a reasonable doubt, all the elements that are required to establish the offense charged, and if it has failed to so do it is the duty of the jury to acquit the defendant.

That is affirmed.

5. The fact that the prosecution has been instituted by the Government is not to be considered by the jury as evidence of the guilt of the defendant. The defendant is presumed to be innocent, and this presumption stands until overcome by evidence that beyond all reasonable doubt establishes the guilt of the defendant.

That is affirmed.

6. The jury are not bound to accept as conclusive the opinion of an expert witness as to any fact of the case. The jury are the judges of the evidence, and they must be satisfied in their own minds as to all facts upon which testimony has been offered or opinions expressed.

That is affirmed.

7. The defendant is entitled to a verdict of "not guilty" unless the Government has established by evidence beyond a reasonable doubt that the statements appearing in the shipment of drugs were false and fraudulent regarding the curative or therapeutic effects of the articles, and that the defendant falsely and fraudulently made such statements.

That is affirmed.

8. The jury must consider all the evidence offered, and if, upon the consideration of the testimony on behalf of both the Government and the defendant, there appears a reasonable doubt as to the guilt of the defendant, the verdict must be "not guilty."

That is affirmed.

9. The jury are entitled to consider in support of the charge made against defendant only such statements, printed and published by defendant, as bear upon the curative or therapeutic effect of the tablets.

That is affirmed.

10. Statements that the tablets are a rational remedy are not statements as to their curative or therapeutic effects.

That is refused.

11. The jury are to consider no portion of the pamphlet offered in evidence, excepting that to which the Government has offered evidence tending to show a false statement, and this only when such evidence bears upon a statement

said to be false, which relates to the curative or therapeutic effects of the defendant's preparation.

That is affirmed.

12. The evidence of the medical experts is that, except in a few cases, drugs or medicines do not work a cure, but are administered for the relief of the patient, and if the jury find that the statements made by the defendant in no case assert a curative property for his preparation, there can be no conviction.

That is affirmed.

14. The jury are to disregard any evidence offered by the Government unless the same attaches to the charge set forth in the information, or is in support of an allegation made in the information.

That is affirmed.

15. The defendant is charged with having misbranded his preparation by the use of false and fraudulent statements as to its curative or therapeutic effects. Unless such has been established beyond a reasonable doubt, the defendant is entitled to a verdict of "not guilty."

That is affirmed.

16. One is entitled to boost or puff his own wares and merchandise. He can express his own views as to their worth and merit, and he is not chargeable with any offense for so doing as long as the statements made by him are not false or fraudulent.

That is affirmed.

The Government has asked me to charge you upon certain points, as follows:

1. It is unnecessary for the Government to prove that all the statements on the label or booklet were false and fraudulent. "If you believe beyond a reasonable doubt that any one statement as to the curative or remedial properties of this medicine was false in fact, and that the defendant knew that it was false, you may find the defendant guilty." *U.S.* v. *Johnson*, 221 U.S. 488.

That is affirmed.

2. If you believe beyond a reasonable doubt that this product is not a rational system remedy for paralysis, and that the defendant must have known this, you may find the defendant guilty.

That is affirmed.

3. If you find beyond a reasonable doubt that this product is worthless for any one of the things for which it is labeled, and that the defendant knew this, you may find the defendant guilty.

That is affirmed provided it is one of the things which is charged in the information.

4. If you believe beyond reasonable doubt that any one of the therapeutic claims as to its effect upon paralysis, liver, kidney, bowels, stomach, and the blood and the skin is absolutely false, and was made by the defendant with a reckless and wanton disregard as to whether it was true or false, you may find the defendant guilty.

That is affirmed.

5. If you believe beyond reasonable doubt that the defendant knew that any one of these therapeutic statements as charged in the information was false and misleading, you may infer a fraudulent intent and find the defendant guilty.

That is affirmed.

Mr. Logue. I will ask your honor for an exception to your refusal to affirm the tenth point presented on behalf of the defendant.

(Exception noted for the defendant as requested, by direction of the court.)

Mr. Logue. Also an exception to the thirteenth point presented on behalf of the defendant, which was refused.

(Exception noted for the defendant as requested, by direction of the court.)

The tenth and thirteenth points presented on behalf of the defendant, which were refused by the court, are as follows:

10. Statements that the tablets are a rational remedy are not statements as to their curative or therapeutic effects.

13. Under all evidence the verdict of the jury should be "not guilty."

UNITED STATES v. C. M. C. STEWART SULPHUR CO.

(District Court, W.D. Washington, Oct. 19, 1915)

N.J. No. 5594

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Mistrial. Verdict of guilty, on retrial.

The United States attorney filed an information against the C. M. Stewart Sulphur Co., a corporation, Seattle, Wash., alleging shipment by said company from the State of Washington into the State of Nebraska of a quantity of an article, labeled in part "Sulphurro", which was misbranded.

It was alleged that the article was misbranded for the reason that statements appearing on the label falsely and fraudulently represented it as a remedy of rheumatism, asthma, goiter, eczema, and all stomach, bowel, kidney, skin, and blood diseases, when, in truth and in fact, it was not. Misbranding was alleged for the further reason that statements included in the booklet accompanying the article represented it as effective in the treatment of diabetes when used according to directions, when, in truth and in fact, it was not, when used according to directions or when used in any other manner.

Neterer, *District Judge* (charge to jury). In this case, members of the jury, you are not concerned about the wisdom of this act of Congress. The act is passed and you are not concerned with that other than to determine what the fact is with relation to this particular case. You are only concerned with the facts in this case and you must determine what the facts are with relation to the issue which is formed by the information filed and the plea entered by the defendant. You are to approach the issue with open minds, and consider all of the evidence which has been presented fairly and not to be concluded with relation to any fact by reason of any sympathy or prejudice of any kind, but are simply to pass upon this issue fairly and impartially as 12 honest persons, and determine what the real truth is with relation to the issue here, and what the facts in this case really establish, by the witnesses who have testified.

The issue is not a complex one. The information is rather lengthy, and I will not read it. You can read that when you go to your jury room. In substance, it charges the defendant company with having violated this drug act which prohibits the false branding of

any drug so that it may mislead persons to believe a different thing is contained in it than the facts really justify, or to lead to conclusions with relation to certain properties which it does not contain, which branding is made knowing it to be false and made for the fraudulent purpose of misleading persons who might read this label.

The defendant has entered a plea of not guilty to this indictment and that places in issue every material allegation in the indictment, and the burden of proof is upon the Government to establish each material allegation beyond every reasonable doubt.

It has been stipulated that the drugs charged in the indictment to have been shipped from this State to Nebraska in interstate commerce were shipped, so that you are not concerned with that. I think about the only issue you have to determine is whether this drug was misbranded, and whether these statements are falsely and fraudulently made as charged in the information. These terms all have their common meaning. There is no technical meaning applied to the terms used, and therefore it is not necessary for me to define what the word " false " is intended to mean, or what " fraudulently " is intended to mean. It simply means exactly what the terms imply and which you all must know.

The information, as I have stated, charges misbranding of this drug called Sulphurro. The test of this branding is what the statements appearing on the label mean to the ordinary man. In other words, what the ordinary man reading the label would understand as to the properties of the drug Sulphurro and what curative effects it had. And if you are convinced by the evidence in this case that there was not anything there to mislead any person, then the further question as to whether Sulphurro can or will cure the diseases for which it is branded to cure and for which parties have purchased it, must be determined. In this case a number of witnesses have testified; on the part of the Government some medical experts testified with relation to the effect of certain drugs on the human system, and certain properties contained in such drugs. On the part of the defense, some 35 of 36 witnesses have testified with relation to the curative effects which have resulted to them individually from the use of this drug. I do not think that any witness for the Government testified that they purchased this for a certain purpose or for certain curative effects and did not obtain them. The testimony of the Government is confined to the medical experts.

In weighing the evidence in this case, you will take into consideration all of the facts and all of the circumstances surrounding these several witnesses. The mere fact that a witness states a conclusion, that does not necessarily bind you to that conclusion, unless you are convinced from the evidence offered and admitted, taking into consideration the surroundings and environment of the witnesses who have testified and the facts upon which the conclusion is based; and you will take into consideration all of those things and then will make your deductions from all of these facts. Some witnesses have testified here who are termed expert witnesses. The mere fact that they have testified to conclusions with relation to what they believe to be the fact, is not conclusive upon you. While their testimony has persuasive effect and should be considered by you with relation to all the facts and circumstances detailed by the witnesses, yet their

conclusions must be based upon facts disclosed by the evidence which would justify the conclusions, and you will take into consideration all of these facts and determine whether the conclusion is justified upon the facts upon which they are predicated. With relation to other witnesses testifying, who are not experts, but who have testified with relation to certain curative effects which they have received from the use of this drug, you will take into consideration their testimony as to their ailments and what effect the drug had upon them and what curative effects they experienced by using it, and if you should find from the evidence in this case, or if you have a reasonable doubt upon that question as to whether the parties who used this drug received the curative effects or some remedial effect, as claimed upon the label found upon the bottle and likewise the printed matter that was enclosed with this drug as it was sent in interstate commerce, then, I say, if you believe from all of these facts that it did have the curative effect or they did get the remedial effect which these labels and literature showed, then of course you will find the defendant not guilty in this case. But if you find, beyond a reasonable doubt, from all of the evidence which has been offered and admitted, that this label is false and that the literature which was enclosed with this which portrayed the curative effects which this medicine would have was false, and the statements contained therein made for the false and fraudulent purpose of inducing persons to buy this drug, then of course you would find the defendant in this case guilty as charged in this indictment.

The defendant is presumed to be innocent until proven guilty by the evidence which has been offered and admitted, and this presumption continues throughout the entire trial; and you will resolve any reasonable doubt that you may have in this case with relation to any fact which is in issue here in favor of the defendant.

It isn't necessary that the Government prove that every statement with relation to the curative effect of each ailment made upon the label is false. If the Government has established any of these statements to be false and fraudulent and made for the purpose of fraudulently misleading the public, that would be sufficient.

You will take all of the evidence into consideration which has been offered and admitted, and conclude with relation to the fact as I have indicated a moment ago as twelve fair minds with an honest purpose of arriving at a just conclusion so that justice may be done between the Government and this defendant.

A reasonable doubt for your consideration in this evidence is such a doubt as an ordinarily reasonable man would entertain in considering any matter of like concern or import to him as that before the jury is to the defendant, and which would make him pause or hesitate in arriving at his determination and conclusion. It is a doubt for which you can give a reason. It is not merely speculative, imaginary or conjectural. If a juror can say that he has an honest conviction of the proof of the charge, then of course he would be convinced beyond a reasonable doubt. If he can say to himself that he feels to a moral certainty that the fact is established, then he is satisfied beyond a reasonable doubt. But if you cannot say that, then of course he has a reasonable doubt which he must resolve in favor of the defendant.

By the COURT. Are there any omissions or exceptions?

By Mr. FRYE. We have none, Your Honor.

By the GOVERNMENT. We have no exceptions.

By the COURT to the jury. It will require your entire number to agree upon a verdict in this case. Two forms will be submitted. If you believe that the charge has been established beyond a reasonable doubt, this will be your verdict:

We, the jury in the above-entitled cause, find the defendant guilty of a violation of the act of Congress of June 30, 1906, known as the Food and Drugs Act, as charged in the indictment.

And if you have a reasonable doubt, this will be your verdict:

We, the jury in the above-entitled cause, find the defendant not guilty.

Whichever verdict you find you will cause to be signed by your foreman, whom you will elect immediately upon retiring to the jury room.

This information will be sent with you to the jury room, but it is not to be considered as evidence in the case, but is simply a paper charge to which the defendant has entered a plea of not guilty.

You may swear the bailiffs.

The jury thereupon retired; and after due deliberations returned into court, and the foreman announced that they were unable to agree upon a verdict; and the jury was discharged.

On October 19, 1915, the case came on for retrial.

NETERER, *District Judge* (charge to jury). In this case, gentlemen of the jury, you have been accepted by both sides as 12 fair-minded men, unprejudiced, without any preconceived notion as to what the facts in this case are to determine the issue which is submitted. You have a distinct duty and function to perform in this case as a part of the machinery of the Government, as have also the attorneys in this case, for the United States, and for the defense, in that it is their duty to present the facts of their respective sides before you in a fair and full manner so that you may get a viewpoint from both sides; and your duty is to pass upon the facts as presented. That is your sole province and nobody can tell you what the facts are in this case, but this you must determine from the evidence offered and admitted. The duty of the presiding judge is to see that the case is fairly tried, exclude immaterial matters, and see that the case is orderly conducted, and advise you upon the questions of law applicable to the facts presented before you for your consideration. You are a part of the machinery of the Government here. The laws must be enforced and persons against whom complaints are made by the officers of the law must be given a fair trial; so you can very readily understand the importance of the functions you perform in this proceeding. You are the sole judges of the facts in this case. I can't tell you what a single fact is, and if I should refer to any fact, it is your duty to disregard it. It is not my purpose to impress upon you any opinion that I may have of any fact. You are the sole arbiters of the facts and must determine what the facts are upon the issue presented by the information filed in this case by the United States district attorney and the plea of not guilty which has been entered by the defendant.

The issue is not a complex one, and it is made, as I have stated, by the information which has been filed by the United States district attorney, and the defendant's plea of not guilty. The plea of not guilty places in issue every material allegation in the information. In other words, it is a denial. By plea of not guilty the defendant denies all of the allegations in the information, and that places upon the Government the burden to prove every material allegation in the information beyond a reasonable doubt. This information you may take with you to the jury room when you retire. You may read it and see just what the charge is, but it is not to be considered as evidence in the case in any sense. The information is entirely too long for me to read to you now and I will leave that to you.

While the burden of proof is upon the Government to establish every material allegation of the information beyond a reasonable doubt, you understand, of course, that when admissions are made upon the trial by the defendant as to the truthfulness of a statement, no proof need be offered with regard to such admission or the fact that has been admitted. It has been admitted on behalf of the defendant that the drugs which are set out in the information were shipped from this State to the place named in the information, and were shipped in interstate commerce, so that no proof need be offered upon that allegation; and I think it has been admitted, if not formally, upon the argument, that Mr. Stewart is the agent of the defendant company, and likewise that the defendant company is a corporation. You will understand that corporations can only act through their agents and representatives, and that any representations made or any act done with relation to the charge in this information by Mr. Stewart is the act of the defendant corporation.

The only issue of fact in controversy in this case to be determined by you is whether the drug described in the information was misbranded. The test of this misbranding is what the statements appearing upon the label mean to the ordinary man, and when I refer to the label I mean likewise the circular or pamphlet which was enclosed in the package as it was transmitted in interstate commerce. In other words, what the ordinary man reading the label would understand as to what properties the drug Sulphurro contained or the curative or therapeutic effects it had. I will not attempt to define or set out the various ailments or physical disabilities which it is claimed the statements contained that this drug would cure, but these diseases or physical ailments you will understand to be such diseases or ailments as the public generally understood and the generally accepted meaning of these drugs by the public, and you are not confined in your deliberations in applying to these diseases the technical medical definition or term which has been scientifically limited by some of the witnesses. I have indicated the generally accepted understanding of the public as to what these terms mean and what physical disabilities they include, and you will apply the curative or therapeutic effect of the drug to the definition as generally understood. And you will also understand that it is not only necessary for the Government to show beyond every reasonable doubt that the statements that were made were false in fact and that the drugs did not have the curative or therapeutic effects that the statements attributed to them, but the Government must further prove beyond a

reasonable doubt that the statements are fraudulent and that the defendant knew them to be false, and that they were falsely made with the intent to deceive the public or induce the purchaser to buy them because of such statements. And if you believe that the statements were false and the defendant knew they were false and made them with the intent to deceive the purchaser, or if, acting as an ordinary prudent man would act under like circumstances, he should have known that the statements were false, then you will find that the statements were falsely made as charged in the indictment, and under such circumstances your verdict should be guilty. On the other hand, if you have a reasonable doubt as to whether the statements were false or whether they were fraudulently made, then it would be your duty to acquit the defendant. So that the mere falsity of the statements would not be sufficient to justify you in returning a verdict of guilty, but in addition to that it requires the further proof that the defendant made them knowingly and with intent to deceive and defraud.

I hardly think it is necessary for me to enter into any definition of these various terms, but suffice it to say that a fraudulent statement is a statement which is recklessly made without knowledge of its truth, but which is really false, and an unqualified statement of that which one does not know to be true, or has no reasonable ground to believe to be true, is equivalent to a statement of that which one knows to be false.

In determining whether the defendant knew the statements were false and fraudulently made, you will take into consideration all of the evidence which was offered and admitted surrounding the placing of this drug upon the market, which led to placing it in interstate commerce as charged in the information, and you will consider all of the testimony with regard to these statements that is before you from the inception, dealing or treating with this drug up to the time of the filing of this information, the date of which you will find endorsed upon the cover of the information, and from all of these statements as disclosed by the evidence bearing on the conduct of the defendant with relation to this drug, determine whether it acted as an honest, fair-minded, average man would act under like circumstances, and whether it had reason to believe, acting as a reasonably prudent man would act under such circumstances, that this drug did contain the curative or therapeutic effects which are attributed to it in the statements, and when I say it, referring to the defendant, I mean Mr. Stewart, who seems to have had the management and control of the concern.

In this case some eight physicians have testified, among whom are some specialists, as you will remember, as well as a chemist or analyst, who has testified with relation to the ingredients of the drug in question. The testimony of the Government is all confined to expert medical evidence, except the testimony of the chemist or analyst. They have testified with relation to the several ingredients contained in this drug as disclosed by the evidence and the curative effect of the drugs separately and likewise the therapeutic effect of the drugs taken together, based upon their experience as practitioners and likewise upon their reading in medical journals and treatises by eminent doctors. The defendant has presented to you some 35 or 36 persons

who have testified that they have been treated by this drug Sulphurro and have been cured of various ailments. Some of them say they have been afflicted for years and have recovered, so they say, their health entirely, and have stated to you what they understand that they were afflicted with. You will weigh all of the evidence which has been presented here. It is not my purpose, nor do I intend, to enter into an analysis of the testimony, or give you a synopsis of my recollection of the evidence. The evidence has all been reviewed by counsel for the Government and the defendant. They have given you their version of the testimony and the conclusions that should be drawn from the testimony of the witnesses, and while you are not bound by the statements or the recollection of the attorneys for the respective parties, you should give these statements and their version of the testimony consideration. Nor are you bound by the conclusions of the witnesses upon the testimony which has been offered and admitted upon either side. You will weigh the evidence in this case very carefully. You are the sole judges of the facts in this case and the weight that should be accorded to the testimony, and you must determine what that is. You are likewise the sole judges of the credibility of the witnesses who have testified before you, and in determining the weight or credit which you desire to give to the testimony of any witness, you will take into consideration the demeanor of the witness upon the witness stand; the opportunity of the witness for knowing the things concerning which he has testified; the interest or lack of interest of the various witnesses in the result of this controversy; the apparent frankness or truthfulness of the witnesses; the reasonableness of the stories of the witnesses who have testified; and from all of these determine which of the witnesses impressed you the more strongly of telling the truth. In considering the conclusions of the witnesses, both the medical experts and likewise the witnesses on the part of the defendant, with relation to the therapeutic effect of the medicine or with relation to the illness with which the witnesses on the part of the defendant claimed to be afflicted, you will determine whether the conclusions are based upon facts which have been disclosed by the evidence as you understand it, and as it is conveyed to you, and the truthfulness of the conditions as portrayed by the witnesses, and while these conclusions are perhaps somewhat persuasive and should be considered by you, yet the facts upon which they are based should be closely scrutinized by you, and determine whether they are true and justified from all of the circumstances developed upon this trial, and apply to each witness who has testified before you the same test you would apply to any person in the ordinary affairs of life, the truthfulness or falsity of whose statements might be under consideration by you, and determine the credit or the weight that should be given to the statements that have been made upon this trial.

The defendant, under the plea of not guilty, is presumed to be innocent until proven guilty beyond a reasonable doubt, and this presumption continues throughout the entire trial and until you are convinced from the evidence beyond every reasonable doubt of its guilt. And in this connection I would say that a reasonable doubt for a trial juror is just such a doubt as the word implies. It is a doubt for which you can give a reason. When a juror can say to himself that

he is convinced to a moral certainty of the guilt of the defendant, then he would be convinced beyond a reasonable doubt. It is not a doubt which is speculative, imaginary, or conjectural, but is such a doubt as a man of ordinary prudence, sensibility, and decision would have in determining an issue of like concern to himself as that before the jury is to the defendant, which would make him pause or hesitate in arriving at his conclusion.

In this case, while the Government must prove beyond every reasonable doubt the material allegations of the information, this need not be done with relation to every disease which is named upon this label or in the statement which is included within this package as it was transmitted in interstate commerce. If you believe from the evidence that this drug has many curative qualities and will cure many of the diseases which are named on the label or the package, but will not cure others, and believe beyond a reasonable doubt that there are some ailments named upon the label or the literature or statement enclosed with the package, as charged in the information, concerning which the statements were false and known to be false at the time they were made, and were made for the fraudulent purpose as charged in the information—if you are so convinced beyond a reasonable doubt of the falsity of the statements with relation to one of the diseases, then it would be sufficient to support a verdict of guilty, and if you are so convinced, your duty would be to return a verdict of guilty. But if you have a reasonable doubt as to all of these, then your duty would be to return a verdict of not guilty.

You will approach the issue in this case as 12 fair-minded men, eliminating from your minds any prejudice that may be there and dispose of this case upon the evidence presented and not be influenced by sentiment or prejudice of any kind or character.

I think I should say in these instructions that this case was tried before during this term before another jury, and you undoubtedly have learned in some way that the other jurors did not agree. I think I should say that in this case additional witnesses have been presented on the part of the Government and likewise on the part of the defendant, and there is evidence before you that was not before the other jury. You are not concerned as to what the other jury did. It is your duty in this case as 12 reasonable men who have been impanelled to try this issue, to honestly endeavor to reach a conclusion. When you go to the jury room you will undoubtedly approach this issue from 12 different viewpoints. You cannot come to any conclusion by continuing to have 12 different viewpoints. You must discuss the issue here from every standpoint from which it can be approached and harmonize the facts in this case as disclosed by the evidence and by an analysis of the evidence, eliminate that which can have no bearing upon the issue, and apply that which is material, and in that way harmonize all of the testimony so that you may ultimately come to a conclusion where you all see this in the same light. No juror should surrender any conscientious conviction which he may have as to any fact established by the evidence in this case, but before he concludes with relation to that conviction and is convinced that he is right, he should approach the subject from the viewpoint of each of the other jurors who may differ with him, and see whether your conclusions cannot be harmonized. I do not know that these

instructions are necessary, but in view of the fact that this case was recently tried and perhaps some information reached you as to the other trial, I thought possibly that I should instruct you upon that phase, so that you might not be influenced thereby. You will therefore entirely disregard what the other jury did and not consider it in any way.

By the COURT. Have I covered the whole subject, or are there any omissions or exceptions?

By COUNSEL FOR THE GOVERNMENT. No exceptions, Your Honor.

By COUNSEL FOR THE DEFENSE. We have no exceptions.

By the COURT to the jury. It will require your entire number to agree upon a verdict. Immediately upon retiring to the jury room you will elect one of your number foreman. Two forms of verdict will be submitted; one will be finding the defendant not guilty, and the other guilty. These forms of verdict speak for themselves, and when you have concluded, you will cause your verdict to be signed by your foreman and report to the court.

You may swear the bailiffs.

UNITED STATES v. 25 BAGS OF NUTS

(District Court, N.D. West Virginia, Oct. 23, 1915)

N.J. No. 4329

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict directed in favor of claimants.

The United States attorney filed a libel for seizure and condemnation of 25 bags of nuts, alleging that the same had been shipped and transported from the State of New York into the State of West Virginia and remained unsold in the original unbroken packages.

Adulteration was alleged in the libel for the reason that the nuts were wormy, some of them empty and moldy and unfit for food, portions thereof being filthy and decayed.

Misbranding was alleged for the reason that the term "Fancy Mixed Nuts", appearing on the label, was false and misleading, because the nuts were not fancy mixed nuts but were of a grade inferior thereto.

DAYTON, *District Judge.* Well, under this law as I understand it, persons—property might be confiscated and the owners held subject to fine—I think there is a criminal offense connected with the violation of the branding feature of the law. Now I don't believe the trade can establish what shall constitute a criminal offense nor that the opinion of men engaged in any special line of business can establish a standard which may hold another man engaged in that business, guilty of a criminal offense and lay him to fine and confiscation of his property.

Well, gentlemen, I don't think I will permit you to go and introduce evidence tending to establish a standard set up by the opinion of the "trade" so called. How can any set of individuals be empowered to speak for the "trade" anyway? It doesn't seem to me

that it would be fair or reasonable to allow the opinion of men who deal in nuts or any other commodity to establish what may be an offense by some one [of] their brother tradesmen. It seems to me it would make it very easy for one set of men to injure and destroy competitors in a similar line. It seems to me that until the Department establishes a set standard of quality for nuts to be branded as "fancy", or "choice", or what not, that it would be altogether unsafe to attempt to set up a standard by common consent of the trade, and to use that standard to harass and annoy dealers who may be in good faith trying to live up to the law, and to make them amenable to such a vague and indefinite standard as I understand the Government seeks to establish by the testimony of men engaged in the business of handling these nuts. The Department under the Pure Food and Drugs Act, as I understand, has the power to establish certain standards—they can establish a standard as to what shall constitute fancy mixed nuts and what shall not, and until they do so, I don't see how it will be possible to proceed under this law. As I understand, there have been standards established for different commodities, and it can be done in the case of nuts, and unless you can establish such a set standard, open and understood by those who come under its rulings, it doesn't seem to me that the Government can hope to establish its case.

I certainly will not permit you to bring in anybody who deals in nuts and have them say that in their opinion these nuts did not come up to the grade of fancy mixed, until you show that there is a Government standard, because this law establishes what is in effect an offense punishable at least by confiscation of property, and I believe under certain circumstances by fine, and this would simply mean allowing the trade to fix what will become a criminal offense, instead of fixing it by regulation of the Department, as the act provides it shall be done. Under the view taken by the Government it seems to me a half a dozen or a dozen dealers, if they wanted to break up a prosperous firm, could get together and swear that they were selling a lower grade of commodity under a brand of a higher grade and were thus guilty of misbranding, and the opinion of these men might prevail in a court of law and thus work great hardship upon a firm or individual.

As I understand, the grade of fancy mixed nuts is not established by any regulation of the Department, but is a mere trade term, which is likely to be different in different localities, and may mean one thing here and something very different at another point, and inasmuch as that standard involves a criminal offense I think it should be established by the Department itself and not by private individuals, who might conceivably have an interest in establishing a grade suitable to themselves and be swayed by self-interest, in their testimony.

The Government has it within its power to fix regulations by which these nuts can be gaged as a quality, whether up to standard called for by the brand or not, and the Government ought to do it and not seek to set a standard by the mere opinion of private individuals.

Well, gentlemen, you can't get me, as a matter of conscience, to believe that any person under an act authorizing the Department of Agriculture to issue regulations as to what shall constitute misbranding, and if that regulation be violated—because the act gives the

Department the right to establish such regulations—and if that act is violated, the party can be made criminally responsible. Now you can't get me to believe in conscience that the Department of Agriculture can, without making any regulation known to the public whereby dealers can be governed and guided, bring in a man or even seize his property, and upon the opinion of the so-called "trade" hold him guilty of a criminal offense, or at least liable to seizure of his property. There is no use of arguing that any further.

The trouble is, it seems to me, that the trade practice in New York might be entirely different from the practice here. Fancy mixed nuts in one place might be an entirely different and distinct grade from that classification in another place. If your idea were proper, we might establish one grade for instance in New York, another in Wheeling, another in Philippi, and so on. Gentlemen, I have stated my ruling before. The Department of Agriculture has the power to fix a standard but fails to do it. Now it brings in a case at Wheeling, where the standard is one thing, and puts it up to the trade in general—brings in perhaps a witness from Baltimore, where the customs may be entirely different as to classification and grading. I don't think it is fair or equitable, and I am not willing it shall be done.

There is no trouble about the name. The trouble lies in the utter failure of the Department to establish what percentage of bad nuts shall constitute the standard of "fancy mixed nuts." The percentage of bad nuts or of small nuts or of the various sorts of nuts contained in the mixture. They have failed to do that, and they can't put that responsibility on the trade. I don't think that meaning was ever intended to be given to the Food and Drugs Act.

You are not in position to establish this case until you can establish a standard set up and published by the Department. A standard which would be known to the trade, so that any dealer who desired to comply with the law as to branding would have access to it and would have absolute knowledge of its requirements and not be dependent altogether on the mere opinion of trade experts who, as I say, might differ materially in their views according to the locations where their business or experience had been attained.

Well, my ruling is that you can't prove by the trade, by a number of witnesses, the trade understanding as to what constitutes fancy mixed nuts, that no such standard can be used as a basis for this action, but that it must be a Government standard fixed and published by the Department of Agriculture.

Let the record show that the defendant claimant objected and excepted to the tender of testimony on this question, and the court sustains such objection, for the reason that these nuts were seized in 1913 and their outside appearance at this time would be manifestly misleading, but more particularly for the reason that the Department of Agriculture under the Pure Food and Drugs Act has full authority by regulation to determine what percentage of these nuts shall constitute a fancy mixed nut or first grade and what percentage second grade or choice nut and to enforce such regulation when published, by the criminal provisions of this act, and that it cannot, in the judgment of this court, fail to establish such regulation and then leave it to the opinion of dealers in various sections

of the country to establish whether 17 percent of badness will constitute a violation of the statute and condemn them, and 10 percent of badness would prevent a person from being so prosecuted.

UNITED STATES v. 11 GROSS PACKAGES OF DR. WILLIAMS' PINK PILLS

(District Court, E.D. Pennsylvania, Oct. 25, 1915)

N.J. No. 4849

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict in favor of the United States. Motion for a new trial overruled.[91]

The United States attorney filed a libel praying seizure and condemnation of 11 gross packages, more or less, of Dr. Williams' Pink Pills, alleging that the article had been transported from the State of New York into the State of Pennsylvania, and charging misbranding in violation of the Food and Drugs Act, as amended.

The article was labeled (on bottle wrapper):

Dr. Williams Pink Pills for Pale People, trade-mark registered, safe and effective tonic for the blood and nerves for anaemia, diseases due to impoverished blood, such as rheumatism, diseases of women, nervous disorders resulting from malnutrition, including neuralgia, sciatica, St. Vitus' Dance. Useful in locomotor ataxia and partial paralysis. A digestive tonic for dyspepsia and chronic constipation.

Circulars accompanying the article contained, among other things, the following:

This remedy is offered the public with full confidence in its efficacy in the treatment of diseases arising from or dependent upon impoverished Blood, such as Anaemia, Chlorosis or Green Sickness, Rheumatism, Lumbago, General Debility, Female Weakness, Leucorrhoea, Tardy, Irregular, or Painful Periods, Disturbances due to Change of Life, etc. As the health of the nerves depends directly upon the condition of the blood these pills are a valuable remedy for Nervous Debility, Nervous Prostration, Sleeplessness, Neuralgia, Sciatica, Sick Headache, and have accomplished beneficial results in the more severe nervous disorders such as St. Vitus' Dance, Partial Paralysis and Locomotor Ataxia. Locomotor Ataxia.—This is one of the most stubborn of nervous diseases in yielding to treatment of any kind. Cases diagnosed as Locomotor Ataxia and a Partial Paralysis, and having characteristic symptoms have shown beneficial results under this tonic treatment and in the cases under observation the resulting improvement has been lasting. For Men.—Dr. Williams Pink Pills are valuable for building up the system shattered by excesses or disease, and for the various ills caused thereby, viz: Spermatorrhoea, Impotence, Nervous Despondency, Confusion of Ideas, Irritability of Temper and Pain in the Back and Perinaeum. For Children.—Parents will find Dr. Williams Pink Pills a safe and effective strengthening medicine for weak and bloodless children. The remedy is also suitable as a nerve tonic for the young and for the treatment of St. Vitus' Dance.

THOMPSON, *District Judge* (charge to jury). Gentlemen of the jury: The case which has been tried before you is a proceeding under the Pure Food and Drugs Act. The proceedings in this case are not brought against an individual, but are brought against certain packages of pills. The act of Congress under which the proceedings

[91] Affirmed, *11 Gross Packages of Dr. Williams' Pink Pills* v. *United States*, p. 752, *post*.

are brought was passed for the purpose of preventing the transportation in interstate commerce—that is, from one State to another, of foods, articles of food, or articles of drug which are adulterated or misbranded. In this case the proceeding is brought for the purpose of confiscating or having condemned these packages of pills upon the allegation of the Government that they are misbranded. So that the proceedings have been commenced by a seizure on the part of the Government, the articles in question being seized by the marshal. The Dr. Williams Pink Pills Co. has intervened as the claimant of these pills; that is to say, it comes into court and claims that the pills belong to it, that they are its property, and it denies the statements in the Government's libel, as it is called, on which the Government bases its right to have these pills seized and destroyed. So that that makes the issue in the case, and throws the burden on the Government of proving the facts which are set out in the libel. The object of this particular paragraph of the act under which these proceedings are brought is to prevent the carrying in interstate commerce from one State to another of drugs which are worthless or injurious, when they are transported with false and fraudulent statements as to their curative effects, the object being to protect credulous and ignorant people, and to protect the public generally from having imposed upon them as medicines, things to be used as medicines, drugs which will not perform the functions which it is claimed they will perform, and to prevent people being injured by the use of harmful drugs. In this case the pills are claimed to be misbranded because the packages contain certain statements as to their therapeutic and curative properties, which the Government claims are false and fraudulent. You have heard the evidence in the case. As I stated, the burden is on the Government to prove what it alleges in its libel. That requires, in a case of this sort, that the statement shall not only be false, but shall be fraudulent. So that there will be a double inquiry of the jury here—first, to ascertain whether the statements are false, and, second, as to whether they are fraudulent. So that in examining into the case it will be necessary for you to examine the labels on the packages, of which you will have copies, and the statements made in the pamphlet or folder that accompanied the packages, and to take into consideration the language used in those statements and ascertain what the statements are. In examining those statements you will give to the language used its ordinary and common meaning, and you will take into consideration what those statements would mean to an ordinary intelligent man who purchased the pills. Having applied that test to the language in determining what the language as set out means, you will then determine from the evidence whether those statements are false. If they are not false, if the statements are true, then, of course, you need go no further in the case. In determining whether they are false, you will take into consideration the testimony which has been offered on the part of the Government, and the evidence which has been offered on the part of the claimant. There has been a great deal of expert testimony here, testimony, in the first place, on the part of the chemists who analyzed these packages, these pills, and who have testified before you as to what are the contents or the ingredients of the pills. In addition to that there has been medical testimony, the testimony of expert physicians, who

have testified as to their opinion as to the therapeutic or curative value of those ingredients, the ingredients which they were informed by the testimony of the chemists were contained in the pills.

In considering expert testimony there has been a good deal said here about it being merely opinion testimony. That is true. The statements of the physicians are merely statements of their opinions, and those opinions are to be considered by you as evidence from which you may draw inferences of fact. The opinions of the experts have more or less value, as they are based on a greater or less amount of experience and learning and opportunities to know what the opinions of other people are who are skilled in the profession as to the therapeutic value of these pills for the ailments for which they are recommended in the statements on the boxes and in the pamphlets as remedies. So that you will take into consideration the testimony of these experts and draw from that testimony such inferences of fact as in your own judgments that testimony warrants.

The question, then, will be whether the statements on these labels are true or false. If you determine that the statements are true, considering the interpretation which would be conveyed to the mind of the ordinarily intelligent man, then it would be your duty to render a verdict for the defendant. If, on the other hand, you are satisfied from the evidence, from the preponderance of the evidence, that they are false, then you would proceed further to determine whether or not they are fraudulent.

As I stated, the object of this part of the act is to prevent credulous and ignorant people and the public generally from being deceived in the purchase of proprietary medicines such as these are. So that in determining whether they are fraudulent you will take into consideration the statements made on the labels, and determine whether or not the claimant, when it made these statements, had them put upon the bottles, knew them to be false. If it knew them to be false, then you would have no difficulty in determining that they were fraudulent, because it would be the inevitable conclusion, willfully making a false statement, that it intended to defraud. But you are at liberty to go further than that. In determining a man's intent, we are very often, and in fact nearly always, obliged to take into consideration the facts and circumstances accompanying his act. Every man is presumed to intend the natural and probable consequences of his act. So that it is not necessary, and it is impracticable, to go into a man's inner consciousness and find out whether or not he intended a thing, but the law imputes the intent to do the thing which would naturally follow from the act of the person charged with the intention. So that in this case you will take into consideration, in case you go that far with the case, whether these statements made on the label were made with an intent to defraud, or with such willful and gross negligence to inquire into the effects of these medicines before making the statements, that the intent would be presumed. In case, after a consideration of all of the evidence, you determine that the statements were false, that they were made with an intent to deceive the public, and the pills were transported with those statements with that intent, then it would be your duty to return a verdict in favor of the Government.

As I stated, the burden of proof in this case is on the part of the Government. It is necessary for you to be convinced by a preponderance of the evidence that the Government has sustained that burden of proof before you would be justified in returning a verdict in its favor.

If, on the other hand, you are satisfied from the evidence that the Government has not sustained that burden of proof, or you are satisfied that the pills were shipped in interstate commerce, with an honest belief on the part of those responsible for making the statements that they would do just what was stated on the labels they would do, then it would be your duty to return a verdict in favor of the defendant.

When you come to consider the statements made in the labels, you will take the statements into consideration in whole and also separately. In other words, if you find that any statement made on these labels or on the folders in relation to the curative or therapeutic value, effect of the pills, was false and fraudulent, then it would be your duty to return a verdict in favor of the Government; that is to say, if any part of those statements is such that you, under the manner of reasoning that I have explained to you, conclude it is false and fraudulent, that would be sufficient to cause a condemnation of the whole of these packages. It is not necessary that all the statements should be false and fraudulent, but if the Government has sustained its contention in regard to any one of them, then it would be your duty to return a verdict in its favor. So that in considering the statements you will bear that in mind.

I hardly think it is necessary for me to review the statements which are made and which are set out in the Government's libel as having been made on these packages. You have heard all of the evidence, and you will have the labels with you, and you will consider the language in the effect which in your judgment it would convey to the mind of an ordinarily intelligent man. As I read the labels, there is no direct statement that these pills are cures for the various sorts of diseases mentioned. The general effect of the statements is that the pills are valuable as a tonic for the blood and nerves, and that they are valuable for use in cases where the ailment is the result of or is accompanied by anemia. So that in considering that you will take those facts into consideration, and determine whether or not it was the intention of this language, interpreting it as an ordinarily intelligent man would, on the part of the claimants to convey the impression that they were to cure or act as a remedy for the diseases and ailments even where the language does not directly say so. If it was the intention so to frame a statement that it conveyed those impressions, and those statements were false, and they were known to be false, or you can infer the intention to defraud, then it would be your duty to return a verdict in favor of the Government. If you do not find that intention, of course you will return a verdict in favor of the defendant.

The district attorney has asked me to charge you on certain points:

1. It is unnecessary for the Government to prove that all the statements on the label or circular were false and fraudulent. If you believe from the evidence that any one statement as to the curative or therapeutic properties of these pills was false in fact, and that the claimant knew that it was false, then you may find a verdict for the Government.

That point is affirmed.

2. If you believe from the evidence that as to any one of the ailments for which these pills are recommended by the label or circular, and about which the Government has complained in its libel, these pills would have no beneficial effect whatever, and the claimant knew this, you may find a verdict for the Government.

I will affirm that point.

3. If you believe from the evidence that any one of the therapeutic claims as to the effect of these pills upon locomotor ataxia, St. Vitus' dance, sciatica, rheumatism, impotence, spermatorrhœa, or partial paralysis was false and was made by the claimant with a reckless and wanton disregard as to whether it was true or false, you may find a verdict for the Government.

I will affirm that point.

The fourth point is declined.

5. If you believe from the evidence that any one of the therapeutic statements upon the label or circular, and of which the Government complains in its libel, was partly true, but was so artfully worded as to convey a meaning as to its therapeutic properties which was wholly false, and that the label and circular were so worded for the purpose of deceiving the public, then that statement would be false and fraudulent, and you may find a verdict for the Government.

I will affirm that point.

I will decline the sixth point.

The claimant has requested me to charge you as follows:

1. The burden is on the Government in this case to prove by the preponderance of the evidence that the statements complained of were both false and fraudulent.

That point is affirmed.

2. There is a difference between mistaken opinion and false opinion. You can only find that these statements were false if you find that the Government has shown that, apart from any question of opinion, the so-called remedy is absolutely worthless and hence the label demonstrably false.

That is true, but it depends on how you find the question of fact based on the opinion evidence. If you find it as a fact that the statements were false, and known to be false, then, of course, your verdict would be for the Government. If you find as a fact that they were not false, or that being false there was no intent on the part of the defendant, either actual intent or implied intent to defraud, then your verdict would be for the claimant.

The defendant's third point is denied.

The defendant's fourth point is denied.

The fourth and sixth points presented on behalf of the United States, which were refused by the court without being read, are as follows:

4. If you believe from the evidence that the defendant knew that any one of these therapeutic statements as charged in the libel was false and misleading, you may infer a fraudulent intent and find a verdict for the Government.

6. If you believe from the evidence that any statement upon the label or circular as to its therapeutic claim was wholly false and one about which there is absolutely no contrariety of medical opinion, you may infer from these facts a fraudulent intent and find a verdict for the Government.

(Exception noted for the United States to the refusal of the court to affirm the fourth and sixth points presented on behalf of the United States.)

(Exception noted for the United States to the affirmance by the court of the defendant's first and second points, by direction of the court.)

The third and fourth points presented on behalf of the claimant, which were refused by the court without being read, read as follows:

3. Unless you find that the Government has shown that the statements complained of were not the honest expression of Mr. Conde's honest opinion, you can not find that these statements were fraudulent.

4. Under all the evidence in the case your verdict must be for the defendant.

(Exception noted for the claimant to the refusal of the court to affirm the third and fourth points presented on behalf of the claimant.)

(Exception noted for the claimant to the affirmance by the court of the Government's first, second, third, and fifth points, by direction of the court.)

(Exception noted for the claimant to the court's answer to the second point presented on behalf of the claimant, by direction of the court.)

Mr. JONES. I would like to except to the charge because of the failure to make clear just what the difference is between "mistaken opinion" and "false opinion."

(Exception noted for the claimant, as requested, by direction of the court.)

Mr. JONES. I would like to have the Government correspondence go out with the jury.

Mr. STERRETT. I object to those letters going out with the jury—the Government letters.

The COURT. Were they offered in evidence?

Mr. JONES. They were offered in evidence and read.

The COURT. You may send them out with the jury.

Mr. STERRETT. May I have an exception?

The COURT. Yes.

(Exception noted for the United States, by direction of the court.)

Mr. STERRETT. I do not know what they are; that is the only thing.

UNITED STATES v. 350 BAGS OF SHELL PEANUTS

(District Court, S.D. New York, Oct. 27, 1915)

N.J. No. 4877

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict in favor of the United States.

The United States attorney filed a libel for the seizure and condemnation of 350 bags of shell peanuts, alleging that they had been shipped and transported from the State of Virginia into the State of New York and remained unsold in the original unbroken packages, and that they were adulterated in violation of the Food and Drugs Act.

Adulteration of the article was alleged in the libel for the reason that it consisted in part of moldy peanuts, 13 per cent; empty shells, 8 per cent; wholly immature shriveled kernels, 40 per cent; and partly immature shriveled kernels, 24 per cent.

MAYER, *Judge* (charge to jury). Gentlemen of the jury: This case has been extremely interesting to me, and I hope it has been to you. This is an illustration of the useful information that we all get in the court room, opening our eyes to the development of industries in this country concerning which probably most, if not all of us, know very little. It is apparently an important case and deserves at your hands equivalent consideration.

My charge to you must be a little bit technical, because I am dealing with the statutes; and in order that the subject matter may be made clear to you, I desire to sweep away at the outset those questions which you are not to consider. I might content myself with being silent about them but for the fact that, in view of your interest, and in view of the fact that this litigation was a sort of human kind of litigation, even though it deals with inanimate thngs, I always like to feel that the court should reserve to itself certain questions and permit the jury to pass upon others. It is the duty of the court to take away from the jury any question which resolves itself merely into a question of law and to leave to the jury questions of fact.

This proceeding is technically known as a forfeiture proceeding, in which the Government proceeds by a process that we call a libel or complaint. A libel is the same thing as a complaint in an ordinary litigation. In this litigation the Government is called not the plaintiff, but the libelant; and the parties who claim that these peanuts are their property are called the claimants and not defendants. But this is simply phraseology, and it all amounts to the same thing; so for convenience, and in order not to confuse you, if I use any of these terms I shall speak of the Government as the plaintiff and the owners of these bags of peanuts as the defendants.

The Government proceeds in its libel or complaint upon the theory that two things have taken place here: (1) That the defendants have misbranded their goods; (2) that the defendants within the purview of the act have adulterated their goods. You will have nothing whatever to do with the question of misbranding. That I do not submit to you and for this reason: The Pure Food Law, broadly speaking, dealt with two general propositions. One was to safeguard the health of the public; the other was to prevent deception, where it might very well be that the subject matter contained in the article to be sold was in no manner deleterious. Now, as a simple illustration of misbranding, a man might sell, we will say, Maria Farina Cologne, which is a well-known product made in the city of that name and having that designation of Maria Farina. Now, if he puts out upon the market a liquid of a similar character but not coming from Cologne, and not being the Maria Farina brand, and called it Cologne of the Maria Farina brand he would be misbranding that article; and yet that article would do nobody any harm from a physical standpoint. That is an illustration of that part of the statutes that has to do with misbranding.

These goods are sold as Gewaltney's Circus Peanuts. The evidence is uncontradicted that that is the name by which they are known in the trade. It has nothing to do whatever with the name by which the public buys, because there is no evidence of that character in the case. If a man orders, as it is presumed he does, a lot of Gewaltney's Circus Peanuts and he gets the sacks or bags which

are here in evidence, he gets precisely what he orders, precisely what is known in the trade and there is no case of misbranding whatsoever; and as there is no evidence of misbranding, or any evidence of attempt to deceive, that part of the case we will not deal with at all.

That brings me to the part of the case with which you would deal, and I would ask your closest attention while I read the statute.

Section 10 of the act says that any article of food, drug, or liquor that is adulterated or misbranded within the meaning of the act, and is being transported from one State, Territory, District, or insular possession to another for sale, or, having been transported, remains unloaded or unsold or in original unbroken packages, or if it be sold or offered for sale in the District of Columbia or insular possessions of the United States or be imported from a foreign country for sale, or if it is intended for export to a foreign country for sale, shall be liable to be proceeded against in any district court of United States in the district where the same is found and seized for confiscation by a process of libel for condemnation.

Under that statute, the Government, taking the position that these peanuts contained in these 350 bags were adulterated within the meaning of the act, seized the 350 bags because the shipment was a shipment in interstate commerce; and they now ask you to render a judgment, the effect of which will be to confiscate all of the 350 bags and all of their contents, so that the Gewaltney concern shall be deprived of the property contained in the 350 bags, the Government taking the position that all of the contents of those bags, whether the peanuts are good or bad, are forfeited to the Government.

Adulterated, under the statute, may mean one of several things. Our popular understanding of adulteration, I think, has been, that you put something into a substance; but Congress went further and provided among other things as follows:

I am reading from section 7, subdivision 6:

> That for the purposes of this act an article shall be deemed to be adulterated: * * *
>
> In the case of food: * * * If it consist in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter.

Now, at the very outset of the case, we are met with what I think is rather a novel question in this class of cases.

For instance, suppose a man were to ship, let us say for illustration, in interstate commerce, 10 quarters of lamb in a refrigerator car and the Government were to find 1 of those that was diseased, within the meaning of this act, and found the other 9 absolutely fit in every respect for human food; it cannot be that Congress meant that the Government could forfeit the whole 10 of those quarters of lamb simply because 1 happened to be within the condemnation of the act. In a case of that kind, if it were my duty to pass on it, I should say that the 1 diseased or unfit quarter of lamb was forfeit to the Government, and the remaining 9 should still remain the property of the shipper or the consignee as the case might be.

We have here, however, a very curious situation and my attention has not been called by the Government or counsel for the defendant to any analogous case which would either guide you or me. We have here a small nut enclosed in bags, those bags in turn enclosed in sacks, the whole aggregating a great many nuts, speaking individually, and that large total running into some thousands and concededly a certain part thereof are not within the condemnation of the act. Now, there can be no question at all that the mature nuts, or as they were called by some of the witnesses, the sound nuts, are not within the condemnation of the act. Further than that, it is my duty to charge you, as a matter of law, that the so-called immature nuts, whether wholly or partly immature, are articles of food not within the condemnation of the statutes; because the evidence is uncontradicted that the immature nuts are fit for human food; that they do not contain any filthy, decomposed, or putrid vegetable substance; and that the only distinction between the immature nuts, whether wholly or partly immature, and the wholly mature nut is in relative food value, as these experts call it, or relative nutrition value, as we laymen call it.

So that, what your case gets down to is this—that a certain number of these nuts were what is called moldy and a certain number of these nuts were what is called wormy. The highest percentage of both combined testified to by any of the witnesses called is, if my recollection is right, the percentage testified to by Dr. Seeker, who says that he found 10 percent moldy and wormy; so that, out of the total shipment here, there were 90 percent which in no manner, shape, or form, were in violation of this statute, and I charge you that, as a matter of law, in any event, 90 percent of the contents of these 350 bags are not subject to forfeit by the Government and the Government must be ordered to return them to the defendants. That is so charged because these articles are separate articles. They are capable of selection, if not in the shell at least after breaking the shell. The details of how they shall be returned is no concern of yours or mine at the moment. But the Government in a case of this kind, where only 10 percent are complained of, cannot, as a matter of law, forfeit 90 percent of merchandise that is not contrary to the statute. That gets us down to the sole question with which you gentlemen are concerned.

Certain of these peanuts are said to be moldy and wormy, or moldy or wormy; and the witnesses agree as to that. They differ as to percentages, and there is no exact figure which will enable anybody to say how many actual peanuts were wormy or moldy. We cannot deal with abstractions and therefore we will accept the basis of percentage; and it is for you to say if you should decide against the defendants what percentage were moldy or wormy. When I say 10 percent, I do not mean that you should find that 10 percent were moldy or wormy. I mean that this is the very most that the Government could retain, because some of the witnesses for the defense put the percentage considerably below that. These nuts may be moldy and wormy, either or both, and yet not subject to forfeiture by the Government, unless you find that within the meaning of the statute they were filthy, decomposed, or putrid

vegetable substance. You are not to be concerned, nor is it any part of your duty, under the statute in this case, as to whether these nuts are better or worse than other nuts; as to whether they are commercially more valuable or not; you are only concerned with determining whether within the meaning of the act, those nuts that are moldy or wormy, or both, are filthy, decomposed, or putrid vegetable substance. If they are, then they are of a character that are deleterious to health, and they come within the purpose of the statute in safeguarding the public health. If they are not, then you must render a verdict for the defendants.

Those words, standing by themselves, cannot mean a mere abstraction. The mere fact that something is decomposed, cannot of itself subject that article to forfeiture, and this is the reason. You have heard the testimony in this case that there are many articles of food which are decomposed, both from a scientific and a lay standpoint, and yet that those articles of food are commonly eaten; and there is not only no evidence that they are harmful, but there is evidence from which you may readily conclude they are not harmful; and many of those articles of food are articles that you are familiar with. If this statute were to be construed as meaning that any article which was decomposed, irrespective of its effect upon the public health, could be forfeited to the Government, then logically the Government could forfeit many kinds of cheeses and many kinds of other articles of food, simply because from looking at it from the standpoint of a theory, these articles were technically decomposed, whether you use that word scientifically or in the lay language. Upon the particular facts in this case, confining myself only to this case—and I am not endeavoring to go beyond this case with any general definitions—it must be for you to say whether the so-called "wormy or moldy," or both, peanuts were first, as a matter of fact, filthy; second, as a matter of fact, decomposed; or third, as a matter of fact, putrid, vegetable substance. If you find that they were any one of the three, whether from the evidence in the case, their consumption as food may tend to be injurious to health. Counsel during the trial said that these words were to be construed by their ordinary meaning—not by the meaning that some scientists might give you—and counsel is entirely right. Scientists differ a whole lot about definitions. This act was framed in ordinary understandable language which any man of reasonable education can understand, and these are the definitions that are to govern. While I regret to take up the time, yet the importance of the case requires that I shall read to you from some standard dictionaries the definitions of these words.

In the Standard Dictionary, filthy is defined: Of the nature of or containing filth; dirty; nasty.

Filth—Anything that soils or makes foul; that which is foul or dirty; also the state or quality of being foul; nastiness; dirt.

Decomposed—In a state of decomposition; decayed; rotten.

Decompose—To resolve into constituent parts or elements, as by means of chemical agents or natural decay; especially to cause it to decay or rot; to putrefy; decay; rot.

Putrid—Being in a state of putrefaction; tainted; as putrid flesh.

In the Century Dictionary the definition is substantially the same. I will not take the time to read it. In Webster's New International Dictionary the definitions are also substantially the same. Now, within those definitions, or within that you know to be the ordinary meaning of these three words, were these moldy or wormy nuts filthy or decomposed or putrid? You are not to employ the scientific meaning, if you are satisfied that any scientific definition was given to these words. There is some controversy as to this law point, but with this you are not concerned. I think you have a right in that connection to determine what I said before when you are considering this case—whether the condition of these nuts on the testimony here offered was such as may tend to injure the public health. If you think it was not, and that the evidence does not justify such a finding, you will find for the defendants to the extent of the nuts that come within this category. If you think that they were, you will find for the Government to that extent, and that extent only. You remember the testimony. If I state it incorrectly, you are not to take what I say; you are to take your own recollection of the facts and your own construction of the facts.

It appears that the mold in the nuts in the case at bar and in the case of all peanuts, if these gentlemen are right, does not appear until after the nut leaves the ground; that it is created by moisture conditions, and that that condition may come up at any time if the nuts are shipped in cars where there is moisture, lying on docks where there is moisture, or otherwise where there is moisture.

You will remember that there is no evidence in the case to show the effect upon the human system of these moldy nuts in a roasted peanut. There was some evidence by Dr. Rusby of what he thought about it, but no evidence of any tests of any kind or description to indicate whether or not these moldy nuts were injurious to public health. The witnesses for the defense insisted that these nuts did not come within any of these words by way of definition, and I shall not spend any time reviewing their testimony.

In regard to the wormy nuts there was no evidence in the case of any scientific tests as to the effect of those nuts or what those nuts may do in the way of injury to health if taken internally. The defendants insist that within these definitions these nuts are not in contravention of the statutes. The plaintiff's position is based upon the proposition that they are.

Finally, I may say to you that the burden of proof in this case is on the Government; that the Government is bound to satisfy you by a preponderance of evidence. That does not mean the number of witnesses, but means the quality of witnesses; the impression that they create upon your minds and the way their testimony impresses you. If, in your opinion, the evidence upon the one question submitted to you upon the vital question, is evenly balanced, you must render a verdict for the defendants. If, however, the evidence of the Government overbalances by ever so little that of the defendants, then they have sustained the preponderance and there must be a verdict for the Government. I therefore submit the matter to you, requesting that you return a verdict in which you shall say either that the verdict shall be for the defendants, namely, the claimant, or

the owners of the merchandise; or, if you find for the Government, that you state in your verdict what percentage of the goods contained in these 350 bags the Government is entitled to forfeit and confiscate.

I have been asked by counsel for the Government to charge you in several respects. As to request no. 1, I am of the opinion that I have covered all that is necessary.

As to request no. 2, I decline to charge as requested and think that what I have said covers the subject matter so far as applicable.

As to request no. 3, in view of the fact that the question at issue is whether the peanuts are adulterated, it seems to me that the third request to charge would only tend to confuse, and I decline to charge as phrased.

I would charge no. 4. The fact that it is not possible to detect moldy and wormy peanuts without breaking open the shells does not constitute a defense to a proceeding of this nature, provided the jury find as a fact that peanuts of that character are a filthy, decomposed, or putrid vegetable product. But I confine that construction to the particular peanuts which, under my charge, the jury have to decide were or were not filthy, decomposed, or putrid vegetable substance.

I decline to charge no. 5.

Mr. BARNES. I take an exception to Your Honor's refusal to charge as requested and Your Honor's qualification on charge no. 4, and I ask that the request be given to the stenographer to be incorporated. I also except to that portion of Your Honor's charge that takes from the jury the question of misbranding, and request to go to the jury on whether the placing of this article in bags labeled "Circus Peanuts" is or is not misbranding within regulation no. 26 of the Department of Agriculture and within the meaning of section 8 of the act in the case of "Food", particularly the second and fourth subdivisions.

The COURT. I decline to allow that question to go to the jury.

Mr. BARNES. I take an exception. I also except to that portion of Your Honor's charge which stated that if a portion only of the shipment was within the prohibition of the act, the entire shipment is not subject to condemnation or forfeiture; and I further except to that portion of Your Honor's charge which stated that 90 percent of the product seized is not subject to condemnation or forfeiture and must be returned to claimant. Of course, I object to the general principle of all—I claim the whole amount is forfeited. If my recollection is correct, Dr. Read testified she found 12 percent.

Mr. MENKEN. That testimony was ruled out.

The COURT. Perhaps it is better to put it this way. I will charge that not to exceed 10 percent of the shipment is the subject in controversy now, within the instructions I have laid down.

Mr. BARNES. I take an exception to the charge as amended. I also except to that portion of the charge that in addition to finding that the article is a filthy, decomposed, or putrid vegetable substance, it is necessary for the jury to find that it is injurious to health.

The COURT. You may have an exception.

Mr. BARNES. I also except to the form of the verdict that Your Honor has directed.

Mr. MENKEN. I except to Your Honor's charging the Government's request No. 4. If Your Honor please, I ask that when the jury retire, they be instructed that they can send for such samples as they want. I particularly want them to take some of the roasted peanuts and some of the unroasted peanuts.

The COURT. Yes; that's all right. I think I should say this, although I am quite sure the jury remembers about it; and that is, to direct your attention to the testimony of the witnesses as to the destruction of bacteria by the roasting of these nuts and as to the uncontradicted testimony in this case that these nuts are roasted and that they are not used for oil.

Mr. MENKEN. I ask Your Honor just to make one charge. Perhaps you have already charged it; and that is, that if the jury finds, as a common-sense proposition, that these peanuts are not filthy, decomposed, or putrid, they must find for the claimant.

The COURT. I so charge.

Mr. BARNES. I except to that.

The COURT. When you say "common sense" you mean by construing the words as in their ordinary significance?

Mr. MENKEN. Yes; as we understand them normally in everyday life.

Mr. BARNES. I also except to that portion of Your Honor's charge where you stated that the testimony is that the peanuts are roasted. My recollection is that the bags seem to contain all unroasted peanuts.

The COURT. The testimony is that in the trade this particular brand of peanuts is used for roasting. If I am in error, the jury can take their own recollection.

LIBELANT'S REQUEST TO CHARGE

1. If the jury find as a fact in this case that the 350 bags of peanuts that are the subject of this proceeding, consisted in part, of peanuts that were filthy, decomposed, or putrid, they shall find a verdict in favor of the Government.

2. If the jury find as a fact in this case that the 350 bags of peanuts that are the subject of this proceeding consisted of peanuts, 10 percent of which were filthy, decomposed, or putrid, they shall find a verdict in favor of the Government.

3. The fact that a percentage of the peanut crop is ordinarily and necessarily moldy and wormy does not justify a shipment of moldy and wormy peanuts in interstate commerce and does not constitute a defense to a proceeding of this nature.

4. The fact that it is not possible to detect moldy and wormy peanuts without breaking open the shells does not constitute a defense to a proceeding of this nature, provided the jury find it a fact that peanuts of that character are a filthy, decomposed, or putrid vegetable product.

5. If the jury finds as a fact that this shipment of 350 bags of peanuts consisted, in part, of filthy, decomposed, or putrid peanuts, the Government is entitled to a verdict and to the condemnation and forfeiture of the entire shipment, and was not bound to separate the good peanuts from the bad, and to return or release the good peanuts to the claimant.

UNITED STATES v. SHUCART

(District Court, E.D. Missouri, Nov. 8, 1915)

N.J. No. 4330

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

The United States attorney filed an information against Jacob Shucart, doing business under the name of National Bottling Co., St. Louis, Mo., alleging shipment by said defendant from the State of Missouri into the State of Illinois of a quantity of cider which was adulterated and misbranded.

Adulteration of the article was alleged in that a substance, namely, saccharin, had been mixed and packed with the article so as to reduce or lower or injuriously affect its quality or strength; and in that substances other than sweet cider, namely, water, saccharin, and caramel, had been substituted in whole or in part for sweet cider which the article purported to be; and in that the article had been colored with caramel in a manner whereby its inferiority was concealed; and in that the article contained an added poisonous or added deleterious ingredient, namely, saccharin, which might render said article injurious to health. Misbranding of the article was alleged in that the statements "Sweet Cider" and "Produced of Concentrated Pure Apple Juice," borne on the labels of the bottles, were false and misleading, because, as a matter of fact, the article was not sweet cider produced of concentrated pure apple juice, as represented by said statements, but was an imitation cider prepared wholly or in part from water, saccharin, and an apple product artificially colored with caramel; and in that the article was an imitation of sweet cider, prepared by mixing water, saccharin, and caramel with an apple product, and said imitation so prepared was offered for sale and sold under the distinctive name of another article, namely, "Sweet Cider"; and in that the article was labeled and branded so as to deceive and mislead the purchaser into the belief that it was sweet cider, whereas, in truth and in fact, it was not sweet cider, but was a mixture or compound prepared from water, saccharin, and caramel.

DYER, *District Judge* (charge to jury). Gentlemen of the jury: On the 30th of June, 1906, an act was passed by the Congress of the United States and was approved by the President of the United States. That is, "An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes." That is the style of the act.

Of course, there can be no punishment under this act for anyone who may in this State adulterate or misbrand such products if their sale is made within the State of Missouri and confined alone to the State of Missouri, but the act of Congress regulating the sale in interstate commerce has control of it so that while under the State law the misbranding or adulteration of food or drugs may be prosecuted in the State court for violation within the State, we have to go beyond that before we can convict a man in the Federal court, because

he must have sold or shipped or transferred to another State the product so adulterated or misbranded. If there was no such shipment, no such carrying to the other side of the river in the State of Illinois, however much the article may be deleterious to health or otherwise, or however false the brand on it may be, there can be no conviction of the party in the Federal court.

The best and wisest law that has found its way upon the statute books in a half century is this particular statute. It is a statute aimed to protect the consumer against adulterated food, or buying in the belief it is one thing under a brand that is put upon it, and finding out afterwards that it is another thing. It is an act for the protection of the consumer of these products, and it insists that if you brand an article at all you shall tell the truth by your brand, and if you do not tell the truth by the brand that you put on the article, then the article is misbranded. That is all there is to this whole business from start to finish. If you sell a food and it has been adulterated and does not represent truly what that food is, then it is a violation of the act to sell such adulterated food, and if you misbrand it by calling it one thing when it is another, then you have violated the law.

You may remember that during the course of this case and during the examination of witnesses the court called the attention of the witnesses on the stand to the averment in this information as to the character of the brand that was upon the article, about which there does not seem to be any dispute at all. Nobody disputed it; it is not disputed, as I understand.

What is it that was sold? As charged in the first count of the information: "Sweet cider produced of concentrated pure apple juice preserved with 1/1000 part of benzoate of soda." That is what was on the bottle, together with the name of the National Bottling Co., 1311 North Leffingwell Avenue, St. Louis, Mo.

That is what the Government complains of in this article—that the defendants claimed to be selling that particular thing when in point of fact, as the Government undertook to show, it was not sweet cider produced of concentrated pure apple juice preserved with 1/1000 part of benzoate of soda.

What did they do; what is it? To get down to the facts: The testimony here is, and it is uncontradicted—there were not two analyses made of this cider, but an analysis made by the Government, and that analysis shows what the contents of that bottle were. That analysis shows that the bottle that was here shown (the analysis of which had been made in the laboratory of the Government) contained solids of 1.6 percent; it contained sugar of 0.6 of 1 percent; it contained ash of 0.06 of 1 percent; it contained saccharin of 0.014 of 1 percent; it contained benzoate of soda of 0.003 of 1 per cent.

The testimony further showed, and about which there seemed to be no contradiction, as to what sweet cider should contain; that it should contain solids of from 8 to 16 percent, whereas the article that was examined, as shown to you by the testimony, contained only 1.6 of 1 percent of solids.

The testimony shows that sweet cider should contain from 6 to 13 percent of sugar, whereas this exhibit here was shown to contain only 0.6 of 1 percent of sugar.

Of ash it should have contained 0.58 of 1 percent, whereas in the sample shown it contained 0.06 of 1 percent.

It was stated that saccharin should not be used in sweet cider, but in this case the amount of saccharin used was 0.014 of 1 percent.

Of benzoate of soda in pure sweet cider none should be used, whereas in this case it showed that 0.003 of 1 percent was used.

With that showing from the testimony in this case are you able to comprehend and did you understand why the court of its own motion asked witnesses as to whether sweet cider produced of concentrated pure apple juice preserved with 1/1000 of benzoate of soda, what that article was?

Pure apple cider: What did you find here? You did not find that? No. Ingredients were put into this product that adulterated the cider. That is the proof. Not necessarily that it should affect the health of anybody. That is one thing, but to keep the product pure is another thing.

What is the label? "Sweet cider produced of concentrated apple juice preserved with 1/1000 part of benzoate of soda." The question is: Does the article that is produced here answer to that description?

There are practically but two questions here: If this defendant did not go to Illinois, did not authorize anyone to go to Illinois, to sell this product, then he can not be bound by any act done by any other person. You have heard the testimony with reference to that particular matter. You are the judges of the testimony, not the court. You are the sole judges. It is your province, and not the court's province, to see whether in 1912 this defendant was selling this so-called cider on the other side of the river or not.

You have heard it stated here that this foreigner, who spoke very indifferent English, and it was very difficult to hear and understand exactly what he said, stated that he went over there in company with Shucart, in company with both of them, eventually, and that they obtained a wagon license in Granite City and in Madison. He says they got the license in the name of this company. The defendant says they did not. Which of them is telling the truth? That you must decide. Vasiloff said they got the license. It appears here in evidence that a license was issued over there to this company. There is no dispute about that, but, as I say, the defendant says he did not get the license and Vasiloff says they did. Somebody got it. There cannot be any doubt about that, because the license was produced here.

All of this testimony you have to take together and see in what way it is corroborated.

The question arose as to when Vasiloff was discharged from the employ of this company. Each of these witnesses, Israel and Jacob Shucart, said that he was discharged in July, somewhere about the 18th or 20th of July, 1912; that they discharged him the evening of the day that they received notice from the Government that Vasiloff had been selling this cider over in Illinois. They say it was for that reason that they discharged him; that he had violated his contract with them and was selling outside of St. Louis instead of selling in St. Louis.

The original notice that was sent to these defendants by the Government was not produced; it had been mislaid or lost, but the

Government showed that two notices were sent to this defendant with reference to this particular cider. One of the notices was dated the 30th of September, the other the 17th of October. The Shucarts say that they discharged this man because they received this notice from the Government. Vasiloff says he was discharged because of the purchase of a horse by them for which he had received a check which, when presented, was not paid by the bank. He says that was the reason for the split-up. It is for you to say which of these witnesses is to be believed. You are the sole judges of the testimony. You heard the testimony of all three of these men, and all the facts and circumstances, and it is for you to say which one of them has told the truth at this trial.

This is an information filed under the statute. One count charges adulteration and the other charges misbranding. You are to pass upon both counts. You may, upon the evidence, find the defendant guilty on one or both counts of the information, or you may find the defendant guilty on one or the other count of the information.

This is the act of Congress to which I called your attention before, being section 2 of the act, which provides:

> That the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this act, is hereby prohibited; and any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded foods or drugs, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor.

And he may be prosecuted under that statute.

The court charges you that cider is a food within the meaning of this statute.

I do not know that it is necessary that I should charge you further. I have been asked to charge in several ways by the defendant. I have aimed to cover all their requests in the charge that I have delivered to you.

If you find, first, that Vasiloff took this product across the river into Illinois, and that he did so with the knowledge, consent, and approval of the defendant, then he was the agent of the defendant, and as such, under the law, the defendant is bound.

A contract between these parties was produced here. It is for you to say from all the facts and circumstances involved as to whether that contract offered in evidence was a genuine contract, intended to confine Vasiloff to St. Louis alone, or whether it was made for the purpose of protecting these defendants in the event that Vasiloff should go into the State of Illinois.

These are matters for your consideration. You take all the facts and circumstances in this case, and in considering it you may take into consideration the intelligence and the ability of this witness, Vasiloff, to read, write, and understand what was written.

This is a criminal proceeding under the statute, and it is governed by certain laws that have been found wise in their application. The defendant here entered a plea of not guilty. That raises the presumption of his innocence, and that presumption continues throughout the trial and until it is overcome by testimony which satisfies you beyond a reasonable doubt of his guilt. He is presumed to be innocent. The law gives him the benefit of the doubt, but if you are satisfied beyond any reasonable doubt that this defendant engaged in shipping this product to Illinois, and that this man, Vasiloff, was acting as his agent in so doing, if you believe that from all the evidence in the case, then you should convict him. If you have such doubt arising from the evidence in the case, then it is your duty to return a verdict of not guilty against the defendant on this count.

You may take the case. A form of verdict has been prepared by the clerk. If you find the defendant guilty, sign the verdict as written. If you find him not guilty, insert the word "not" before the word "guilty."

Mr. KLENE. If Your Honor please, I believe the rule is that any exception I have to the charge ought to be made in the presence of the jury?

The COURT. Yes.

Mr. KLENE. I want to except to the action of the court in not granting our several requests for a charge, numbering from 1 to 8.

The COURT. That may be allowed.

Mr. KLENE. I want to except to that part of the charge wherein the court stated that saccharin should not be used.

The COURT. The court did not say any such thing. The court stated what the witnesses said, that saccharin should not be used.

Mr. KLENE. Let me put it that way, then.

The COURT. Very well. I quoted the testimony of the witnesses.

Mr. KLENE. I except to the court stating that a witness should determine whether or not saccharin should be used.

The COURT. I did not say that. I said that the testimony of witnesses had been introduced and the witnesses testified so-and-so.

Mr. KLENE. I except to the court telling the jury that witnesses may say that saccharin shall not be used.

The COURT. You may have that exception.

Mr. KLENE. I except further to the court's instruction wherein he said it was not necessary for the Government to show that the use of saccharin should not affect the health of anyone. That language I took down——

The COURT. My charge will speak for itself. You may have your exception.

Mr. KLENE. I except further to the comment of the court (although I know it is permissible to make comments) that Vasiloff said that they obtained the license, when the court did not also say in that same connection that Vasiloff said he was not present when the license was taken out.

The COURT. You state that and I do not dispute it. Vasiloff says they got the license. He was not present when they got it. It turned out they had the license.

Mr. KLENE. I except to that statement.

The COURT. I am talking to you.

Mr. KLENE. I except to the insinuation the court made as to the genuineness of this contract when the Government called it in question.

The COURT. You may have your exception to that.

Mr. KLENE. I further except to the fact that the court has not indicated to the jury the maximum of punishment.

The COURT. Gentlemen of the jury, you have nothing to do with the punishment in this case. Your duty will be performed when you find this defendant guilty or not guilty. It is the business of the court to assess the punishment, and not the jury. [To Mr. Klene:] Does that satisfy you?

Mr. KLENE. Yes, sir.

GOODE v. UNITED STATES

(Court of Appeals, District of Columbia, Nov. 29, 1915)

44 App. D.C. 162; N.J. No. 4310

Appeal from decree of the Supreme Court of the District of Columbia. Decree affirmed.[92]

Before SHEPARD, ROBB, and VAN ORSDEL, Justices.

ROBB, *Justice.* This is an appeal from a final decree in the Supreme Court of the District condemning seven cases, more or less, of "Buffalo Lithia Water", for misbranding in violation of the provisions of the Pure Food Act of June 30, 1906 (34 Stat. 768).

In the libel as amended it is alleged that each bottle in the seized cases is

> branded and labeled with a certain label containing, among other things, the following, to wit: "Buffalo Lithia Water—Springs No. 2," "Buffalo Lithia Springs Water—Nature's Materia Medica," "Buffalo Lithia Water Company, Buffalo Lithia Springs, Va.,"

and that each bottle is misbranded

> for the reason that each and every bottle in said cases purports to contain a food and drug, that is to say, a liquid known as lithia water, the said cases and bottles bearing labels as aforesaid, which said labels bear certain statements regarding said food and drug which are false and misleading, in this, that the said statement imports that the liquid contained in said bottles is a lithia water, whereas, in truth and in fact, the food and drug contained in said bottles is not a lithia water, or entitled by reason of its ingredients to be so called; and said cases and the bottles therein contained are further misbranded in that the same are offered for sale, as more fully hereinafter set forth, under the distinctive name of article, to wit, under the name of lithia water, when, in truth and in fact, the contents of said bottles is not a lithia water or entitled to be so called; and further in that the said bottles and each thereof are labeled and branded so as to deceive and mislead the purchaser thereof, etc.

After the overruling of a demurrer to the libel as amended, an answer was interposed. A jury trial was waived, voluminous testimony taken, and the court upon the pleadings and testimony found the seized property to be misbranded in violation of the Pure Food Act and ordered its condemnation and forfeiture. To this ruling

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[92] Affirming *United States* v. *Seven Cases of Buffalo Lithia Water,* p. 573, *ante.*

and order no exception was taken, but appellants did note an appeal therefrom in general terms and subsequently filed assignments of error in which it is alleged that the court erred in entering judgment against the property seized and in admitting and considering evidence objected to by them. It now is urged, on behalf of the appellant, that the case is here for trial *de novo*, both as to law and fact.

In *443 Cans of Egg Product* v. *United States* (226 U.S. 172), the court ruled that it was not intended to liken proceedings under the Pure Food Act—

> to those in admiralty beyond the seizure of the property by process *in rem*, then giving the case the character of a law action, with trial by jury, if demanded, and with the review already obtaining in actions at law.

The court observed that if—

> The action is tried in the district court without a jury, the circuit court of appeals is limited to a consideration of such questions of law as may have been presented by the record proper, independently of the special finding—

And cited *Campbell* v. *United States* (224 U.S. 99), as authority for the proposition. The court further said:

> But as the party on jury trial may reserve his exceptions, take a bill of exceptions, and have a review upon writ of error in the manner we have pointed out.

Inasmuch as provision has been made in the District of Columbia for a trial of issues of fact in civil cases by the court without a jury, the ruling in the Campbell case does not apply. In this jurisdiction the finding of the court upon the facts, which may be either general or special, has the same effect as the verdict of a jury. An exception may be taken to any ruling of the court during the hearing and to such finding on the ground that the evidence was insufficient in law to justify it, and may be stated in a bill of exceptions as in case of a jury trial. (See Code, secs. 70–71.)

From the foregoing it is apparent that our review of this case must be confined to questions of law presented by the record proper and to such other questions as may have been reserved by exceptions duly noted during the progress of the trial. The only exceptions taken, which are followed up in appellants' brief, relate to the admission of evidence introduced by the Government tending to prove the inappreciable quantity of lithium in Buffalo Lithia Water, and that the trace of lithium found would not of itself give any therapeutic effect. The libel as amended alleges that the water in question is misbranded because, as branded, it is represented as lithia water, when it is not such a water or entitled by reason of its ingredients to be so called, and that by reason of this misbranding the purchaser of the water is deceived. Clearly, under these averments, it was competent for the court to receive evidence concerning the real character of this water. Evidence that an analysis of about half a gallon of the seized water failed to disclose any lithium except by the use of the spectroscope, and then only a trace, and evidence that water from the Atlantic and Pacific Oceans, from the Mississippi and Potomac Rivers, contained five times as much lithium as the same quantity of " Buffalo Lithia Water ", certainly shed some light upon the question whether such so-called lithia water was in fact what the label under which it was sold represented it to be.

Appellants insist that the libel fails to allege any facts constituting misbranding and hence that it is fatally defective. It alleges that is false and misleading—

> In this, that the said statement imports that the liquid contained in said bottles is a lithia water, whereas, in truth and in fact, the food and drug contained in said bottles is not a lithia water, or entitled by reason of its ingredients to be so called.

In other words, the libel alleges that the seized property is branded, labeled, and sold as lithia water, when, in fact, it is not, and that by reason of such branding the public is deceived and misled. If appellants mean that the libel should have characterized this water, we do not agree with them. Whether it should be called a mineral water or a spring water is not important. The important question is whether it is what the label represented it to be—a lithia water. The libel in unambiguous terms alleges that it is not, and we think the averments sufficiently explicit.

The decree must be affirmed, with costs.

Affirmed.

UNITED STATES v. SIMPSON

(District Court, N.D. Ohio, Nov. 30, 1915)

N.J. 5526

Information in two counts alleging violation of section 2 of the Food and Drugs Act. Jury trial. One count dismissed. Verdict of guilty as to the other.[93]

The United States attorney filed an information in 2 counts against Charles M. Simpson, alleging shipment from the State of Ohio into the State of Minnesota of a quantity of an article labeled in part "Cerebro-Spinal Nerve Compound", which was misbranded.

Misbranding of the article was alleged in the first count for the reason that it contained 0.36 percent of alcohol, and the package containing the article failed to bear a statement on the labels of the bottle and carton of the quantity or proportion of alcohol contained therein. It was alleged in substance in the second count of the information that the article was misbranded for the further reason that certain statements appearing on the carton, and certain statements included in the circular accompanying the article, falsely and fraudulently represented it as a treatment of all diseases which are really the result of diseases of the brain, spinal cord, medulla oblongata, the nerves given off from each of them, all nervous diseases and heart troubles; and as a valuable remedy for lost nervous strength, nervous prostration, spinal diseases, mania, melancholia, and neurasthenia; and as a remedy for dementia or acquired feeble-mindedness, and katatonia or alternating insanity, when, in truth and in fact, it was not.

The defendant entered a plea of not guilty to the information, and the case came on for trial before the court and a jury. During the

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[93] Affirmed, *Simpson* v. *United States*, p. 832, *post*.

progress of the trial it was ordered that the first count of the information be dismissed, as will more fully appear from the following remarks by the court:

CLARKE, *District Judge.* Gentlemen, I have concluded that the first count in this information should be dismissed. The charge is that goods shipped and delivered for shipment as aforesaid, said article of drugs, was then and there misbranded within the meaning of said act of Congress in that it contained 0.36 percent of alcohol, and that the package containing the said article then and there failed to bear a statement on the labels of the bottle and carton of the quantity or proportion of alcohol contained therein.

You will see that in the count it is set out that the carton did contain a statement that this bottle contains about one third of a drop of alcohol to each teaspoonful. Now, there has been no evidence to indicate that this statement of the quantity of alcohol is not correct, and of course, I assume that if it was not a reasonable approximation to the amount of alcohol which the analysis shows, counsel would have to have testimony. Therefore, it seems to me, under the state of the proof as it now is, the count is, to say the least, contradictory. The case will proceed on the second count.

The trial of the case was then resumed, and after the submission of evidence and arguments by counsel the following charge was delivered to the jury by the court:

Gentlemen of the jury: I am submitting this case to you upon the second count of the information only. In this count the Government charges that on the 28th day of May, 1914, the defendant, Charles M. Simpson, trading as Dr. C. M. Simpson's Medical Institute, of Cleveland, Ohio, unlawfully shipped from the city of Cleveland, in the State of Ohio, to the city of St. Paul, in the State of Minnesota, one dozen bottles enclosed in cartons (which simply means pasteboard boxes) which contained an article designed and intended to be used for the cure and mitigation of diseases of man; and that these bottles or rather the pasteboard boxes in which they were shipped were branded or marked, and contained a circular within them, and that upon the carton and circular were printed certain statements which were false and fraudulent as to the curative or therapeutic properties or contents of the bottles. "Therapeutic" is a word that is used in this count and has been frequently used in the testimony, and as used in this case it means simply healing or curative properties of any substance to which it may be applied.

Now, the statements appearing on the pasteboard box or carton which the Government charges were false and fraudulent are as follows, viz:

Dr. C. M. Simpson's Cerebro-Spinal Nerve Compound, a valuable remedy for lost nervous strength and treatment of all diseases which are really the result of the diseases of the brain, spinal cord, medulla oblongata and the nervous diseases given off from each of them.

Dr. C. M. Simpson's Remarkable Discovery for the treatment of all nervous diseases, also heart troubles * * * a most valuable remedy for nervous prostration, spinal diseases * * * melancholia, neurasthenia.

And the statements as to the therapeutic or curative effects of the substance contained in the bottles, which it is charged were printed in the circulars enclosed in the pasteboard boxes with the bottles are as follows:

> For * * * dementia, or acquired feeble-mindedness, katatonia or alternating insanity.

The charge of the Government is that these statements as to the curative properties of the substance which the defendant was selling were fraudulent and false and that the substances did not contain ingredients or medical agents effective among other things as a remedy for the diseases which the statements which I have read to you from the carton and from the circular contained.

The Government claims that these statements were not only false when thus used on the cartons containing the bottles and in the circular, but that they were made with the fraudulent purpose of inducing persons sick or afflicted with one or more of the diseases named, to purchase the so-called remedy so that the defendant might make money out of the sale of it.

The act of Congress under which this charge is being prosecuted is entitled:

> An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes.

This is important legislation intended to protect the people so far as this case is concerned from the transportation and sale of misbranded medicines, experience having shown that men and women afflicted with disease are disposed to try a professed remedy, no difference how useless or even harmful it may be if it is strongly recommended, and it is to protect the sick and afflicted and people who are easily imposed upon, from fraudulent practices of the unprincipled and avaricious that this law was passed. It is a wise law and in proper cases should be rigidly enforced.

It is admitted by the defendant that the bottles in the pasteboard boxes or cartons were shipped from Cleveland to St. Paul, Minn., as charged in the information. It is also not questioned that the boxes or cartons had printed on them the language I have quoted to you from the information as constituting the charge of the Government against the defendant. The language which the Government charges was falsely and fraudulently used was not all that was printed upon the carton or in the circular, but the entire inscription is in evidence, and you may look to any other part of the printed matter to determine whether the language especially set out in this second count was or was not falsely and fraudulently used.

You will note, gentlemen of the jury, that before you can find the defendant guilty, you must find not only that the statements charged in the information were false, but that the defendant knew they were false when he used them, and that he used them for a fraudulent purpose. This is a criminal case and so the degree of proof that is necessary to convict the defendant is higher and greater than is sufficient in a civil case to support a verdict.

Before you can find the defendant guilty as charged in the information, you must be satisfied not by a preponderance of the evidence as in a civil case, but you must be satisfied beyond a reason-

able doubt both that the statements set out in the second count were false, and also that they were fraudulent. The burden of this proving the defendant guilty beyond a reasonable doubt is on the Government.

The expression "reasonable doubt" seems to me to be so clear, plain, and exact an expression that to attempt to define or explain it is more likely than not to obscure its meaning. You all know that doubt as to how a case should be decided is an uncertainty of mind arising from the evidence introduced in the trial or the lack of evidence which may be necessary to create a clear conviction with respect to the guilt of the accused. Such a doubt springing from evidence, or from the lack of what you may think is necessary evidence, if honestly entertained, is a reasonable doubt such as is meant when the expression is used in this charge. This doubt, in order to justify your making it the ground of a verdict of acquittal, should be of such a character that it would require some evidence to remove it. It should not be a doubt raised by a mere whim, caprice, or prejudice on the part of a juror.

The rule is intended to be a shield for the innocent and not as a protection for the guilty.

The pasteboard cases or cartons with the inscriptions thereon and the circular which was in each of the cartons and which contained the statements, which are charged by the Government to be false and fraudulent, have been introduced in evidence and will be before you in your jury room.

The Government has produced a witness who has analyzed the contents of one of the bottles and has stated what he found as the result of his analysis. An analysis has also been made of the compound by a witness called by the defendant. So far as the curative properties of the compound are concerned, these two analyses do not differ substantially.

The Government has called physicians who have testified, as you have heard, that in their opinion the ingredients found in the bottle analyzed by the Government chemist are not effective as a remedy for the disorders which it is stated upon the label, and in the circular, and enumerated in the second count it is effective in the treatment of, and they have testified that in their opinion there is no single combination of substances or drugs which would be effective as a remedy for all of the diseases which are enumerated in the charge in this second count.

On the other hand, the defendant has called several witnesses who state that they have used the compound as a medicine and that it has proved in their cases effective as a remedy for the disorders with which they have stated to you they were afflicted. The question involved in this case is peculiarly one of professional learning, and it is significant that not a single doctor has been called by the defendant. One young doctor was called as a witness but on preliminary examination he said he was not competent to testify as an expert physician upon the subjects involved in the case, and he was dismissed without testifying. This is a fact which you should take into consideration in arriving at your decision of this case.

Gentlemen, you will take all of this evidence into consideration and determine first of all whether the statements which are referred

to in the second count and which I have read to you with regard to the therapeutic—that is, the curative—properties of this preparation were false, and in deciding this question you should take into consideration all of the evidence which has been produced by the Government, as well as that produced by the defendant.

If you find that the statements on the cartons and in the circulars which are set out in the second count were false, then before you can find the defendant guilty, it will be necessary for you to go further and consider whether such statements were fraudulently made. If you find beyond a reasonable doubt that the statements set out in this second count with respect to the curative properties of this compound were false, and that they were made with the fraudulent purpose of deceiving people, and so inducing them to buy the compound, then you should return a verdict of guilty. But if you find that these statements were not false, or that they were not made with the fraudulent purpose of deceiving people into purchasing and using the compound, then you should return a verdict of not guilty.

Gentlemen of the jury, you will be furnished with two forms of verdict, one finding the defendant guilty, and one finding him not guilty. You will fill in one of these forms of verdict as your decision of the case may render proper and have the verdict signed by your foreman and return it into court.

(Addressing counsel:) Gentlemen, have you any suggestions or exceptions?

(None.)

(Addressing jury:) You may retire and consider the case.

UNITED STATES v. 1,000 CASES OF TOMATO PUREE

(District Court, S.D. New York, Dec. 29, 1915)

N.J. No. 4597

Libel under section 10 of the Food and Drugs Act for seizure and condemnation of 1,000 cases, each containing 4 dozen cans, of tomato purée. Libel dismissed as to all except 46 cans. Jury trial. Verdict in favor of the United States as to one can, and for the claimant as to 45 cans.

The United States attorney filed a libel for the seizure and condemnation of 1,000 cases, each containing 4 dozen cans, of tomato purée, alleging that the article had been shipped from the State of New Jersey into the State of New York, and charging adulteration and misbranding in violation of the Food and Drugs Act. The cases were labeled: "4 Doz., Contents 10 oz. net, No. 1 tin, Ceres Brand Tomato Puree, Francis H. Leggett and Co., Distributors, New York." The retail packages were labeled: "Ceres Brand, Contents 10 avoir. oz. Tomato Puree, Francis H. Ligget and Company, New York City, Distributors, Reg. U.S. Pat. Off."

Adulteration of the article was alleged in the libel for the reason that it consisted in particular [part] of a filthy, putrid, or decomposed vegetable substance, to wit, decayed tomato, contrary to the provisions of section 7, subdivision 6 under "food," of the Food and Drugs Act.

Misbranding was alleged for the reason that the article was contained in cans with labels which bore a picture of a whole ripe tomato and contained no statement that the product was manufactured from peelings, cores, and trimmings, contrary to the provisions of section 8, first general paragraph, and paragraph second under "food," of the said Food and Drugs Act.

The case came on for hearing before the court and a jury. At the conclusion of the Government's case, the court dismissed the libel as to all of the cans except 46, which had been opened and analyzed by the Government's analysts. The action was taken upon motion of counsel of Francis H. Leggett & Co., New York, N.Y., claimant, and, in granting the motion, the court (HAND, *District Judge*) said: "I will grant that motion upon the ground that it appears from the evidence that there was a variation in the contents and amount of mold in the different cans, and that it does not sufficiently appear from any testimony offered as to the manufacture of this product and the introduction and filling of the cans which have not been examined, that they contain, filthy, putrid, or decomposed vegetable substance, to wit, decayed matter." After the completion of the introduction of evidence and arguments by counsel, the following charge was delivered to the jury by the court:

HAND, *District Judge.* Gentlemen of the jury: This action is brought under what is known as the Pure Food Law to condemn 46 cans of tomato purée, which are all that are involved before you now, on the ground that those cans are adulterated, and the statute makes a statement in regard to adulteration which I will read to you:

> That for the purposes of this Act an article shall be deemed to be adulterated * * * In the case of food: * * * If it consist in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not.

For the purposes of this case before you the definition of the statute might be read as follows:

> That for the purposes of this Act an article shall be deemed to be adulterated in the case of food if it consists in whole or in part of a filthy or decomposed animal or vegetable substance.

So that the question which first arises here is whether this article, this tomato purée, can be considered filthy or decomposed. If it is filthy or decomposed it is subject to seizure and condemnation under the provisions of the statute. There is no doubt in my mind, and I do not believe that either counsel would contest the proposition that the words "filthy" and "decomposed" are not to be used or considered by you in a purely technical and scientific sense. They are to be used in a practical common sense way, and are to relate to a substantial presence of filth or decomposition. Some of the dictionaries give definitions of these words. For instance, in the Standard Dictionary, filthy is defined as of the nature of or containing filth; dirty; nasty. Filth: Anything that spoils or makes foul; that which is filthy or dirty; also, the state or quality of being foul; nastiness; dirt.

I think the question for you to determine here, gentlemen, is whether upon all the facts appearing in this case there was such a substantial presence of mold in this tomato purée that you regard it as filthy in a natural, practical sense.

Now, to come down to decomposition or decomposed. Some of these experts have given you, among other things, a very technical definition of decomposed, the scientific definition, which relates to structural changes, that is to say, changes in its composition, the breaking down of a complicated system of cells, for instance, into a lower and simpler system of cells. That, I take it, is not the meaning of decomposed, or decomposition referred to in the statute. Decomposed as given in some of the dictionaries is decayed, rotten, and that is the definition that I shall give to you, and I shall leave to you the question of whether or not upon all the facts appearing in this case you find that there was a substantial degree of decomposition in whole or in part in these 46 cans or any of them. To the extent that you find that there was, you shall condemn the 46 cans or any part of them in which you find such a degree of decomposition exists.

Now, I will say a word in regard to the testimony of these experts. You have probably heard so much about it that you remember very distinctly Dr. Howard's test, his method of examining tomato purée at any rate, and I presume other things. In order to find the presence of molds, as I understand it, two drops are extracted and under a microscope these drops are divided into 25 fields, and then the person making the examination determines whether or not if each field, of the 25 in each drop, that is to say whether in all the 50 fields there are any molds present. If he finds mold in 50 of the fields, he would say that there were a hundred percent and if he finds molds in 25 of the fields he would say 50 percent. It is argued that that does not show the percentage of molds at all; it simply shows if there was a hundred percent according to Dr. Howard's test, that there may be some molds, no matter how little; no matter how extremely little, in each field of the drop, and it is claimed that by a further churning process, or stirring process, or some dividing process of these molds, you could get a more even distribution than the ordinary stirring under Dr. Howard's test, and you could determine the real percentage of the mold in the mixture, which undoubtedly Dr. Howard's test does not attempt absolutely to do. So that on the side of the defendant it is claimed that Dr. Howard's test is too uncertain. He says admittedly some of these tests show only 60 percent and others show 100 percent, and it is impossible to get the mixture sufficiently stirred and the molds sufficiently separated so that you can tell how substantial the presence through the mixture or even in any one drop, is of the mold. On the other hand, I think, all of the experts would have to admit that this test of Dr. Howard's is some evidence. It is certainly evidence of the presence of mold. It shows that there are some molds.

Now, taking into consideration, gentlemen, these arguments and counterarguments, for you are made by the law the sole judges of the facts, and if I have intimated anything in regard to the facts you are at liberty to disregard it, you are only to take the law from the court. Taking all these arguments and counterarguments, I say, into consideration, you are to determine whether upon the whole case there was a sufficient presence of these molds in these cans of tomato purée to render the product filthy or decomposed. If you find that there was such a substantial presence of these molds as to render the product filthy or decomposed, you must find a verdict for the

Government. If you find to the contrary you must find a verdict for the defendant.

The defendant has asked me to charge that the jury will remember that the testimony of the Government experts as to the percentage of the fields in which they found mold, are statements of facts, but that the inference that they draw from these facts are opinions which they can accept or reject. I so charge. In other words, the statements of the experts as to this Howard method merely state the method in which they determine the percentage of fields which contain molds. They do not purport to state a definite percentage of molds in the tomato purée. I leave to you the inference that is to be drawn as to the degree of mold that was in this tomato purée from the fact that in these various specimens taken by the Government there was an average of from 60 to 100 percent of some kind of mold found in the various drops. I also remind you of the fact, gentlemen, that the defendant did not examine the cans examined by the Government, but examined other cans which for reasons it is unnecessary to discuss before you, in my judgment, are not under consideration in this case. I charge you that the Government must establish its case by the preponderance of evidence and if you are in doubt on the whole case as to whether the Government has made a case or not, you must find for the defendant.

I refuse the first two of the requests which I have not charged, which have been submitted by counsel, as follows:

(1) The Government must not only establish its case by the weight of evidence, but, this being a case involving the forfeiture of property, the evidence must be of a clear and convincing character.

(2) If they find products not unwholesomely decomposed, they must find for the claimant.

The jury thereupon retired, and after due deliberation returned into court with its verdict in favor of the Government for the condemnation of one can of the article, and in favor of the claimant as to the remaining 45 cans.

SEVEN CASES OF ECKMAN'S ALTERATIVE v. UNITED STATES

SIX CASES OF ECKMAN'S ALTERATIVE v. UNITED STATES

(Supreme Court of the United States, Jan. 10, 1916)

239 U.S. 510; N.J. No. 4816

Error to the District Court for the District of Nebraska. Judgments affirmed.

Mr. Justice Hughes delivered the opinion of the court.

Libels were filed by the United States, in December, 1912, to condemn certain articles of drugs (known as "Eckman's Alterative") as misbranded in violation of section 8 of the Food and Drugs Act.

The articles had been shipped in interstate commerce, from Chicago to Omaha, and remained at the latter place unsold and in the unbroken original packages. The two cases present the same questions, the libels being identical save with respect to quantities and the persons in possession. In each case demurrers were filed by the shipper, the Eckman Manufacturing Company, which challenged both the sufficiency of the libels under the applicable provision of the statute and the constitutionality of that provision. The demurrers were overruled, and the Eckman Company having elected to stand on the demurrers, judgments of condemnation were entered.

Section 8 of the Food and Drugs Act, as amended by the act of August 23, 1912, ch. 352, 37 Stat. 416, provides, with respect to the misbranding of drugs, as follows:

SEC. 8. That the term "misbranded," as used herein, shall apply to all drugs or articles of food or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as the State, Territory, or country in which it is manufactured or produced.

That for the purposes of this Act an article shall also be deemed to be misbranded. In case of drugs:

* * * * * * *

Third. If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent.

The amendment of 1912 consisted in the addition of paragraph "Third," which is the provision here involved.

It is alleged in each libel that every one of the cases of drugs sought to be condemned contained 12 bottles, each of which was labeled as follows:

Eckman's Alterative,—contains twelve per cent. of alcohol by weight, or fourteen per cent. by volume—used as a solvent. For all throat and lung diseases including Bronchitis, Bronchial Catarrh, Asthma, Hay Fever, Coughs and Colds, and Catarrh of the Stomach and Bowels, and Tuberculosis (Consumption) * * * Two dollars a bottle. Prepared only by Eckman Mfg. Co. Laboratory Philadelphia, Penna., U. S. A.

And in every package, containing one of the bottles, there was contained a circular with this statement:

Effective as a preventative for Pneumonia. We know it has cured and that it has and will cure Tuberculosis.

The libel charges that the statement "effective as a preventative for pneumonia" is "false, fraudulent, and misleading in this, to wit, that it conveys the impression to purchasers that said article of drugs can be used as an effective preventative for pneumonia, whereas, in truth and in fact said article of drugs could not be so used"; and that the statement "we know it has cured" and that it "will cure tuberculosis" is false, fraudulent, and misleading in this, to wit, that it conveys the impression to purchasers that said article of drugs will cure tuberculosis, or consumption, whereas, in truth and in fact said article of drugs would not cure tuberculosis, or consumption, there being no medicinal substance nor mixture of substances known at present which can be relied upon for the effective treatment or cure of tuberculosis, or consumption."

The principal question presented on this writ of error is with respect to the validity of the amendment of 1912.

So far it is objected that this measure, though relating to articles transported in interstate commerce, is an encroachment upon the reserved powers of the States, the objection is not to be distinguished in substance from that which was overruled in sustaining the White Slave Act, ch. 395, June 25, 1910, 36 Stat. 825. *Hoke* v. *United States*, 227 U.S. 308. There, after stating that "if the facility of interstate transportation" can be denied in the case of lotteries, obscene literature, diseased cattle and persons, and impure food and drugs, the like facility could be taken away from "the systematic enticement of and the enslavement in prostitution and debauchery of women," the court concluded with the reassertion of the simple principle that Congress is not to be denied the exercise of its constitutional authority over interstate commerce, and its power to adopt not only means necessary but convenient to its exercise, because these means may have the quality of police regulations. *Id.* pp. 322, 323. See *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U.S. 196, 215; *Hipolite Egg Co.* v. *United States*, 220 U.S. 45, 57; *Lottery Case*, 188 U.S. 321.

It is urged that the amendment of 1912 does not embrace circulars contained in the package, but only applies to those statements which appear on the package or on the bottles themselves; that is, it is said that the word "contain" in the amendment must have the same meaning in the case of both "package" and "label." Reference is made to the original provision in the first sentence of section 8 with respect to the statements, etc., which the package or label shall "bear." And it is insisted that if the amendment of 1912 covers statements in circulars which are contained in the package it is unconstitutional. Such statements, it is said, are not so related to the commodity as to form part of the commerce which is within the regulating power of Congress.

But it appears from the legislative history of the act that the word "contain" was inserted in the amendment to hit precisely the case of circulars or printed matter placed inside the package, and we think that is the fair import of the provision. Cong. Rec. 62d Cong., 2d Sess., Vol. 48, Part 11, p. 11,322. And the power of Congress manifestly does not depend upon the mere location of the statement accompanying the article, that is, upon the question whether the statement is *on* or *in* the package which is transported in interstate commerce. The further contention that Congress may not deal with the package, thus transported, in the sense of the immediate container of the article as it is intended for consumption, is met by *McDermott* v. *Wisconsin*, 228 U.S. 115. There the court said:

> That the word "package" or its equivalent expression, as used by Congress in sections 7 and 8 in defining what shall constitute adulteration and what shall constitute misbranding within the meaning of the act (Food and Drugs Act), clearly refers to the immediate container of the article which is intended for consumption by the public, there can be no question. * * * Limiting the requirements of the act as to adulteration and misbranding simply to the outside wrapping or box containing the packages intended to be purchased by the consumer, so that the importer, by removing and destroying such covering, could prevent the operation of the law on the imported article yet unsold, would render the act nugatory and its provisions wholly inadequate to accomplish the purposes for which it was passed.

And, after stating that the requirements of the act thus construed were clearly within the power of Congress over the facilities of interstate commerce, the court added that the doctrine of original packages set forth in repeated decisions, which protected the importer in the right to sell the imported goods, was not "intended to limit the right of Congress, now asserted, to keep the channels of interstate commerce free from the carriage of injurious or fraudulently branded articles and to choose appropriate means to that end." *Id.* pp. 130, 131, 137.

Referring to the nature of the statements which are within the purview of the amendment, it is said that a distinction should be taken between articles that are illicit, immoral, or harmful and those which are legitimate, and that the amendment goes beyond statements dealing with identity or ingredients. But the question remains as to what may be regarded as "illicit" and we find no ground for saying that Congress may not condemn the interstate transportation of swindling preparations designed to cheat credulous sufferers and make such preparations, accompanied by false and fraudulent statements, illicit with respect to interstate commerce, as well as, for example, lottery tickets. The fact that the amendment is not limited, as was the original statute, to statements regarding identity or composition (*United States* v. *Johnson*, 221 U.S. 488) does not mark a constitutional distinction. The false and fraudulent statement, which the amendment describes, accompanies the article in the package, and thus gives to the article its character in interstate commerce.

Finally, the statute is attacked upon the ground that it enters the domain of speculation (*American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94) and by virtue of consequent uncertainty operates as a deprivation of liberty and property without due process of law in violation of the fifth amendment of the Constitution, and does not permit of the laying of a definite charge as required by the sixth amendment. We think that this objection proceeds upon a misconstruction of the provision. Congress deliberately excluded the field where there are honest differences of opinion between schools and practitioners. Cong. Rec., 62d Cong., 2d Sess., vol. 48, Part 12, App., p. 675. It was, plainly, to leave no doubt upon this point that the words "false *and fraudulent*" were used. This phrase must be taken with its accepted legal meaning, and thus it must be found that the statement contained in the package was put there to accompany the goods with actual intent to deceive,—an intent which may be derived from the facts and circumstances, but which must be established. *Id.* 676. That false and fraudulent representations may be made with respect to the curative effect of substances is obvious. It is said that the owner has the right to give his views regarding the effect of his drugs. But state of mind is itself a fact, and may be a material fact, and false and fraudulent representations may be made about it; and persons who make or deal in substances, or compositions, alleged to be curative, are in a position to have superior knowledge and may be held to good faith in their statements. *Russell* v. *Clark's Executors*, 7 Cranch 69, 92; *Durland* v. *United States*, 161 U.S. 306, 313; *Stebbins* v. *Eddy*, 4 Mason 414, 423; *Kohler Mfg. Co.* v. *Beeshore*, 59 Fed. 572, 574; *Missouri Drug Co.* v. *Wyman*, 129 Fed. 623, 628; *McDonald* v. *Smith*,

139 Mich. 211; *Hedin* v. *Minneapolis Medical Institute*, 62 Minn. 146, 149; *Hickey* v. *Morrell*, 102 N.Y. 454, 463; *Regina* v. *Giles*, 10 Cox, C.C., 44; *Smith* v. *Land & House Corporation*, L.R., 28 Ch. Div. 7, 15. It cannot be said, for example, that one who should put inert matter or a worthless composition in the channels of trade, labeled or described in an accompanying circular as a cure for disease when he knows it is not, is beyond the reach of the law-making power. Congress recognized that there was a wide field in which assertions as to curative effect are in no sense honest expressions of opinion but constitute absolute falsehoods and in the nature of the case can be deemed to have been made only with fraudulent purpose. The amendment of 1912 applies to this field and we have no doubt of its validity.

With respect to the sufficiency of the averments of the libels, it is enough to say that these averments should receive a sensible construction. There must be a definite charge of the stautory offense, but we are not at liberty to indulge in hypercriticism in order to escape the plain import of the words used. There is no question as to the adequacy of the description of the article, or of the shipments, or of the packages. It is said that there was no proper statement of the contents of the circular. But the libels give the words of the circular and we think that the allegations were sufficient to show the manner in which they were used. The objection that it was not alleged that the statements in question appeared on the original package or on the bottles themselves, as already pointed out, is based on a misconception of the statutory provision. The remaining and most important criticism is that the libels did not sufficiently show that the statements were false and fraudulent. But it was alleged that they were false and fraudulent, and with respect to tuberculosis it was averred that the statement was that the article "has cured" and "will cure", whereas "in truth and in fact" it would "not cure", and that there was no "medicinal substance nor mixture of substances known at present" which could be relied upon to effect a cure. We think that this was enough to apprise those interested in the goods of the charge which they must meet. It was, in substance, a charge that, contrary to the statute, the article had been made the subject of interstate transportation with a statement contained in the package that the article had cured and would cure tuberculosis, and that this statement was contrary to the fact and was made with actual intent to deceive.

Judgments affirmed.

UNITED STATES v. KELLETT

(District Court, District of Utah, Jan. 20, 1916)

N.J. No. 4846

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

The United States attorney for the district of Utah filed an information against John L. Kellett, alleging shipment by said defendant from the State of Utah into the State of California, of quantities

of "Dr. J. L. Kellett's Oil of Eden No. 1" and "Dr. J. L. Kellett's Sweet Spirits of Eden" which were misbranded.

Misbranding of the article labeled "Dr. J. L. Kellett's Oil of Eden No. 1" was alleged in the information for the reason that certain statements regarding the therapeutic or curative effects thereof, appearing on the cartons enclosing the bottles containing the article, and included in circulars or pamphlets accompanying the article, were false and fraudulent in that they were applied to the article knowingly and in reckless and wanton disregard of their truth or falsity, so as to represent falsely and fraudulently to the purchasers thereof, and create in the minds of purchasers thereof the impression and belief, that it was, in whole or in part composed of, or contained, ingredients or medicinal agents effective, among other things, for curing all ordinary complaints of a rheumatic nature when used in conjunction with Sweet Spirits of Eden, for dissolving and removing ulcerated tumors, enlarged glands, and all other eruptions, for the cure of rheumatism and gout, in the treatment of granulated eyelids, for curing deafness, and as a cure for rheumatism and goiter, when used in conjunction with Sweet Spirits of Eden, when, in truth and in fact, it was not in whole or in part composed of, and did not contain, ingredients or medicinal agents effective, among other things, for curing all ordinary complaints of a rheumatic nature when used in conjunction with Sweet Spirits of Eden or when used in any other manner, or for dissolving or removing ulcerated tumors, enlarged glands, or all other eruptions, for the cure of rheumatism or gout, in the treatment of granulated eyelids, for curing deafness, or, when used in conjunction with Sweet Spirits of Eden or when used in any other manner, as a cure for rheumatism or goiter.

Misbranding of the article labeled "Dr. J. L. Kellett's Sweet Spirits of Eden" was alleged in the information for the reason that a statement, appearing on the labels of the article, to wit, "Alcohol 25 percent," was false and misleading in that it indicated to purchasers thereof that the article contained 25 percent of alcohol by volume, when, in truth and in fact, it contained a greater amount of alcohol, to wit, 50.48 percent. Misbranding was alleged for the further reason that certain statements regarding the therapeutic or curative effects of the article, appearing on the cartons inclosing the bottles containing the article, and included in a circular or pamphlet accompanying the article, were false and fraudulent in that they were applied to the article knowingly and in reckless and wanton disregard of their truth or falsity, so as to represent falsely and fraudulently to the purchasers thereof, and create in the minds of purchasers thereof the impression and belief, that it was in whole or in part composed of, or contained ingredients or medicinal agents effective, among other things, for curing nervous prostration, and as a cure for rheumatism and goiter when used in conjunction with Oil of Eden, when, in truth and in fact, it was not in whole or in part composed of, and did not contain ingredients or medicinal agents effective for curing nervous prostration or as a cure for rheumatism or goiter when used in conjunction with Oil of Eden or when used in any other manner.

The case having come on for trial before the court and a jury, after the submission of evidence and arguments by counsel, the following charge was delivered to the jury by the court:

JOHNSON, *District Judge.* Gentlemen of the jury: The defendant, John L. Kellett, is charged by the United States Government in this case on three counts with the violation of what is commonly known as the Food and Drugs Act.

Each count of the information charges that the defendant, John L. Kellett, trading as California's Cooperative Medicine Company, of Salt Lake City, Utah, did within the Judicial District of Utah, and within the jurisdiction of this court, on or about the 13th day of April, 1914, then and there, in violation of the act of Congress of June 30, 1906, known as the Food and Drugs Act, as amended by the act of August 23, 1912, unlawfully ship and deliver for shipment from Salt Lake City, State of Utah, to the city of San Francisco, State of California, consigned to H. C. Moore, certain packages, to wit, six bottles, enclosed in cartons, and containing an article designed and intended to be used in the cure, prevention, and mitigation of diseases of man.

The Foods and Drugs Act, gentlemen, makes it unlawful for any person to ship or deliver for shipment from any State into any other State, any drugs misbranded within the meaning of the act, such shipment being made with the intent upon the part of the shipper that such misbranded drug shall be used by the consignee, or any other person.

In this connection, gentlemen, I instruct you that the preparations, Oil of Eden and Sweet Spirits of Eden, introduced in evidence as exhibits, are drugs within the meaning of this act.

Before you can convict the defendant on any of the counts of the information, you must be convinced by the evidence in the case beyond a reasonable doubt that the defendant, on or about the date alleged in the information, shipped or caused to be shipped from the State of Utah—from any point within the central division of the Judicial District of Utah—into the State of California, the preparations, Oil of Eden and Sweet Spirits of Eden, exhibits of which are in evidence in this case, and that the defendant in making or causing to be made said shipment intended that said preparations, or either of them, should be used by the witness Moore, or by some other person, as a remedy for some one or more of the ailments mentioned on the labels, cartons, or in the literature accompanying the shipment.

In this connection I charge you that in order that the defendant be liable under the act as the shipper of these preparations, it is not necessary that he should have been the owner of them, or either of them, or that he shipped them for his own profit; he would be equally liable as shipper under this act if he as an officer, agent, or manager of any company or corporation, made the shipment or caused the same to be made for the purpose aforesaid.

Under the head of "misbranded" the act provided that for the purposes of this act an article shall be deemed to be misbranded, in case of drugs, if its package or label shall bear or contain any statement regarding the curative or therapeutic effect of such article or

any of the ingredients or substances contained therein, which is false and fraudulent.

(The court here reviewed the various charges in the information.)

The labels, cartons, and circulars are in evidence as exhibits, and you are at liberty to take them with you to the jury room for your information in determining your verdict.

In addition to the instructions already given you with respect to the shipment by the defendant, if you so find, I charge you with respect to the first and third counts of the information, that, as appears from the information as read to you, the charges are that there were statements on the labels, cartons, and in the circulars in the packages containing these preparations which were false and fraudulent with regard to their curative or therapeutic effects. So that it is not sufficient for the Government to prove merely that the statements were false, but the Government must also prove beyond a reasonable doubt that they were fraudulent. If you, gentlemen of the jury, are satisfied beyond a reasonable doubt that the statements referred to and charged as false and fraudulent in the third count, are not only false, but that the defendant knew them to be false, or, not knowing whether they were true or false, yet in reckless and wanton disregard of their truth or falsity, and without any reasonable ground to believe that they were true, he stated them falsely and knowingly, or without knowledge of their truth or falsity, as I have explained to you, with the intent to deceive the witness Moore, or any other person who might use the preparations, then you will be justified in finding that the statements were false and fraudulent, and it would be your duty to return a verdict of guilty upon both of said counts, or either of them, as your finding may be with respect to the matters charged as false and fraudulent, in these counts, respectively. But if, on the other hand, you are not satisfied beyond a reasonable doubt that the statements were not only false but that they were also fraudulent, then it would be your duty to acquit the defendant upon both of said counts, or either of them, as your finding may be with respect to the matters charged as false and fraudulent in said counts, respectively.

The mere falsity of a statement would not be sufficient to justify you in convicting the defendant, unless you are satisfied beyond a reasonable doubt that in stating the falsity the defendant did it knowingly, or, without knowing, did it in reckless and wanton disregard of the truth or falsity of the statement and without any reasonable ground to believe it to be true and with intent to deceive and defraud.

In order to convict the defendant it is not necessary that you find beyond a reasonable doubt that all of the statements charged by the Government to be false and fraudulent were in fact so. If you believe from the evidence beyond a reasonable doubt that any one statement charged as false and fraudulent, as I have before explained to you, is in fact so, then it would be your duty to find the defendant guilty upon the count in which such false and fraudulent statement is charged.

In respect to the second count of the information I charge you, gentlemen of the jury, that if you believe from the evidence beyond a reasonable doubt, and so find, that the label or carton or literature

on or accompanying the Sweet Spirits of Eden contained a statement showing "alcohol 25 percent", and you further find that the content of alcohol in the Sweet Spirits of Eden was different in quantity or volume in any substantial proportion and was false and misleading in that it indicated to the purchasers thereof that the said article of drug contained 25 percent, and it in fact contained some other substantially different quantity or volume, then it would be your duty under the evidence, if you so find, to return a verdict of guilty upon this count.

In respect to the several counts, gentlemen of the jury, you have heard the evidence on the part of the Government; the packages, or at least some of them, with the labels thereon, the cartons, with the printed matter thereon, and the circulars which are charged to be false and fraudulent, have been offered in evidence and are before you. The Government has produced a witness who has analyzed the contents of the Sweet Spirits of Eden, and who has stated to you the result of his analysis and the percentage of alcohol. The Government has called physicians who have testified, as you have heard, that in their opinion the preparations, and the ingredients found in them, are not effective as a remedy for the disorders which it is stated they are effective for, and in respect to which it is charged by the Government that such statements are false and fraudulent, and who stated that in their opinion there are no substances or drugs that would be effective as remedies according to the statements made on the labels and in the pamphlets and on the cartons. On the other hand, the defendant has called witnesses to show, in the instances in which they have been treated, that the drug has been effective as a remedy for the disorders with which they stated they were afflicted.

You will take all of this evidence into consideration and determine, first, whether or not the statements which are referred to by the Government with regard to the therapeutic or curative properties of these preparations are false; and you will also take into consideration the evidence in behalf of the Government of the expert physicians, as opposed to the evidence introduced in behalf of the defendant, and determine whether the statements were false. If they were false, then it will be necessary for you to go further and be satisfied beyond a reasonable doubt in your minds not only of their falsity but that the defendant when he made them knew them to be false or, not knowing, had no reasonable ground to believe them to be true, and that he put forth the statements in reckless and wanton disregard of their truth or falsity and intended by such false statements to deceive and defraud. If you are satisfied beyond a reasonable doubt that the statements as to the therapeutic or curative properties of the preparations were false and fraudulent with respect to all or any one of the diseases charged in the information, then it would be your duty to return a verdict of guilty. Upon the other hand, if you are not satisfied beyond a reasonable doubt that they were not [only] false, but fraudulent, and made with the intent to deceive and defraud the public, then it would be your duty to return a verdict of not guilty.

In the first instance, the presumption of innocence is in favor of the defendant, and it attends him throughout the trial, and the

burden is upon the Government to overcome that presumption of innocence by proof which satisfies your minds beyond a reasonable doubt.

By reasonable doubt, gentlemen, is not meant all doubt. A reasonable doubt is one that arises upon a consideration of all of the evidence, and which addresses itself to your reason, such a doubt as would affect your action in matters of the highest importance to you.

You are required to decide this case, as every other criminal case, upon the strong probabilities of the case, and in order to warrant a conviction those probabilities must be so strong as not to exclude all possible doubt or possibility of error, but to exclude all reasonable doubt.

You are the judges of the facts in this case and of the credibility of the witnesses, as well as the weight to be attached to their testimony. If you believe that any witness has willfully sworn falsely to a material fact in this case, you are at liberty, though not required, to disregard all the testimony of that witness, except where it is corroborated by other credible testimony. In considering the weight to be attached to the evidence of any witness, you should consider the interest, bias, or prejudices which any such witness may have in the result of the case, as affecting the credit to be given to his testimony. You should judge of that bias, prejudice, and interest of the witness from his manner in giving his testimony, his deportment on the stand, and in fact anything which strikes you from his manner of testifying that tends to show that he is swearing to an untruth or falsehood.

There will be submitted to you, gentlemen, a form of verdict in which a blank space will be left before the word " guilty ", one applying to the first count, another to the second count, and another to the third count. If you shall find the defendant guilty upon any one or all of the counts, you shall sign the verdict as written; but if you find the defendant not guilty upon any one or all of the counts, write the word " not " before the word " guilty."

Mr. Cook. With respect to the second count, may it please the court, we wish the jury to be instructed with respect to the branding of the quantity of alcohol, that the intent of the defendant with respect to the marking of the percentage is immaterial; that the law is directed merely at the correctness of the statement, and that the defendant should be found guilty, without regard to the defendant's intent, if the statement is incorrect.

The Court. That instruction or request is granted, gentlemen of the jury. The matter of intent on the second count is immaterial—that is, the intent of the defendant.

Mr. Cook. With respect to the marking.

The Court. In respect to the matter concerning which that charge was given.

Mr. Cook. It is sufficient that the label, at the time of shipping, is incorrect.

The Court. That is the intention in the granting of your request.

UNITED STATES v. SWIFT & CO.

(District Court, D. New Jersey, Jan. 20, 1916)

N.J. No. 4850

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

HAIGHT, *District Judge* (charge to jury). Gentlemen of the jury: The defendant, Swift & Company, is charged with having violated the National Pure Food and Drugs Act, with which generally, no doubt, all of you are familiar, both as respects its general scope and the purpose for which it was enacted. I shall not, therefore, endeavor to explain the many features of the act to you.

It appears that on January 17 or 18, 1913, Swift & Company shipped to a concern at Baltimore, Maryland, a certain number of boxes containing "digester tankage", and on those boxes they caused to be written or labeled that the products therein contained protein to the amount of from 60 to 70 percent. These facts are not disputed at all: they are admitted. The Government contends that this tankage did not in reality contain protein to the extent of from 60 to 70 percent, but that the amount of protein, or the percentage of protein, in the tankage was much less, it having been testified by the witnesses for the Government that the three examinations which were made for the purpose of ascertaining the amount of protein resulted as follows: In the analysis which was made in the summer—I think it was in July—of 1913 the tankage was found to contain protein to the extent of 44.19 percent. At the examination that was made on November 6, 1913, it was found that the protein in the tankage was 44.75 per cent; and then at the subsequent analysis, which was made by Mr. Bidwell, in January of 1914, it was found that the protein in the tankage was 43.19 percent.

Now then, it is admitted that this tankage was shipped from one State to another. That is a necessary element of the crime charge—that it be shipped from one State to another—namely, from the State of New Jersey to the State of Maryland. It is also admitted that the bags in which the tankage was contained purported to be and were in fact labeled so as to convey to a person who looked at it information that the amount of protein in the tankage was from 60 to 70 percent. The only question to be decided is this: What amount of protein did it contain at the time it was shipped—namely, in January of 1913? If it contained less at that time than the 60 to 70 per cent, which is the amount mentioned on the labels of the bags in which the tankage was packed, then the defendant is guilty. If it did not contain less than the 60 to 70 percent, then the defendant is not guilty. So, gentlemen, you have only that simple question to determine.

Now, then, the defendant finds itself in an embarrassing position by reason of its inability to get a witness, and has not been able to, at any rate, has not produced any evidence as to the amount of protein that was in this tankage at the time it was shipped. Nor, for

that matter, has the Government, and necessarily so, been able to produce any direct evidence as to the amount of protein that was in the tankage at the time it was shipped, because the Government did not, and indeed could not, at that time make an analysis of it. But in the July succeeding the time of the shipping of the tankage, which was about 6 months thereafter, an analysis was made of some samples of the tankage, which admittedly had been taken by the Government from these bags, and it was then found that it contained a far less amount of protein than the amount stated on the bags in which it was.

You have heard the evidence of the Government's chemists as to the condition of the tankage as they found it, and the unlikelihood that the amount of protein in the tankage could have been materially changed by any conditions that may have existed between the time of shipping and the time of the analysis; and therefore if you find from the evidence in the case that there is nothing to account for the difference in the amount of protein stated on the labels, and the amount of protein that the Government chemists state they found, then your verdict will be that the defendant is guilty. If, on the other hand, you are not convinced from the evidence that the amount of protein that the tankage was found to contain in July, or at the time of any of these examinations, fairly represents the amount of protein it contained in January, then your verdict will be that the defendant is not guilty.

As this is a criminal case the general rule of the criminal law is applicable to it; that is, that every man is presumed to be innocent until he is proven guilty. The burden of proving that the defendant is guilty beyond a reasonable doubt rests upon the Government. I do not mean by that that a person in order to be found guilty must be proven guilty beyond all doubt, but only beyond a doubt based upon reason and arising from evidence; not a doubt that is merely captious or capricious, but a doubt which prevents you, upon all the evidence that you have, from having an abiding conviction of the guilt of the defendant, or saying that you are convinced of its guilt to a moral certainty. If, under those circumstances, you have a reasonable doubt of the guilt of the defendant, then your verdict must be not guilty.

UNITED STATES v. 408 BUSHELS OF OYSTERS

(District Court, S.D. New York, Mar. 16, 1916)

N.J. No. 4922

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict in favor of the United States.

The United States attorney filed a libel for the seizure and condemnation of 408 bushels of oysters in the shell, alleging that they had been shipped and transported from the State of New Jersey into the State of New York and remained unloaded and unsold, and that they were adulterated in violation of the Food and Drugs Act.

Adulteration of the article was alleged in the libel for the reason that it consisted in particular [part] of a partially filthy, decomposed, and putrid animal product, to wit, polluted oysters.

The case came on for trial before the court and a jury, and the following charge was delivered to the jury:

HAND, *District Judge.* Gentlemen of the jury: I will first, before beginning a more general discussion of the case, charge certain propositions requested by the counsel for the defendants. In order to consider the conclusions of the Government experts, the jury must first find that the Government has proved all the facts submitted to its experts in its behalf, because otherwise, the conclusion of the Government experts would be based upon an incorrect premise. I charge that so far as it relates to the opinion of the Government experts, expressed in answer to the hypothetical question.

If the jury shall find that any facts alleged in the Government's hypothetical question have not been established by a preponderance of evidence, then the jury must not consider either the conclusions nor the evidence of the Government experts in answer to the hypothetical question, in arriving at its verdict. If the jury shall find the testimony of Professor Gorham and other Government experts is based upon any fact that the Government does not prove by a preponderance of evidence, then the jury shall in arriving at its verdict disregard the testimony of these experts as to such matters. You are not bound to accept the scoring system, but you must pass on the question of whether or not filth was or was not present in a substantial amount. If you find it was not, you must find for the claimant. You must give the same weight to the testimony of the experts testifying for the defendants as to that of the experts appearing for the Government, if you find that they have equal qualifications. The United States Department of Agriculture has no right or authority to condemn oyster beds or prohibit their use for growing oysters for shipment in interstate commerce or otherwise.

If you find that sewage in fact did not reach these particular oyster beds, you will disregard all testimony as to the amount of sewage going into Jamaica Bay. If you find that these oysters in fact did not contain filth at the time they were seized, you will then disregard all testimony in reference to Jamaica Bay or any other place in which the oysters may have been. There is no evidence in this case that these oysters were unhealthy. For that matter, the question of health is not involved under this statute. The testimony of Dr. Parsons as to the number of coli he found in the oysters is a statement of fact. The statements of Miss Noble, of the Board of Health of the City of New York and the representative of the Lederle Laboratory as to the number of coli that they found in the oysters, are also statements of fact, but the inference that experts draw from these statements of fact are opinions, which you can accept or reject. There is no legal standard of 50 for oysters, and the United States Department of Agriculture has no right or authority to accept such a standard. If you find that the testimony of Miss Noble, of the Department of Health of New York City, and of the representative of the Lederle Laboratories as to the coli test is untrue, you must then consider whether or not there was filth present

in a substantial amount, and if you find there was not, you must find for the claimant.

You must remember that Miss Noble, of the Department of Health of the City of New York, was an uninterested witness. Therefore, give due weight to her testimony, if you believe it to be true.

In charging these facts which have been requested by defendant's counsel in regard to the Department of Agriculture, I don't mean to say that they are not right in taking certain stands in the matter which they have, as to a 50 count, or anything else, which they deem proper and in conformity with the law. All I mean to charge you is, and all I imagine that defendant's counsel asks me to charge is, that any pronouncement in that regard by them is not binding on this court here; that the question you will have to determine is whether in fact there was a substantial amount of filth in these oysters.

The COURT. I decline to charge the other requests, and I have marked them, Mr. Carlin; they will appear on those pages.

Mr. CARLIN. Thank you.

The COURT. Now, gentlemen of the jury, this question before you here is a question arising under the Food and Drug Law, as it is commonly called. It is not a question of health, as submitted to us here. It is purely a question of whether these oysters, these 408 bushels of oysters, which were libeled by the Government, were filthy within the meaning of the Pure Food Act.

This is a case, as the Government views it, that is of importance to the Government and importance to the public. You would realize that from the number of experts that have [been] called, and the amount of attention they have given to it. It is also a case which is of great importance to the oyster growers who maintain that industry at Jamaica Bay. These considerations, however, can have no place here in your deliberations, except in a single respect in which they must affect any man who has a part in this proceeding, and that is that it undoubtedly fills you, as it does me, with an added sense of responsibility in dealing with the question.

But the only question for you to consider is the somewhat narrow, legal question, as to whether the 408 bushels of oysters were filthy or not at the time they were seized by the Government. You gentlemen are the sole judges of the facts in this case. You are to take the law as laid down by me. If I indicate, or have appeared to indicate at any time during the trial that I had any opinions in regard to the facts, you are entirely at liberty to disregard it, because you are the sole and absolute judges of the facts in this case.

In the first place, what is filth? What does it mean? I think that both counsel in this case would take the dictionary definition which I think Mr. Barnes gave in his summing up, nasty, foul, or dirty. It has no technical significance. It has a practical significance.

I also charge you, that for these oysters to be regarded and held by you as filthy, the filth or degree of filth, must be substantial. In saying that I do not necessarily mean to indicate that filth which is microscopic so far as observation goes, that is so small in quantity that you cannot see it with the naked eye, may not be substantial in amount. Under all the circumstances, if you should find that a substantial portion of human excrement was in these oysters, you may find that they were filthy to a substantial extent, even though

the filth was present to a degree that can be only observed under a microscope. It is for you to say, gentlemen, under all the circumstances, taking into account the character of the product and the character of the filth, if you find any, whether or not these oysters were filthy to a substantial degree.

It is for the Government to prove by the preponderance of evidence that these oysters were filthy to a substantial degree, and if you find that they have failed to do that, if after considering all the evidence you are in doubt, then it is your duty to find for the defendant.

Some of the experts, gentlemen, say the tests are unreliable. Some say they could not give an opinion unless they knew whether the beds were in a place likely to be polluted. Others say the presence of *B. coli* alone in large scores indicates the presence of sewage and other animal excrement. Some say Jamaica Bay was polluted; others, that it was not. The testimony of Mr. Parsons gives high scores, that of Miss Noble, examining for the city of New York, low scores; that of the Lederle Laboratories, low scores; that of Schwartz, low scores. Are the tests correct? Were the oysters submitted genuine? In other words, were they fair specimens and fair tests in these different scores? You must analyze all the evidence and discover the truth. It is for you gentlemen to do the hard work of deciding when doctors disagree. You may consider the amount of sewage poured into Jamaica Bay, the testimony of the experts who say it reaches the beds, the testimony of those who say it never could have reached the beds, or if so, only when dead and mineralized. All these facts are for your consideration. You have heard a vast amount of testimony, a vast amount of very novel and very interesting testimony. You heard the argument and conflict of the experts, and you have heard all the facts, and it all boils down to the very simple proposition of law, for you to determine upon these facts whether these oysters were substantially filthy or not.

There is one other thing which I have not mentioned: Certain oysters were examined, other oysters were not examined. The oysters examined, were, of course, very few as compared with the large bulk of 408 bushels of oysters. If you condemn the other oysters, which have not been tested here at all, that is, individually, specifically, you will have to find, of course, in the first place, that there was substantial filth in the oysters that were examined; in the second place that those were fair specimens, so that the other portion of the 408 bushels were similar, and would be properly condemned with those that were actually found to contain excrement. So the question is first whether any of these oysters were filthy to a substantial degree. If you find the oysters actually examined were filthy, to a substantial degree, and that is the result of your finding, and you find there is a preponderance of evidence to that effect, then those would be condemned. If you find they were fair samples of the rest, then you would condemn the rest.

I hope, and I believe I am perfectly clear. It is a narrow question to be determined, and involves the consideration of a large amount of conflicting evidence, and that, gentleman, if [is] your province.

Mr. BARNES. Will Your Honor allow me an exception? I think very likely Your Honor did not intend to charge—I except to Your Honor's charge that the jury must give the same weight to the testimony of experts for the defense as to that of the experts testifying for the Government, if you find they have equal qualifications.

The COURT. I mean by qualifications, Mr. Barnes, qualifications in all senses, as to ability and reliability, truthfulness and experience.

Mr. BARNES. That is all I want Your Honor to charge, that the question of credibility of witnesses is exclusively for the jury.

The COURT. It is exclusively for the jury.

Mr. BARNES. I will read another request: There is no evidence in the case that Mr. Holborrow, a city official, did not deliver the samples just as he took them, and in the absence of evidence to that effect you must accept his testimony, unless you say he is unworthy of belief.

The COURT. I so charge.

Mr. BARNES. I except.

Mr. CARLIN. I respectfully ask Your Honor to charge that if the jury finds that samples from this shipload of oysters scored under 50, they must find for the claimant upon all the evidence.

The COURT. I decline so to charge.

Mr. CARLIN. Exception.

The COURT. The question as to what is a substantial degree of filth here, is one for the jury.

Mr. CARLIN. I except.

The COURT. You may retire.

UNITED STATES v. ABBOTT BROS. CO.

(District Court, N.D. Illinois, May 4, 1916)

N.J. No. 4842

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.[94]

The United States attorney filed an information against the Abbott Bros. Co., alleging shipment from the State of Illinois into the State of Ohio, of a quantity of "Abbott Bros. Rheumatic Remedy," which was misbranded.

Misbranding of the article was alleged in the information for the reason that certain statements regarding the therapeutic or curative effects thereof, appearing on the carton enclosing the bottles containing the article, on the labels on the bottles, and included in a booklet accompanying the article, were false and fraudulent in that the same were applied to the article knowingly and in reckless and wanton disregard of their truth or falsity, so as to represent falsely and fraudulently to the purchasers thereof, and create in the minds of purchasers thereof the impression and belief, that it was in whole or in part composed of, or contained, ingredients or medicinal agents effective, among other things, as a remedy for rheumatism of every form and stage, for inflammatory rheumatism, for sciatica, for acute

[94] Affirmed, *Abbott Bros. Co.* v. *United States*, p. 831, *post*.

rheumatism, for all uric-acid diathesis, for all uric-acid troubles, and for eczema, and as a cure for sciatica, gonorrheal rheumatism, acute inflammatory rheumatism, rheumatoid arthritis, inflammatory rheumatism, and Bright's disease, when, in truth and in fact, it was not in whole or in part composed of, and did not contain such ingredients or medicinal agents.

The case having come on for trial before the court and a jury, the following charge was delivered to the jury:

ANDERSON, *District Judge.* Gentlemen of the jury: This is a criminal case, and in this case you are the judges of the evidence, the weight of the evidence, and the credibility of the witnesses. It is your exclusive province to determine what the facts are, but you are bound by the law as it is given to you by the court. During the course of the trial defendant's counsel objected to some statements made by the court in colloquy between court and counsel, or in ruling upon some evidence as to questions of fact. You will understand, gentlemen of the jury, that you are not bound by any statement that the court may make as to the facts in this case, but, as I have stated, you are the exclusive judges of the facts. If, in the course of these instructions, the court should make any statement of fact, that statement is not made, will not be made for the purpose of binding your judgments, controlling your minds, but only for the purpose of assisting and aiding you in coming to a correct conclusion upon the facts.

Now, Congress has forbidden the transportation of drugs in interstate commerce which are misbranded, and it is defined in the law which prohibits transportation, what that misbranding shall consist in. If a person transports in interstate commerce an article which is misbranded, as I shall define to you, the law says he or, in this case it, the defendant in this case being a corporation, shall be guilty of a misdemeanor and shall be fined not to exceed $200. Now, this statute says that it shall be an offense, a misdemeanor, to ship in interstate commerce any drug which is misbranded, it says for the purpose of this act an article shall be deemed to be misbranded in case of drugs if its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent. The word "therapeutic" means specifically the same as the word "curative." "Therapeutic" means pertaining to the healing or curative therein. You will understand it best in determining the questions here, the word "therapeutic" practically means the same as "curative." This statement, as you will see, in order to subject the defendant to a successful prosecution, should be false and fraudulent. The false statement needs no definition. A false statement is a statement which is not true. A fraudulent statement is a statement which is not true and which is made for the purpose of misleading some one—made for the purpose of gaining some advantage. Now, in this case the charge is made by an information by the district attorney; it is in one count. It charges that the defendant, a corporation, did on a certain day in November 1913, I believe—January 1913—the defendant shipped in interstate commerce 12 dozen, I believe it was, of bottles of a certain article, describing it. It sets forth that on the label and within

the package in which this article was packed there were certain statements made with regard to the curative and therapeutic effects of this so-called medicine. It is not necessary for me to read to you this information, as you will be allowed to take it with you to the jury room and can read it there, nor is it necessary for me now to read over to you the statements which are relied upon by the Government to make up this case—they are contained in the information and are upon the cartons and the bottle, which will go out with you if you desire, and you can then see just what they are.

Now, this information proceeds after setting out the fact that this shipment was made and that the carton and bottle, or the package contained in it, and the bottle contained on it certain labels, certain statements in the label and in the package, [and] avers that these statements were false and fraudulent in this, that the same were applied to said article knowingly, and in reckless and in wanton disregard of truth or falsity so as to represent falsely and fraudulently to the purchasers thereof, and create in the minds of purchasers thereof an impression and belief that it was in whole or in part composed of or contained ingredients or medicinal agents effective, among other things, as a remedy for rheumatism of every form and stage, and effective as a remedy for inflammatory rheumatism, and effective as a remedy for sciatica, and effective as a remedy for acute rheumatism, and effective as a remedy for all uric-acid diathesis, and effective as a remedy for all uric-acid troubles, and effective as a remedy for eczema; when, in truth and in fact, said article was not, in whole or in part, composed of, and did not contain, ingredients or medicinal agents effective, among other things, as a remedy for rheumatism of every form or stage; or effective as a remedy for inflammatory rheumatism; or effective as a remedy for sciatica; or effective as a remedy for acute rheumatism; or effective as a remedy for all uric-acid diathesis; or effective as a remedy for all uric-acid troubles; or effective as a remedy for eczema.

Now, to these things there has been entered a plea of not guilty, and that makes the issue which you are to try; and upon that issue, before the Government can ask a verdict at your hands it must establish all the material averments of the information beyond all reasonable doubt. There has been filed in this case a stipulation which relieves you of determining some of the facts put in issue by this plea. It has been admitted here before you that the shipment was made as averred of the articles as averred in interstate commerce at the time and in the place averred in the information so that with that stipulation in the record it leaves for you to determine simply these two questions:

1. Was there any statement within this package, or upon the label attached to this article, which was false; and

2. Was that statement, was such statement, if false, fraudulent?

If you find that the statement was false and fraudulent both, then your verdict should, of course, be guilty. If you should find that the statement was not false, then you need go no further, because it must be false and fraudulent. If you determine that the statement or any statement within this package or on this label is false, then you will proceed to consider whether or not it was fraudulent.

Now, you will notice that the statute does not require or provide that in order to make a defendant amenable to its provisions that every statement made in the label or in its packing, that its package or on the label shall be false or fraudulent, if its package or label shall bear or contain any statement regarding the curative or therapeutic effect of said article, or any of the ingredients or substances contained therein, which is false and fraudulent, it shall be misbranded within the meaning of this act.

So you will proceed to determine, gentlemen of the jury, first, whether or not the statements which are on the label and contained in the packages which were shipped, as the stipulation shows, were false, and if you determine that they were false, then you will proceed to determine whether they were fraudulently named; that is, made for the purpose of gaining some advantage, monetary or otherwise—in this case, of course, money.

In a criminal case a defendant is presumed to be innocent until he is proven guilty beyond all reasonable doubt, and this presumption of innocence remains with him throughout the trial; with it throughout the trial in this case, and before the Government can ask the jury to return a verdict of guilty, it must remove that reasonable doubt and overcome that presumption of innocence by proof beyond a reasonable doubt. A reasonable doubt, gentlemen of the jury, is what the term implies. It means a doubt for which a reason can be given. It is not a speculative or captious doubt, it is not a doubt conjured up by your own ingenuity or by the ingenuity of counsel, but it is a reasonable, substantial misgiving generated by the evidence or the want of it. As I have said, you are the judges of the evidence, the weight of the evidence, and the credibility of the witnesses. In determining what weight you shall give to the testimony of any witness you should take into consideration his manner, bearing upon the witness stand, his knowledge or want of knowledge of the things about which he testifies, his intelligence or his want of intelligence, and his interest or his want of interest in the result of the suit. Many of the witnesses who have testified here are what are known in law as expert witnesses—because all men cannot know about all things, and because some men by studied examination learn about things which the average man does not know, it is permissible for persons who are schooled in certain matters and branches of learning to state their conclusions and express their opinions for the guidance and assistance of juries in investigations of fact. Expert evidence is often spoken of as opinion evidence, and it is opinion evidence. When a man has devoted years of study to a science or a branch of learning, and has become proficient in that branch, it is of assistance to juries and to average men to have their opinions upon certain questions of fact about which the witness is informed and about which the jurors ordinarily are not informed. Now, when you come to determine what weight you will give to the testimony of an expert witness, you will apply the same rules that you will apply to any other witness so far as they are applicable. In other words, you will inquire what interest, if any, the witness has in testifying in the case, what his knowledge or opportunities are for knowing the things about which he testifies, what his opportunities and quali-

fications are for expressing the things which he is allowed to express upon the witness stand, and when you come to consider the testimony of what are not properly considered expert witnesses, but non-expert witnesses and average men. The man who follows his trade of blacksmith, barber, or farmer, or lawyer, for that matter, when it comes to medicine and he states upon the witness stand that he had a certain disease and that he took a certain remedy, and that it cured him, in determining what weight you will give to his testimony you will consider what knowledge he has upon the subject, what he knows, what particular investigation or experience—investigation he has made or experience he has had which will enable him to say to you that he had a particular disease or what he knows about medicine or the curative effects of medicine whereby he can state to you that a certain thing that he took effected a certain remedy; and when you are to determine whether or not this medicine will or will not do things which are claimed for it, and you are weighing the testimony on the one side of experienced and learned men who have given their lives to the study of this question, giving consideration to their testimony in determining what weight you will give to it when you come to considering it to the testimony of witnesses who have never studied such subjects and have had no opportunity to become acquainted with such subjects, you will then decide what weight you will give to the opinions which they express as to what afflictions they were suffering from and as to what effect, if any, the medicine which they took had upon those afflictions.

You will also understand, gentlemen of the jury, in our system of jurisprudence the unsworn testimony—statement of a third party—is no evidence, and you will not give weight to the statements made by many witnesses upon the stand, that Dr. So-and-so said he had rheumatism. Dr. So-and-so is not here upon the witness stand, and that is the unsworn statement of a third party and is hearsay evidence and is not regarded as of weight in a court like this.

Now, you will take this case, gentlemen of the jury, weigh the evidence in the light of the instructions which I have given to you. If you, after having considered this evidence, weighed and compared it in the light of the instructions which I have given to you, have a reasonable doubt as to the guilt of this defendant, it is your duty to return a verdict of not guilty. But, if upon full consideration you determine that the Government has established the averments of the information beyond a reasonable doubt as defined to you, it is your duty to return a verdict of guilty. A good deal of evidence has been allowed to go before you upon the question of good faith—ordinarily what somebody said to the defendant or what the defendant said to somebody else is not evidence, but where there comes a question in the case as to whether or not a defendant, and in this case the defendant's officers have acted in good faith, then the information that has come to him, whether it be reliable or not and which he claims to have acted upon becomes pertinent for the jury to consider. Now, the president of this defendant has taken the witness stand and testified as to the various persons who have told him that they have taken his medicines and of the curative effects

it has had, and that evidence has been allowed to go to you, that bearing upon the question whether he honestly believed that this medicine could do the things which are claimed for it. In determining, gentlemen of the jury, the question of the good faith of the defendant you will take into consideration the fact that the president of this organization, the only officer who has appeared here and testified here for it, who himself says he originated the manufacture of this thing and has superintended it throughout the course of this business—he himself says that he is neither a physician nor a chemist, that he has never studied medicine nor the practice of it, that he has never studied chemistry nor the science of chemistry, and when you are asked to find that he acted in good faith in selling to persons who supposed themselves to be afflicted with certain diseases, this so-called remedy, you will take into consideration the fact that he himself admits that he is neither a physician nor a chemist, and bear those things in mind, as well as the other circumstances in the case, determine whether or not if you find that these statements were not true they were made either knowing them to be untrue or with such a reckless disregard of the truth as to amount to fraud.

You will have nothing to do with the punishment in this case if you find the defendant guilty. If you find the defendant guilty the duty of inflicting the punishment which can not be anything but a fine not to exceed $200, is imposed upon the court. You have nothing to do except to determine the simple question whether or not the defendant is or is not guilty. Forms of verdict will be provided to you. If you find that the defendant is guilty the form of your verdict will be: We, the jury, find the defendant guilty as charged. If you find the defendant not guilty the form of your verdict will be: We, the jury, find the defendant not guilty as charged in the information. The verdict is signed by all the jurors.

The COURT. Any suggestion?

Mr. ANDERSON. If Your Honor please, I do not think the fact as to what constitutes fraud was brought out sufficiently. The court instructed the jury as I understood it, that fraud is where the proposition was false and was put out to mislead the public.

The COURT. Knowingly; I intended to use that word.

Mr. ANDERSON. And, further, the proposition as the charge now stands, I believe that the jury are instructed to disregard all statements as to what physicians may have told the witnesses, although they told that to Mr. Abbott, I think.

The COURT. Except as bearing upon the question of good faith.

Mr. DICKINSON. Your Honor, in stating the charge, made no refcrence to statement in the pamphlet.

The COURT. I said statement on the label; the charge is specific. It is so understood, gentlemen of the jury, the statement in the package or on the label are to be considered by you statements in the package as well as on the label.

You have no exceptions?

Mr. ANDERSON. None further than I have stated and which you corrected.

UNITED STATES v. SIMON ET AL.

(District Court, E.D. Pennsylvania, May 10, 1916)

N.J. No. 4979

Information charging violation of the Food and Drugs Act. On motion to quash. Motion denied.

DICKINSON, *Judge*. The district attorney, in his official capacity, instituted proceedings against the defendant for a violation of the food and drugs statute through and by an information. The defendant has moved to quash the proceedings because, as is averred, they did not in actual fact have the previous sanction of an allowance by the court. In every proceeding, whether criminal or civil, before the cause can be determined by a court and judgment go against the defendant, the court must have jurisdiction of the subject matter and of the person of the defendant. The first is necessary because the court cannot proceed to render judgment unless vested with the lawful power and authority to do so. The second is necessary in order to meet the requirement of justice that both sides shall be heard. Although, therefore, jurisdiction of the subject matter may exist, some process must be resorted to in order to bring the defendant into court. This process, it is clear, must be a lawful process in the sense that it must be such as the law recognizes as sufficient to justify the finding that the parties whose rights are to be adjudged are before the court with the opportunity to be heard. Hence we have provisions made for forms of writs and the manner of service. The established practice of the courts supplies us with information of what these provisions are. The sanction or authority for some of them is to be found in statutes; for others their accepted usage in a long-established practice or in the recognition of the inherent power of the courts to adopt and issue appropriate writs of process. In criminal procedure against individuals several modes of bringing the defendant to trial have come to be well known and accepted as usual and because of this, regular. They are all followed by a trial in open court. One is by a complaint, followed successively by a warrant of arrest, a preliminary hearing before a magistrate, and an indictment by a grand jury. Another is by the presentment of a grand jury followed by the issuance of a bench warrant without the preliminary complaint and hearing. Still another is an information emanating from the official representative of the sovereign power in lieu of the other procedure preceding the indictment. In the course of time some of these processes, although recognized as lawful in the sense of being authorized by law, were, or were thought to be at least, fraught with the possibility of abuse resulting in oppression. Out of this sprang the provisions of the Constitution of the United States and like provisions of the constitutions of different States. The practice of the courts must, of course, yield to these mandates. The practice followed in the instant case must therefore meet these two tests. It must be in accord with recognized procedure and it must not be within the inhibitions of the Federal Constitution.

The legal literature of the subject supplies us with a rich mine of learning, an opening into which is afforded by the opinion in *Weeks*

v. *United States*, 216 Fed. Rep. 292. Into this, however, we need not delve further than to extract the fact that prosecutions by information have long had a recognized place in criminal procedure. This narrows the inquiry into the constitutional provisions. It is clear that they are directed against arrests and seizures, and because of this have no application to the case before us. In form, informations proceed with the leave of court. Whether this leave is made formal or actual is a matter of practice to be regulated by the courts. Actual leave may be exacted, or it may be permitted to be assumed, unless and until challenged. The latter we think to be the established practice, and to be on the whole the better practice, because it leaves the propriety of the proceedings to be determined on its merits. The distinction between proceedings in which the sovereign is directly concerned and those which directly concern private persons is of doubtful practical value. It narrows and limits the control of the courts over its process by shifting the inquiry from the broad one of whether the proceeding should go on to a narrow inquiry into the mere nature of the offense charged.

The practice adopted, as we are informed, in the Western District of this circuit of requiring actual leave before permitting informations to be filed presents certain advantages, as does the practice followed in other jurisdictions of permitting leave to be assumed until challenged, but each comes in the end to be the same.

We find no abuse of process in the present case and no reason to revoke the leave, by virtue of which the information purports to have been filed.

The motion to quash is denied.

UNITED STATES v. TUBERCLECIDE CO.

(District Court, S.D. California, May 15, 1916)

252 Fed. 938; N.J. No. 5616

Information alleging violation of section 2 of the Food and Drugs Act. Trial before the court. Judgment for defendant.

On May 15, 1916, the United States attorney for the Southern District of California, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against the Tuberclecide Company, a corporation, Los Angeles, Calif., alleging shipment by said company, in violation of the Food and Drugs Act (act June 30, 1906, ch. 3915, 34 Stat. 771), as amended (act Aug. 23, 1912, ch. 352, 37 Stat. 416), on or about August 25, 1914, from the State of California into the State of Arizona of quantities of an article labeled in part "Tuberclecide," which was misbranded.

It was alleged in substance in the information that the article described as "Tuberclecide" was misbranded for the reason that certain statements appearing on the labels falsely and fraudulently represented it to be effective as a remedy for tuberculosis (or consumption), and effective when used in connection with "Metablitone" as a reliable treatment for tuberculosis, and effective when used in connection with the plasters accompanying said articles as a

remedy for tuberculosis, and effective when taken in doses of 14 drops in the capsules accompanying said articles as a remedy for tuberculosis, when, in truth and in fact, it was not so effective when used as described, or when used in connection with any plasters, or when taken in any quantity in any capsules or in any other manner. It was alleged in substance that the article was misbranded for the further reason that certain statements included in the circular accompanying the article falsely and fraudulently represented it to be effective as a remedy, reliable treatment, and cure for tuberculosis, and also to be effective as a remedy, reliable treatment, and cure for tuberculosis when used in connection with the tonic, when taken in number O capsules, and when used in connection with the chest pads, when, in truth and in fact, it was not so effective when used as described, or when taken in any capsule, or when used with any chest pads.

TRIPPET, *District Judge* (orally). This action is brought under the paragraph denominated third, of section 8 of the Food and Drugs Act, approved June 30, 1906. That third paragraph reads as follows:

> If its package or label shall bear or contain any statement design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein which is false and fraudulent

it shall be deemed misbranded within the meaning of the act.

The action is one alleging that this shipment in interstate commerce contained a misbranding under the paragraph quoted. It is necessary for the Government to establish that the package or label was both false and fraudulent. The word "Tuberclecide" is used, and that is claimed to be a misbranding. The word "Tuberclecide" is a coined word. It has no meaning aside from the meaning which is given to it by the people that coined it and put it out. The evident purpose of the word and of the representations accompanying the word, is to indicate that it is a remedy or cure for tuberculosis. The representations do not go any further, as I understand it, than to assert that it is a remedy for tuberculosis. Now, let us consider first whether or not this thing is false. I want it distinctly understood that I have not decided, and will not decide, because it is not necessary, that this medicine will cure or will not cure, that it will remedy or will not remedy, tuberculosis. It is not necessary for me to decide that it is or is not a remedy for it, and I am not going to decide that. I may say, however, that that is one of the things which it was necessary for the Government to prove—that the claims made for this medicine were false.

The Government produced physicians, the most eminent in this city, graduates of the best colleges, who testified upon the subject, and I take it from their testimony that they conclude that there is no cure, in the sense in which that word is understood, for tuberculosis; that there is no specific remedy for it. In that connection, however, I do not construe this medicine as being advertised as a specific. I think it is fair to say that they do not advertise that it is a specific for consumption. The physicians brought by the Government testified that creosote carbonate has been discarded, as a remedy for tuberculosis, for a great many years. Creosote carbonate is one of the ingredients of this medicine. According to the analysis

given by the chemist testifying on behalf of the Government, that is the principal ingredient of this medicine. Now, the defense brings an equal number of physicians. So far as I know, they are regular physicians, of good repute, graduates from good colleges, who testify that creosote carbonate is used today as a remedy for tuberculosis. They not only do that, but they bring standard medical works, one printed this year, which say that it is used as a remedy for tuberculosis.

Aside from that, however, the Government produced a chemist who testified that he analyzed a bottle of the stuff, and it seems that he used practically all of the contents of the bottle to make the analysis; there is not a half a teaspoonful left in the bottle. He found certain things in this bottle. The man that got up this medicine testified that it had many other things in it, at least four more ingredients than the chemist gave. The Government offers no proof whatever that the testimony of that man is false. There is no proof offered on the subject, but I believe it is a fact that chemists cannot always tell what is in a mixture. It seems to me that if the Government claimed that this medicine did not contain the four other things which the man that manufactured it said it contained, it was up to the Government to produce that testimony. The Government has another quantity of this medicine and refused to produce it for the defense. I do not like that attitude.

Now, these physicians, on behalf of the Government, testified that a medicine containing the ingredients which the Government chemist testified this medicine contains, would have no remedial effect upon a consumptive. They were testifying about this medicine as analyzed by this chemist. They were not testifying about this medicine according to its true properties as proven by undisputed evidence in this case. There are four other ingredients in this medicine according to the undisputed testimony of the manufacturer. They do not say anything about the medicine as it is proven to be; that is, about the actual ingredients of the medicine. I repeat that I am not deciding that this stuff is a remedy or is not a remedy for tuberculosis.

In addition to proving that the statements are not true, the Government must show that they are fraudulent. Now, a man may make a statement that is not true, but if he believes it to be true, and is warranted by his information in making the statement, it is not fraudulent. What do these people do that are going to buy this formula and sell this medicine. They get physicians to examine patients that have been treated with it. I think they had four physicians to investigate it, and these physicians advised them that it was a remedy for tuberculosis. Aside from that, they bring three physicians here who say that they have prescribed this stuff to patients, and that it has proven itself by experience to be a remedy. The Government doctors never prescribed it to any person, while one of the witnesses for the defense testified that he had treated 3,000 patients with it, with good results. Do not these people representing defendant have a right to act upon that? Can anybody say that they willfully falsified anything in the face of that testimony? We all know from our own observations that doctors disagree. I have heard them disagree in making sworn statements in this court many

a time. Schools of physicians disagree. One school thinks that the other school does not know anything, and that they are practicing fraud and deception. Can it be fairly said that a man is practicing a fraud when he acts upon the advice of a physician, although other physicians disagree with him? Have we come to such a pass that fraud can be attributed to a man when he accepts the advice of a doctor, or several doctors, notwithstanding that other physicians may disagree with those whose advice he accepts? For my part, I cannot see why a man cannot act in perfectly good faith in following the advice of any doctor that he chooses to consult, if he acts with fair intelligence in getting that advice. The doctors that advised these people are all licensed physicians, and why could they not accept their advice?

Let me illustrate my idea of this case by a supposititious one. Take vaccine. Vaccine is a coined word. It means what the coiner of the word meant for it to mean; namely, that vaccine is a preventive of smallpox. Suppose a party should transport vaccine in interstate commerce under an advertisement that it was the only known remedy for preventing smallpox, and that it would prevent smallpox. Suppose the Government were to prosecute him under this statute. Suppose the Government could bring physicians who would testify that vaccine would not prevent smallpox; that it was not only not a preventive, but that it was positively injurious to those who used it. This is by no means an improbable presumption. Then the defense would bring in an array of physicians to testify that it would prevent smallpox. Would any court convict the man that shipped the article for fraud in misbranding it?

The prosecution in this case seems to want to make a point of the fact that the man who prepared the formula for Tuberclecide was not a licensed physician, nor a graduate of any college, although he did practice medicine for several years. Doctor Jenner, who discovered vaccine, did not do it by any scientific method. He discovered it from deduction from the fact that milkmaids did not have smallpox, or if they did have it at all, they had it only in a mild form. It did not take a graduate from any college, or a licensed physician, to make that deduction, and the same might probably be said concerning Tuberclecide.

I cannot see how these people were practicing a fraud in the face of the testimony in the case. They believed they were doing good.

The case will be dismissed.

UNITED STATES v. THE ATHLOPOROS CO.

(District Court, District of Connecticut, May 19, 1916)

N.J. No. 4834

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

The United States attorney filed an information against The Athlophoros Co., a corporation, New Haven, Conn., alleging shipment by said company from the State of Connecticut into the State

of California of a quantity of an article labeled "Athlophoros" which was misbranded.

Misbranding of the article was alleged for the reason that the following statements regarding the therapeutic or curative effects thereof, appearing on the label (on label of bottle and on carton), to wit, "Athlophoros, Remedy for Sciatica, Gout, sick headache," and included in a circular or pamphlet accompanying the article, to wit, "It reaches the liver and kidneys, cleansing them from irritating substances, and restoring the organs to regularity and health. The unpleasant symptoms will soon pass off, leaving the patient free from neuralgia. For sick headache—Athlophoros has proved an absolute specific * * *. Our observation and experience warrant the positive claim that Athlophoros is an absolute cure for * * * Neuralgia wherever and whenever these diseases alone exist," were false and fraudulent in that the same were applied to the article knowingly and in reckless and wanton disregard of their truth or falsity, so as to represent falsely and fraudulently to the purchasers thereof and create in the minds of purchasers thereof the impression and belief that it was, in whole or in part, composed of, or contained, ingredients or medicinal agents effective, among other things, as a remedy for sciatica, gout, and sick headache, for cleansing the liver and kidneys from irritating substances and restoring those organs to regularity and health, for curing neuralgia, and as a specific for sick headache, when, in truth and in fact, it was not, in whole or in part, composed of and did not contain such ingredients or medicinal agents.

The case having come on for trial before the court and a jury, the following charge was delivered to the jury:

THOMAS, *District Judge.* On the 14th of May 1915, the learned district attorney for the United States for this district filed a criminal information against the defendant, the Athlophoros Company, charging it with a violation of what is known as the Pure Food and Drugs Act. To this information the accused has pleaded not guilty. This puts in issue every material allegation contained within the information, and the burden of proof rests upon the Government to establish the truth of all those allegations beyond a reasonable doubt.

Section 8 of the Food and Drugs Act, as amended by the act of August 23, 1912, provides, with respect to the misbranding of drugs, as follows:

That the term "misbranded" as used herein, shall apply to all drugs, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular. That for the purposes of this act an article shall also be deemed to be misbranded, in case of drugs, if its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent. (The court here reviewed the charges in the information.)

Those are all of the important allegations of this information. As I stated, the defendant's plea of "Not guilty" puts the burden

of proof upon the Government to establish the truth of all of those allegations beyond a reasonable doubt.

The jurisdiction of the Federal court is invoked because the act of Congress is intended to reach an interstate shipment, and there is no question raised in this matter of the interstate shipment. The object of the act under which this prosecution is brought is to prevent the carrying in interstate commerce, that is, from one State to another, of drugs which are worthless and injurious when they are transported with false and fraudulent statements as to their curative or therapeutic effects, the object being to prevent credulous and ignorant people, and to protect the public generally, from having imposed upon them as medicine, things to be used as medicines, drugs which will not perform the functions which it is claimed they will perform, and to prevent people being injured by the use of harmful drugs. In this case it is claimed by the Government that this article is misbranded because the packages contain certain statements as to their curative or therapeutic properties which the Government claims are false and fraudulent.

Now, gentlemen, you have given very patient consideration to the extended arguments of able counsel in behalf of the Government and for this defendant, to both of whom you and I are indebted for their courtesy and their efforts to expedite this trial. Each one of them has, with much ability and free from the personalities which sometimes enter the trial of a long case, presented the evidence and their respective claims. Of course, it is now my duty to give you the principles of law which are applicable, and which you must carefully apply to that state of the case which you find true from the evidence. You are aware, doubtless, that your verdict, as does the verdict of every other jury, consists of two things—first, the truth as you find it; and second, the principles of law applicable to that truth. In that way you reach the result which we call a verdict. These principles of law affect either the whole or some particular feature of the case, and in any instance you are to bear them carefully in mind and diligently apply them wherever they are applicable.

Courts are established to administer the law and enforce its execution. The law is the only standard by which judges and jurors can be governed, and in considering your verdict you should be governed by the law as it is given you by the court, and by the evidence as you hear it from the witness stand. You have heard the evidence offered on both sides of this controversy. From that evidence you must decide what the facts are and what the truth is.

The attorneys have had a wide range of discussion. They have had complete freedom of argument before you upon all questions of fact and have asked you to draw certain inferences and conclusions from either conceded or proven facts. It is their privilege in the argument to criticize the evidence, the attorney for the Government to criticize the conduct of this defendant, and the attorney for the defendant to criticize the conduct of the Government and its witnesses, to attack the credibility of the witnesses. Arguments of counsel are not evidence, however, and only insofar as their respective claims are, in your opinion, supported by the evidence in the case should their claim receive consideration. You should arrive at your

verdict only after a cool, calm, careful, and scrutinizing consideration of all the evidence in the case.

In all criminal cases a person charged with crime, as is charged here by virtue of the provisions of this act, starts out at the threshold of the trial with the presumption in his favor that he is innocent of the crime with which he is charged. It is a humane provision of law, and it is based upon the theory that neither a jury nor the court shall presume that a person is guilty simply because he is charged with a violation of a criminal statute, but, on the contrary, the law presumes that all persons are honest and righteous in their dealings with their fellow men. So that if a criminal information has been filed by the district attorney, yet that information does not take away from this defendant the presumption of innocence; that presumption remains with it throughout the trial and it is only removed when you, as a result of the conscientious consideration which you are required to give to the evidence in this case, conclude that the defendant is guilty of the crime with which it is charged. Moreover it is a fundamental rule of law that the Government which makes this charge shall satisfy you of the guilt of the accused beyond a reasonable doubt.

Before we come to the questions particularly involved in this case I ought to and do remind and charge you that you, and you alone, are the sole judges of all questions of fact which arise here, and you are to determine those questions upon a careful consideration of all the evidence before you without direction or suggestion from the court as to what weight or value you should give to all or any part of the testimony, nor are you in any way to be governed in your conclusions by any opinion the court may express or even seem to express.

In analyzing testimony and drawing conclusions from it a juror must use all of his experience, his knowledge of human nature, his knowledge of human events, his knowledge of the motives which influence and control human action, and test the evidence in the case according to such knowledge and render his verdict accordingly.

It is properly within your province, in listening to the testimony of witnesses, to observe their manner and bearing, their intelligence, their character, their means of knowledge, and to take into consideration any interest or bias or prejudice any witness may have or entertain, and reconcile so far as possible any conflicting testimony. In weighing the evidence and determining the credibility of the witnesses, and each of them, you should look to the manner and demeanor of each witness, to the readiness and willingness, or tardiness or unwillingness, if any, in answering; to the consistencies or inconsistencies of his testimony; to the interest or want of interest, if any, upon the one side or the other; to the witness' means of knowledge and opportunity for knowing the facts he testified to and professes to know and understand; to the reasonableness or unreasonableness, the probability or improbability of the facts and circumstances related by the witnesses when considered in connection with all the facts and circumstances in evidence before you, and having thus carefully considered all of these matters you must fix the weight and the value of the testimony of each and every witness and the evidence as a whole.

In considering this case and in drawing your conclusions, you may be guided to some extent by the testimony of expert witnesses. I therefore deem it necessary to instruct you with reference to the evidence of such witnesses. An expert witness is one who is skilled in any particular art, trade, or profession, being possessed of peculiar knowledge concerning the same, acquired by study, observation, and practice. The jury is not necessarily bound by expert testimony, but such testimony should be considered by you in connection with all the other evidence in the case. Their evidence is subject to your consideration, to your supervision, and to your judgment. Such testimony is to be taken and treated by you like the evidence of other witnesses; and their testimony, their opinions, are subject to the same rules of credit or discredit as the testimony of other witnesses, and are not necessarily conclusive upon you. Whether the matters testified to by them are facts, whether they are true or false, and the value of their opinions, is to be determined by you and you alone; and you will carefully consider and examine their testimony in this case, subject to the same rules of credit and disbelief as the testimony of other witnesses.

The only issue of fact in controversy in this case, gentlemen, which must be determined by you, is whether the product described in the information was misbranded. The test of this misbranding is what the statements appearing on the label mean to the ordinary man, and when I refer to the label I mean likewise the circular or pamphlet which was enclosed in the package as it was transmitted in interstate commerce. In other words, what the ordinary man reading the label would understand as to what properties Athlophoros had or the curative or therapeutic effects it had. I will not attempt to define or set out the various ailments or physical disabilities which it is claimed the statements contained that this drug would cure, but these diseases or physical ailments you will understand to be such diseases or ailments as the public generally understood and the generally accepted meaning of those drugs by the public, and you are not confined in your deliberations in applying to these diseases the technical medical definition or term which has been scientifically limited by some of the witnesses. I have indicated the generally accepted understanding of the public as to what these terms mean and what physical disabilities they include, and you will apply the curative or therapeutic effect of the drug to the definition as generally understood. And you will also understand that it is not only necessary for the Government to show beyond all reasonable doubt that the statements that were made were false in fact and that the drugs did not have the curative or therapeutic effects that the statements attributed to them, but the Government must further prove beyond a reasonable doubt that the statements are fraudulent and that the defendant knew them to be false, and that they were falsely made with the intent to deceive the public. If you find they were not false, then your inquiry is ended; if you find they were false, you have to go on further and find they were fraudulently—that they were fraudulently made with intent to deceive the public or induce the purchaser to buy them because of such statements. If you believe that these statements were false and the defendant knew they were false and made them with the intent to deceive the purchaser, or if, acting as an ordinary pru-

dent man would act under like circumstances, he should have known that the statements were false, then you will find that the statements were falsely made as charged in the information, and under such circumstances your verdict would be guilty. On the other hand, if you have a reasonable doubt as to whether the statements were false or whether they were fraudulently made, then it would be your duty to acquit this defendant. So that the mere falsity of the statements would not be sufficient to justify you in returning a verdict of guilty, but in addition to that it requires the further proof that the defendant made them knowingly and with intent to deceive and defraud.

It will not be necessary for me to enter into any definition of these various terms, but suffice it to say that a fraudulent statement is a statement which is recklessly made without knowledge of its truth, but which is really false, and an unqualified statement of that which one does not know to be true, or has no reasonable ground to believe to be true, is equivalent to a statement of that which one knows to be false. This phrase "false and fraudulent" must be taken with its accepted legal meaning, and thus it must be found that the statement contained in the package was put there to accompany the goods with actual intent to deceive—an intent which may be derived from the facts and circumstances, but which must be established. That false and fraudulent representations may be made with respect to the curative effect of substances is of course obvious. The owner has the right to give his views regarding the effect of his drugs. But state of mind is itself a fact and may be a material fact, and false and fraudulent representations may be made about it; and persons who make or deal in substances or compositions, alleged to be curative, are in a position to have superior knowledge and may be held to good faith in their statements.

In determining whether the defendant knew the statements were false and fraudulently made, you will take into consideration all of the evidence which was offered and admitted surrounding the placing of this drug on the market, which led to placing it in interstate commerce as charged in the information, and you will consider all of the testimony with regard to these statements that is before you from the inception, dealing or treating with this drug up to the time of the filing of this information, May 22, 1915, and from all of these statements as disclosed by the evidence bearing on the conduct of the defendant with relation to this drug, determine whether it acted as an honest, fair-minded, average man would act under like circumstances, and whether it had reason to believe, acting as a reasonably prudent man would act under such circumstances, and that Athlophoros did contain the curative or therapeutic effects which are attributed to it in the various statements. In this case a number of physicians have testified, among whom, if I remember correctly, are some specialists. A chemist or analyst testified regarding the ingredients, about which there has been no dispute. The testimony of the Government is confined largely to expert medical evidence, except the testimony of the chemist or analyst. They have testified with relation to the sodium salicylate contained in this drug as disclosed by the evidence, and the curative and therapeutic effect of sodium salicylate, based upon their experience as practitioners and likewise upon their reading in medical journals and treatises by emi-

nent doctors. The defendants claim to have established the value of sodium salicylate in rhemuatism, and I take it there is no contention about its value in what is known as acute articular rheumatism. The defendant further claims in that connection that these various diseases that are enumerated on the carton and in the literature are what are known as kindred ailments. If you find from the evidence that these various diseases enumerated on this carton and bottle are kindred ailments, kindred to rhemuatism—if you find that to be true. you may take that into consideration as bearing upon the question of good faith or bad faith.

Perhaps at this point I ought to call your attention to this question of testimonials. You will understand that I said to you yesterday that they were not entered as proof of the truth contained in those letters, but merely bearing upon this charge or question of fraud—question of intent. If they received such letters as those, assuming those letters to be true, it is claimed that it is an evidence of the fact that they were acting in good faith in continuing their business right down to the date of this information and labeling their article as they have labeled it.

It is not my purpose to go into an analysis of the testimony or give you a synopsis of my recollection of it. It has been reviewed by counsel for both sides, and while you are not bound by their recollection of it, you will give their statements, their version of it, such consideration as you think it is entitled to receive.

In this case, while the Government must prove beyond every reasonable doubt the material allegations of the information, this need not be done with relation to every disease which is named upon this label or in the statement which is included within this package as it was transmitted in interstate commerce. If you believe from the evidence that this drug will cure many of the diseases which are named on the label or package but will not cure others in which it is alleged that it would effect a cure, and believe beyond a reasonable doubt that there are some ailments named upon the label or the literature or statement enclosed with the package, as charged in the information, concerning which the statements were false and known to be false at the time they were made, and were made for the fraudulent purpose, as charged in the information—if you are so convinced beyond a reasonable doubt of the falsity of the statements with relation to one of the diseases—then it would be sufficient to support a verdict of guilty; and if you are so convinced, your duty would be to return a verdict of guilty. But if you have a reasonable doubt as to all of these, then your duty would be to return a verdict of not guilty.

Throughout the charge I have told you that the Government must prove the material allegations of the information beyond a reasonable doubt. By reasonable doubt it is not meant that the proof should establish this defendant's guilt to a certainty, but merely that you should not convict unless from the evidence you find the defendant guilty beyond a reasonable doubt. Speculative notions or possibilities arising upon mere conjecture, not arising nor deducible from the proof or from the want of it, should not be confounded with reasonable doubt. A doubt suggested by the ingenuity of counsel, or by your own ingenuity, not legitimately warranted by the evidence,

or the want of it, or one born of merciful inclination to permit the defendant to escape the penalty of the law, or one prompted by sympathy, is not what is meant by reasonable doubt. It is an honest, substantial misgiving, generated by the proof or want of it; that is, such a state of the proof as fails to convince your judgment or conscience and satisfy your reason of the guilt of the accused. If the evidence, when carefully examined, weighed, compared, and considered, produces in your minds a settled conviction or belief of the guilt of the defendants—such an abiding conviction that you would be willing to act upon it in the most weighty and important affairs of your own lives—you may be said to be free from any reasonable doubt and may find a verdict in accordance with that conviction or belief.

I have been requested by the defendant to make certain charges. I will take them up by paragraphs.

First, I charge as requested. I think I have substantially covered it.

First. This offense is that the defendant misbranded its label and circular accompanying the remedy by statements as alleged in the information regarding the curative or therapeutic effects of the medicine which, it is claimed, were false and fraudulent. If, then, the statements were not false and fraudulent, no crime has been committed and the law has not been violated. In other words, the gist of this action is that the statements were both false and fraudulent.

Second. In deciding whether they are false and fraudulent, I would instruct you that the expression "false and fraudulent" has a well-defined meaning in the criminal law. The word "false" means untruthful in its ordinary sense. The word "fraudulent", as used in this criminal statute and as a very material word in the allegation in this information, which charges the defendant with fraudulently representing certain things, is given its legal meaning, and that is that the defendant deliberately planned, and it was its purpose and intent, to deceive the public. In other words, that it made such false statements regarding the curative or therapeutic effect of the remedy, well knowing that the remedy contained nothing in its ingredients which could operate beneficially and as a remedy for the various ailments it pretended to benefit, and this for the sole purpose of deceiving the public.

Third. That the statements as to the curative or therapeutic effects of this remedy must be both false and fraudulent, within the meaning I have described. And in this connection I would inform you that it is well recognized that the curative properties of articles purveyed as medicinal preparations are matters of opinion largely, and the contrariety of views among medical practitioners and the conflict between the schools of medicine are imperfectly described. If you should find from the evidence that the defendant made its statements based upon an honest opinion arising out of this contrariety of views of medical practitioners and this conflict between the schools of medicine regarding the curative and therapeutic effect of the ingredients, you may take those facts into consideration as bearing upon the good faith of the defendant and upon his honest intention to put out an article labeled with such statements as he honestly believed to be true,

and as bearing upon the question of fraudulent intent. With these variations I charge paragraph three.

Fourth. In order for you to find this defendant guilty of the offense charged, you must find that the statements of the curative and therapeutic effects of this remedy were a false representation of a fact; in other words, that in labeling the article as a remedy or cure as alleged it was nothing of the sort from any point of view. If you find that there is honest diversity of opinion among the medical profession and among schools of medicine upon the curative or therapeutic effect of the ingredients of the medicine, with reference to the diseases named, and this defendant acted upon this honest opinion, this evidence will then bear upon the question of whether it made any false statements and which were made fraudulently for the purpose of deceiving the public. Of course, if you find that it did not make them fraudulently, it would then be your duty to acquit the defendant.

Further, that the use of the word "fraudulent" in this prosecution requires the Government to prove such a state of facts regarding the properties of the remedy sold as alleged, which imply a knowledge on the part of this defendant that the medicine will not do the thing that is asserted on the label or circular. In other words, it must show that the so-called "remedy" is absolutely worthless as to its curative or therapeutic effect upon the ailments for which it is claimed, and this the Government must prove beyond a reasonable doubt. If the Government has not proved to you, beyond a reasonable doubt by facts and circumstances, that the remedy is absolutely worthless as to its curative or therapeutic effects upon the ailments or diseases claimed for it, or any one of them set out in the information, then you must find that the defendant is not guilty and render your verdict accordingly.

Further, that the word "fraudulent" is descriptive of the wrongful motive with which the statements are made, and it is the duty of the Government to satisfy you beyond a reasonable doubt that the statements were made with that wrongful motive for the purpose of deception. If, as I have said before, the motive was an honest motive, from all the facts and circumstances surrounding the preparation and sale of the remedy, due to the fact that there is a contrariety of views in the medical profession regarding the curative or therapeutic effect of the remedy, or due to any other fact in evidence, then your verdict must be for the defendant, for under such circumstances the statements cannot be held to be false and fraudulent.

I further charge you that in considering the question as to whether the statements alleged in the information are false and fraudulent, you are to consider not only the statements upon the carton but upon the bottle and in the circular, and all of them, and from the entire context you are to draw your conclusions whether or not they can be said to be false and fraudulent within the meaning I have described. If the statements alleged as false and fraudulent are matters only of opinion, taking them all as I have stated, based upon the contrariety of views of practitioners and schools of medicine as to the curative or therapeutic effect of the remedy employed, you should take this seriously into consideration as bearing upon the good faith or the bad faith of the defendant, as bearing upon the

defendant's honest belief that the statements on the carton and the literature were true and were not made with fraudulent intent.

Paragraphs 8 and 9 I must decline to charge. Eight I will charge in a modified form:

That you may take into consideration the statements upon the bottle and within the circular relative to the use of Athlo Tablets in connection with the Athlophoros, as an aid and as a part of the remedy, and when this bottle of Athlophoros was sold to the purchaser that Athlo Tablets was really an assential part of the remedy—all bearing again on its good intention.

The COURT. If you wish, Mr. Webb, you may have an exception to refusal to charge paragraph nine.

Mr. WEBB. Exception to the modification.

Mr. SPELLACY. The Government has no requests.

Gentlemen, you may retire to the jury room and when you have arrived at your verdict you will make it known by your foreman.

UNITED STATES v. COCA COLA CO.

(Supreme Court of the United States, May 22, 1916)

241 U.S. 265; N.J. No. 4801

Error to the Circuit Court of Appeals for the Sixth Circuit, affirming judgment of District Court for the Eastern District of Tennessee. Judgment reversed.[95]

Mr. Justice HUGHES delivered the opinion of the court.

This is a libel for condemnation under the Food and Drugs Act (June 30, 1906, ch. 3915, 34 Stat. 768) of a certain quantity of a food product known as "Coca Cola" transported, for sale, from Atlanta, Ga., to Chattanooga, Tenn. It was alleged that the product was adulterated and misbranded. The allegation of adulteration was, in substance, that the product contained an added poisonous or added deleterious ingredient, caffeine, which might render the product injurious to health. It was alleged to be misbranded in that the name "Coca Cola" was a representation of the presence of the substances coca and cola; that the product "contained no coca and little if any cola" and thus was an "imitation" of these substances and was offered for sale under their "distinctive name." We omit other charges which the Government subsequently withdrew. The claimant answered, admitting that the product contained as one of its ingredients "a small portion of caffeine," but denying that it was either an "added" ingredient, or a poisonous or a deleterious ingredient which might make the product injurious. It was also denied that there were substances known as coca and cola, "under their own distinctive names," and it was averred that the product did contain "certain elements or substances derived from coca leaves and cola nuts." The answer also set forth, in substance, that "Coca Cola" was the "distinctive name" of the product under which it

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[95] Reversing *United States* v. *40 Barrels and 20 Kegs of Coca Cola*, p. 606, *ante*. For case in the lower court, *United States* v. *40 Barrels and 20 Kegs of Coco Cola*, see p. 239, *ante*.

had been known and sold for more than 20 years as an article of food, with other averments negativing adulteration and misbranding under the provisions of the act.

Jury trial was demanded, and voluminous testimony was taken. The district judge directed a verdict for the claimant (191 Fed. 431), and judgment entered accordingly was affirmed on writ of error by the Circuit Court of Appeals (215 Fed. 535). And the Government now prosecutes this writ.

First. As to "*adulteration.*" The claimant, in its summary of the testimony, states that the article in question "is a syrup manufactured by the claimant * * * and sold and used as a base for soft drinks both at soda fountains and in bottles. The evidence shows that the article contains sugar, water, caffeine, glycerin, lime juice, and other flavoring matters. As used by the consumer, about 1 ounce of this syrup is taken in a glass mixed with about 7 ounces of carbonated water, so that the consumer gets in an 8-ounce glass or bottle of the beverage, about 1.21 grains of caffeine." It is said that in the year 1886 a pharmacist in Atlanta "compounded a syrup by a secret formula, which he called 'Coca-Cola Syrup and Extract'"; that the claimant acquired "the formula, name, label, and good will for the product" in 1892, and then registered "a trade mark for the syrup consisting of the name Coca Cola" and has since manufactured and sold the syrup under that name. The proportion of caffeine was slightly diminished in the preparation of the article for bottling purposes. The claimant again registered the name "Coca Cola" as a trade mark in 1905, averring that the mark had been "in actual use as a trade mark of the applicant for more than ten years next preceding the passage of the act of February 20, 1905", and that it was believed such use had been exclusive. It is further stated that in manufacturing in accordance with the formula "certain extracts from the leaves of the Coca shrub and the nut kernels of the Cola tree were used for the purpose of obtaining a flavor" and that "the ingredient containing these extracts", with cocaine eliminated, is designated as "Merchandise No. 5." It appears that in the manufacturing process water and sugar are boiled to make a syrup; there are four meltings; in the second or third the caffeine is put in; after the meltings the syrup is conveyed to a cooling tank and then to a mixing tank where the other ingredients are introduced and the final combination is effected; and from the mixing tank the finished product is drawn off into barrels for shipment.

The questions with respect to the charge of "adulteration" are (1) whether the caffeine in the article was an added ingredient within the meaning of the act (sec. 7, subd. 5), and if so, (2) whether it was a poisonous or deleterious ingredient which might render the article injurious to health. The decisive ruling in the courts below resulted from a negative answer to the first question. Both the district judge and the Circuit Court of Appeals assumed for the purpose of the decision that as to the second question there was a conflict of evidence which would require its submission to the jury. (191 Fed. 433; 215 Fed. 540.) But it was concluded, as the claimant contended, that the caffeine—even if it could be found by the jury to have the alleged effect—could not be deemed to be an "added in-

gredient", for the reason that the article was a compound, known and sold under its own distinctive name, of which the caffeine was a usual and normal constituent. The Government challenges this ruling and the construction of the statute upon which it depends; and the extreme importance of the question thus presented with respect to the application of the act to articles of food sold under trade names is at once apparent. The Government insists that the fact that a formula has been made up and followed and a distinctive name adopted do not suffice to take an article from the reach of the statute; that the standard by which the combination in such a case is to be judged is not necessarily the combination itself; that a poisonous or deleterious ingredient with the stated injurious effect may still be an added ingredient in the statutory sense, although it is covered by the formula and made a constituent of the article sold.

The term "food" as used in the statute includes "all articles used for food, drink, confectionery, or condiment, * * * whether simple, mixed, or compound" (sec. 6). An article of "food" is to be deemed to be "adulterated" if it contain "any added poisonous or other added deleterious ingredient which may render such article injurious to health" (sec. 7, subd. 5 [96]). With this section is to be read the proviso in section 8, to the effect that "an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded" in the case of "mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names," if the distinctive name of another article is not used or imitated and the name on the label or brand is accompanied with a statement of the place of production. And section 8 concludes with a further proviso that nothing in the act shall be construed "as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except insofar as the provisions of this act may require to secure freedom from adulteration or misbranding." [97]

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[96] Section 7, with respect to "confectionery" and "food," is as follows:

"SEC. 7. That for the purposes of this act an article shall be deemed to be adulterated:

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"In the case of confectionery:

"If it contains terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt, or spiritous liquor or compound or narcotic drug.

"In the case of food:

"First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

"Second. If any substance has been substituted wholly or in part for the article.

"Third. If any valuable constituent of the article has been wholly or in part abstracted.

"Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

"Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health: *Provided,* That when in the preparation of food products for shipment they are preserved by any external application applied in such manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the covering or the package, the provisions of this Act shall be construed as applying only when said products are ready for consumption.

"Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter."

[97] Section 8 provides:

"SEC. 8. That the term 'misbranded,' as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingre-

In support of the ruling below, emphasis is placed upon the general purpose of the act which it is said was to prevent deception, rather than to protect the public health by prohibiting traffic in articles which might be determined to be deleterious. But a description of the purpose of the statute would be inadequate which failed to take account of the design to protect the public from lurking dangers caused by the introduction of harmful ingredients, or which assumed that this end was sought to be achieved by simply requiring certain disclosures. The statute is entitled "An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors," etc. In the case of confectionery, we find that it is to be deemed to be adulterated if it contains certain specified substances " or other ingredient deleterious or detrimental to health." So, under section 7, subdivision 6, there may be adulteration of food in case the article consists in whole or in part of " any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter." In *United States* v. *Lexington Mills Co.*, 232 U.S. 399, 409, it was said that—

> the statute upon its face shows that the primary purpose of Congress was to prevent injury to public health by the sale and transportation in interstate commerce of misbranded and adulterated foods. The legislation, as against misbranding, intended to make it possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was and not upon misrepresentations as to character and quality. As against adulteration, the statute was intended to protect the public health from possible injury by adding to articles of food consumption poisonous and deleterious substances which might render such articles injurious to the health of consumers.

See also *United States* v. *Antikamnia Co.*, 231 U.S. 654, 665; H.R.Rept. No. 2118, 59th Cong., 1st Sess., 6–9. It is true that in

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dients or substances contained therein which shall be false or misleading in any particular. * * *

" That for the purposes of this Act an article shall also be deemed to be misbranded:

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" In the case of food:

" First. If it be an imitation of or offered for sale under the distinctive name of another article.

" Second. If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if it fail to bear a statement on the label of the quantity or proportion of any morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein.

" Third. If in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package.

" Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided,* That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

" First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

" Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word 'compound,' 'imitation,' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale: *Provided,* That the term 'blend' as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only: *And provided further,* That nothing in this Act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except in so far as the provisions of this Act may require to secure freedom from adulteration or misbranding."

executing these purposes Congress has limited its prohibitions (*Savage* v. *Jones*, 225 U.S. 501, 529, 532) and has specifically defined what shall constitute adulteration or misbranding; but in determining the scope of specific provisions the purpose to protect the public health, as an important aim of the statute, must not be ignored.

Reading the provisions here in question in the light of the context, we observe:

(*a*) That the term "adulteration" is used in a special sense. For example, the product of a diseased animal may not be adulterated in the ordinary or strict meaning of the word, but by reason of its being that product the article is adulterated within the meaning of the act. The statute with respect to "adulteration" and "misbranding" has its own glossary. We cannot, therefore, assume that simply because a prepared "food" has its formula and distinctive name, it is not, as such, "adulterated." In the case of confectionery, it is plain that the article may be "adulterated," although it is made in strict accordance with some formula and bears a fanciful trade name, if in fact it contains an "ingredient deleterious or detrimental to health, or any vinous, malt, or spiritous liquor or compound or narcotic drug." And the context clearly indicates that with respect to articles of food the ordinary meaning of "adulteration" cannot be regarded as controlling.

(*b*) The provision in section 7, subdivision 5, assumes that the substance which renders the article injurious, and the introduction of which causes "adulteration", is an ingredient of the article. It must be an "added" ingredient; but it is still an ingredient. Component parts, or constituents, of the article which is the subject of the described traffic are thus not excluded but are included in the definition. The article referred to in subdivision 5 is the article sought to be made an article of commerce—the article which "contains" the ingredient.

(*c*) "Adulteration" is not to be confused with "misbranding." The fact that the provisions as to the latter require a statement of certain substances if contained in an article of food, in order to avoid "misbranding" does not limit the explicit provisions of section 7 as to adulteration. Both provisions are operative. Had it been the intention of Congress to confine its definition of adulteration to the introduction of the particular substances specified in the section as to misbranding, it cannot be doubted that this would have been stated, but Congress gave a broader description of ingredients in defining "adulteration." It is "any" added poisonous or "other added deleterious ingredients", provided it "may render such article injurious to health."

(*d*) Proprietary foods, sold under distinctive names, are within the purview of the provision. Not only is "food" defined as including articles used for food or drink "whether simple, mixed, or compound", but the intention to include "proprietary foods" sold under distinctive names is manifest from the provisos in section 8 which the claimant invokes. "Mixtures or compounds" which satisfy the first paragraph of the proviso, are not only "articles of food", but are to enjoy the stated immunity only in case they do "not contain any added poisonous or deleterious ingredients". By the concluding clause of section 8 it is provided that nothing in the

act shall be construed to require manufacturers of "proprietary foods" to disclose "their trade formulas" except insofar as the provisions of the act "may require to secure freedom from adulteration or misbranding", and the immunity is conditioned upon the fact that such foods "contain no unwholesome added ingredient." Thus the statute contemplates that mixtures or compounds manufactured by those having trade formulas, and bearing distinctive names, may nevertheless contain "added ingredients" which are poisonous or deleterious and may make the article injurious, and if so, the article is not taken out of the condemnation of section 7, subdivision 5.

(*e*) Again, articles of food including "proprietary foods" which fall within this condemnation are not saved because they were already on the market when the statute was passed. The act makes no such distinction; and it is to be observed that the proviso of section 8 explicitly refers to "mixtures or compounds which may be now, or from time to time hereafter, known as articles of food." Nor does the length of the period covered by the traffic, or its extent, affect the question if the article is in fact adulterated within the meaning of the act.

Having these considerations in mind, we deem it to be clear that, whatever difficulties there may be in construing the provision, the claimant's argument proves far too much. We are not now dealing with the question whether the caffeine did, or might, render the article in question injurious; that is a separate inquiry. The fundamental contention of the claimant, as we have seen, is that a constituent of a food product having a distinctive name cannot be an "added" ingredient. In such case the standard is said to be the food product itself which the name designates. It must be, it is urged, this "finished product" that is "adulterated." In that view, there would seem to be no escape from the conclusion that, however poisonous or deleterious the introduced ingredient might be, and however injurious its effect, if it be made a constituent of a product having its own distinctive name it is not within the provision. If this were so, the statute would be reduced to an absurdity. Manufacturers would be free, for example, to put arsenic or strychnine or other poisonous or deleterious ingredients with an unquestioned injurious effect into compound articles of food, provided the compound were made according to formula and sold under some fanciful name which would be distinctive. When challenged upon the ground that the poison was an "added" ingredient, the answer would be that without it the so-called food product would not be the product described by the name. Further, if an article purporting to be an ordinary food product sold under its ordinary name were condemned because of some added deleterious ingredient, it would be difficult to see why the same result could not be attained with impunity by composing a formula and giving a distinctive name to the article with the criticized substance as a component part. We think that an analysis of the statute shows such a construction of the provision to be inadmissible. Certain incongruities may follow from any definition of the word "added", but we cannot conclude that it was the intention of Congress to afford immunity by the simple choice of a formula and a name. It does not seem to use to be a reasonable construction that in the case of "proprie-

tary foods" manufactured under secret formulas Congress was simply concerned with additions to what such formulas might embrace. Undoubtedly it was not desired needlessly to embarrass manufacturers of "proprietary foods" sold under distinctive names, but it was not the purpose of the act to protect articles of this sort regardless of their character. Only such food products as contain "no unwholesome added ingredient" are within the saving clause, and in using the words quoted we are satisfied that Congress did not make the proprietary article its own standard.

Equally extreme and inadmissible is the suggestion that where a "proprietary food" would not be the same without the harmful ingredient, to eliminate the latter would constitute an "adulteration" under section 7, subdivision 3, by the abstraction of a "valuable constituent." In that subdivision Congress evidently refers to articles of food which normally are not within the condemnation of the act. Congress certainly did not intend that a poisonous or deleterious ingredient which made a proprietary food an enemy to the public health should be treated as a "valuable constituent", or to induce the continued use of such injurious ingredients by making their elimination an adulteration subject to the penalties of the statute.

It is apparent, however, that Congress in using the word "added" had some distinction in view. In the Senate bill (for which the measure as adopted was a substitute) there was a separate clause relating to "liquors", providing that the article should be deemed to be adulterated if it contained "any added ingredient of a poisonous or deleterious character"; while in the case of food (which was defined as excluding liquors) the article was to be deemed to be "adulterated" if it contained "any added poisonous or other ingredient which may render such article injurious to human health." (Cong. Rec., 59th Cong., 1st Sess., vol. 40, p. 897.) In explaining the provision as to "liquors", Senator Heyburn, the chairman of the Senate committee having the bill in charge, stated to the Senate (*Id.*, p. 2647):

> The word "added", after very mature consideration by your committee, was adopted because of the fact that there is to be found in nature's products as she produces them poisonous substances to be determined by analysis. Nature has so combined them that they are not a danger or an evil—that is, so long as they are left in the chemical connection in which nature has organized them; but when they are extracted by the artificial processes of chemistry they become a poison. You can extract poison from grain or its products and when it is extracted it is a deadly poison; but if you leave that poison as nature embodied it in the original substances it is not a dangerous poison or an active agency of poison at all. So, in order to avoid the threat that those who produce a perfectly legitimate article from a natural product might be held liable because the product contained nature's poison it was thought sufficient to provide against the adding of any new substance that was in itself a poison, and thus emphasizing the evils of existing conditions in nature's product. That is the reason the word "added" is in the bill. Fusel oil is a poison. If you extract it, it becomes a single active agency of destruction, but allow it to remain in the combination where nature has placed it, and while it is nominally a poison, it is a harmless one, or comparatively so.

For the Senate bill the House of Representatives substituted a measure which had the particular provisions now under consideration in substantially the same form in which they were finally enacted into law. (Sec. 7, subd. 5; sec. 8, subd. 4, provisos.) And the committee

of the House of Representatives in reporting this substituted measure said (H. R. Rept. No. 2118, 59th Cong., 1st Sess., pp. 6, 7, 11):

> The purpose of the pending measure is not to compel people to consume particular kinds of foods. It is not to compel manufacturers to produce particular kinds or grades of foods. One of the principal objects of the bill is to prohibit in the manufacture of foods intended for interstate commerce the addition of foreign substances poisonous or deleterious to health. The bill does not relate to any natural constituents of food products which are placed in the foods by nature itself. It is well known that in many kinds of foods in their natural state some quantity of poisonous or deleterious ingredients exist. How far these substances may be deleterious to health when the food articles containing them are consumed may be a subject of dispute between the scientists, but the bill reported does not in any way consider that question. If, however, poisonous or deleterious substances are added by man to the food product, then the bill declares the article to be adulterated and forbids interstate traffic.

This statement throws light upon the intention of Congress. Illustrations are given to show possible incongruous results of the test, but they do not outweigh this deliberate declaration of purposes; nor do we find in the subsequent legislative history of the substituted measure containing the provision any opposing statement as to the significance of the phrase. It must also be noted that some of the illustrations which are given lose their force when it is remembered that the statutory ban (sec. 7, subd. 5) by its explicit terms only applies where the added ingredient may render the article injurious to health. See *United States* v. *Lexington Mills Co.*, *supra.* It is urged that whatever may be said of natural food products, or simple food products, to which some addition is made, a "proprietary food" must necessarily be "something else than the simple or natural article"; that it is an "artificial preparation." It is insisted that every ingredient in such a compound cannot be deemed to be an "added" ingredient. But this argument, and the others that are advanced, do not compel the adoption of the asserted alternative as to the saving efficacy of the formula. Nor can we accept the view that the word "added" should be taken as referring to the quantity of the ingredient used. It is added ingredient which the statute describes, not added quantity of the ingredient, although of course quantity may be highly important in determining whether the ingredient may render the article harmful, and experience in the use of ordinary articles of food may be of greatest value in dealing with such questions of fact.

Congress, we think, referred to ingredients artificially introduced; these it described as "added." The addition might be made to a natural food product or to a compound. If the ingredient thus introduced was of the character and had the effect described, it was to make no difference whether the resulting mixture or combination was or was not called by a new name or did or did not constitute a proprietary food. It is said that the preparation might be "entirely new." But Congress might well suppose that novelty would probably be sought by the use of such ingredients, and that this would constitute a means of deception and a menace to health from which the public should be protected. It may also have been supposed that, ordinarily, familiar food bases would be used for this purpose. But, however the compound purporting to be an article of food might be made up, we think that it was the intention of Congress

that the artificial introduction of ingredients of a poisonous or deleterious character which might render the article injurious to health should cause the prohibition of the statute to attach.

In the present case the article belongs to a familiar group; it is a syrup. It was originally called "Coca Cola Syrup and Extract." It is produced by melting sugar, the analysis showing that 52.64 percent of the product is sugar and 42.63 percent is water. Into the syrup thus formed by boiling the sugar there are introduced coloring, flavoring, and other ingredients, in order to give the syrup a distinctive character. The caffeine, as has been said, is introduced in the second or third "melting." We see no escape from the conclusion that it is an "added" ingredient within the meaning of the statute.

Upon the remaining question whether the caffeine was a poisonous or deleterious ingredient which might render the article injurious to health there was a decided conflict of competent evidence. The Government's experts gave testimony to the effect that it was, and the claimant introduced evidence to show the contrary. It is sufficient to say that the question was plainly one of fact which was for the consideration of the jury. (See *443 Cans of Egg Product*, 226 U.S. 172, 183.)

Second. As to "*misbranding*." In the second count it was charged that the expression "Coca Cola" represented the presence in the product of the substances coca and cola, and that it contained "no coca and little if any cola." So far as "cola" was concerned, the charge was vague and indefinite, and this seems to have been conceded by the Government at the beginning of the trial. With respect to "coca", there was evidence on the part of the Government tending to show that there was nothing in the product obtained from the leaves of the coca plant, while on behalf of the claimant it was testified that the material called "Merchandise No. 5" (one of the ingredients) was obtained from both coca leaves and cola nuts. It was assumed on the motion for a peremptory instruction that there might be a disputed question of fact as to whether the use of the word "coca" is to be regarded "intrinsically and originally" as stating or suggesting the presence of "some material element or quality" derived from coca leaves, and it was also assumed that the evidence might be deemed to be conflicting with respect to the question whether the product actually contained anything so derived (191 Fed. 438, 439). But these issues of fact were considered not to be material. On this branch of the case the claimant succeeded upon the ground that its article was within the protection of the proviso in section 8 as one known "under its own distinctive name." (215 Fed. 544.)

Section 8 (*ante*, p. 743), in its fourth specification as to "food", provides that the article shall be deemed to be "misbranded" "if the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein which * * * shall be false or misleading in any particular." Then follows the proviso in question, that an article not containing any added poisonous or deleterious ingredients "shall not be deemed to be * * * misbranded" in the case of "mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an

imitation of or offered for sale under the distinctive name of another article" if the name is accompanied with a statement of the place where the article has been produced.[97a]

A distinctive name is a name that distinguishes. It may be a name in common use as a generic name, e.g., coffee, flour, etc. Where there is a trade description of this sort by which a product of a given kind is distinctively known to the public, it matters not that the name had originally a different significance. Thus, soda water is a familiar trade description of an article which now, as is well known, rarely contains soda in any form. Such a name is not to be deemed either "misleading" or "false", as it is in fact distinctive. But unless the name is truly distinctive, the immunity cannot be enjoyed; it does not extend to a case where an article is offered for sale "under the distinctive name of another article." Thus, that which is not coffee, or is an imitation of coffee, cannot be sold as coffee; and it would not be protected by being called "X's Coffee." Similarly, that which is not lemon extract could not obtain immunity by being sold under the name of "Y's Lemon Extract." The name so used is not "distinctive", as it does not appropriately distinguish the product; it is an effort to trade under the name of an article of a different sort. So, with respect to "mixtures or compounds", we think that the term "another article" in the proviso embraces different compounds from the compound in question. The aim of the statute is to prevent deception, and that which appropriately describes a different compound can not secure protection as a "distinctive name."

A "distinctive name" may also, of course, be purely arbitrary or fanciful, and thus, being the trade description of the particular thing, may satisfy the statute, provided the name has not already been appropriated for something else so that its use would tend to deceive.

If, in the present case, the article had been named "Coca" and it were found that the name was actually descriptive in the sense that it fairly implied that the article was derived from the leaves of the coca plant, it could not be said that this was "its own distinctive name" if in fact it contained nothing so derived. The name, if thus descriptive, would import a different product from the one to which it was actually affixed. And, in the case supposed, the name would not become the "distinctive name" of a product without any coca ingredient unless in popular acceptation it came to be regarded as

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[97a] Among the departmental regulations (adopted in October, 1906, pursuant to sec. 3, for the enforcement of the act) is regulation 20, with respect to "distinctive names" under sec. 8, as follows:

"(*a*) A 'distinctive name' is a trade, arbitrary, or fancy name which clearly distinguishes a food product, mixture, or compound from any other food product, mixture, or compound.

"(*b*) A distinctive name shall not be one representing any single constituent of a mixture or compound.

"(*c*) A distinctive name shall not misrepresent any property or quality of a mixture or compound.

"(*d*) A distinctive name shall give no false indication of origin, character, or place of manufacture, nor lead the purchaser to suppose that it is any other food or drug product."

Regulation 27 is as follows:

"(*a*) The terms 'mixtures' and 'compounds' are interchangeable and indicate the results of putting together two or more food products.

"(*b*) These mixtures or compounds shall not be imitations of other articles, whether simple, mixed, or compound, or offered for sale under the name of other articles. They shall bear a distinctive name and the name of the place where the mixture or compound has been manufactured or produced.

"(*c*) If the name of the place be one which is found in different States, Territories, or countries, the name of the State, Territory, or country, as well as the name of the place, must be stated."

identifying a product known to be of that character. It would follow that the mere sale of the product under the name "Coca", and the fact that this was used as a trade designation of the product, would not suffice to show that it had ceased to have its original significance if it did not appear that it had become known to the public that the article contained nothing derived from coca. Until such knowledge could be attributed to the public the name would naturally continue to be descriptive in the original sense. Nor would it be controlling that at the time of the adoption of the name the coca plant was known only to foreigners and scientists, for if the name had appropriate reference to that plant and to substances derived therefrom, its use would primarily be taken in that sense by those who did not know or who took pains to inform themselves of its meaning. Mere ignorance on the part of others as to the nature of the composition would not change the descriptive character of the designation. The same conclusion would be reached if the single name "Cola" had been used as the name of the product and it were found that in fact the name imported that the product was obtained from the cola nut. The name would not be the distinctive name of a product not so derived until in usage it achieved that secondary significance.

We are thus brought to the question whether if the names coca and cola were respectively descriptive, as the Government contends, a combination of the two names constituted a "distinctive name" within the protection of the proviso in case either of the described ingredients was absent. It is said that "coca" indicates one article, and "cola" another, but that the two names together did not constitute the distinctive name of any other substance or combination of substances. The contention leads far. To take the illustration suggested in argument it would permit a manufacturer, who could not use the name chocolate to describe that which was not chocolate, or vanilla to describe that which was not vanilla, to designate a mixture as "Chocolate-Vanilla", although it was destitute of either or both, provided the combined name had not been previously used. We think that the contention misses the point of the proviso. A mixture or compond may have a name descriptive of its ingredients or an arbitrary name. The latter (if not already appropriated) being arbitrary, designates the particular product. Names, however, which are merely descriptive of ingredients are not primarily distinctive names save as they appropriately describe the compound with such ingredients. To call the compound by a name descriptive of ingredients which are not present is not to give it "its own distinctive name"—which distinguishes it from other compounds—but to give it the name of a different compound. That, in our judgment, is not protected by the proviso, unless the name has achieved a secondary significance as descriptive of a product known to be destitute of the ingredients indicated by its primary meaning.

In the present case we are of opinion that it could not be said as matter of law that the name was not primarily descriptive of a compound with coca and cola ingredients, as charged. Nor is there basis for the conclusion that the designation had attained a secondary meaning as the name of a compound from which either coca or cola ingredients were known to be absent; the claimant has always in-

sisted, and now insists, that its product contains both. But if the name was found to be descriptive, as charged, there was clearly a conflict of evidence with respect to the presence of any coca ingredient. We conclude that the court erred in directing a verdict on the second count.

The judgment is reversed and the cause is remanded for further proceedings in conformity with this opinion.

It is so ordered.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

ELEVEN GROSS PACKAGES OF DR. WILLIAMS' PINK PILLS v. UNITED STATES

(Circuit Court of Appeals, Third Circuit, May 22, 1916)

233 Fed. 71; N.J. No. 4849

In error to the District Court for the Eastern District of Pennsylvania. Decree affirmed.[98]

BUFFINGTON, *Circuit Judge*. In the court below, the United States filed a libel to forfeit certain packages of pills. Thereupon the Dr. Williams Medicine Company claimed the packages seized, answered the libel, and the case proceeded to trial. After a verdict for the plaintiff and a decree of forfeiture, the claimant sued out this writ.

The claim of forfeiture is based on an alleged misbranding of the packages of pills in violation of an amendment to the Food and Drugs Act, passed August 23, 1912, which provides:

> That for the purposes of this act an article shall also be deemed to be misbranded: In case of drugs: * * * Third. If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent.

The errors alleged group themselves into rulings on evidence, answers to points and exceptions to the court's charge. Without entering into a discussion of the many refined questions of words, terms, and medical theories with which the general subject is beclouded, we may say that to our mind the words used in the statute are clear in meaning, and the court below tried the case on that basis. The purpose of the act was, in the branding of drugs, to punish false and fraudulent statements regarding the curative or therapeutic effects of such drug or any of its ingredients. It follows, therefore, the case below resolved itself into two questions: First, were the statements regarding the curative or therapeutic effects of these pills false, and, second, were they fraudulent? Without citing in detail the rulings of the court in admitting the evidence, in answering the points, and in charging the jury, we may say the court consistently adhered to admitting proof and directing the attention of the jury in points and charge to the two decisive elements of the branding being false and fraudulent. Limiting our extracts to locomotor

[98] Affirming *United States* v. *11 Gross Packages of Dr. Williams' Pink Pills*, p. 680, *ante*.

ataxia alone, we note the branding complained of made the statement that the pills were—

> Useful in locomotor ataxia and partial paralysis. * * * This remedy is offered to the public with full confidence in its efficacy in the treatment of diseases arising from or dependent upon impoverished blood. * * * rheumatism, leucorrhoea. * * * These pills are a valuable remedy for * * * sciatica * * * and have accomplished beneficial results in * * * partial paralysis and locomotor ataxia * * * cases diagnosed as locomotor ataxia and as partial paralysis, and having characteristic symptoms have shown beneficial results under this tonic treatment and in the cases under observation the resulting improvement has been lasting.

The libel alleged that:

> These statements were false and fraudulent in this, that they indicated to the purchaser thereof and created in the minds of the purchasers thereof the impression and belief that the said article was a remedy for, when in fact it was not a remedy for, locomotor ataxia, partial paralysis, etc.

and that

> These statements were false and fraudulent in this, that they indicated to the purchaser thereof and created in the minds of the purchasers thereof the impression and belief that the said article was a remedy for, when in fact it was not a remedy for, partial paralysis, locomotor ataxia, etc., which statements were made with the knowledge of their falsity and in reckless and wanton disregard of their truth or falsity for the purpose of defrauding the purchasers.

In support of its case the Government called several witnesses, physicians of proven ability, knowledge, and experience, who testified that the pill would not and why it could not have any beneficial effects in locomotor ataxia and the other diseases named. They also testified to the fact that medical opinion was unanimous in so saying. It was also shown, and all this without contradiction, that the pill was practically the well-known Blaud pill used generally in medical practice. It is complained, however, that the testimony of these witnesses was not competent, being a mere expression of their personal opinion or views. But an examination of the proofs shows that the case was wholly different from one where witnesses were testifying to their personal views upon a controverted question of opinion. The testimony here was of fact, namely, that there was general, uncontroverted consensus of opinion. For example, referring to the effect of these pills, the proofs were:

> Q. How about locomotor ataxia?
> A. Utterly useless.
> Q. Is there any difference at all in medical opinion on that point?
> A. I should say not, as far as I know medical opinion * * *.
> Q. Is there anything known to medicine that can have a beneficial effect upon all these various troubles in one pill?
> A. No, sir.
> Q. Is there any difference of medical opinion on that point?
> A. None whatever. I think medical opinion would be unanimous on that.

In the absence of countervailing proof in such matters, it was manifestly a question for the jury to determine the fair or fraudulent character of the branding statement. This question the court left to it, saying if they were satisfied "that the pills were shipped in interstate commerce, with an honest belief on the part of those responsible for making the statement that they would do just what was stated on the label they would do, that then it would be your duty to return a

verdict in favor of the defendant." Referring to such statements, the court further said:

> You will take those facts into consideration and determine whether or not it was the intention of this language, interpreting it as an ordinarily intelligent man would, on the part of the claimants to convey the impression that they were to cure or act as a remedy for the diseases and ailments even where the language does not directly say so. If it was the intention to so frame a statement that it conveyed those impressions and those statements were false, and they are known to be false, or you can infer the intention to defraud, then it would be your duty to return a verdict in favor of the Government. If you do not find that intention, of course you will return a verdict in favor of the defendant.

See also, in answer to points, the court said, in substantial accord with *Cooper* v. *Schleslinger*, 111 U.S. 148, and *Lehigh Co., etc.*, v. *Bamford*, 150 U.S. 665:

> If you find it as a fact that the statements were false, and known to be false, then, of course, your verdict would be for the Government. If you find as a fact that they were not false, or that being false there was no intent on the part of the defendant, whether actual intent or implied intent, to defraud, then your verdict would be for the claimant.
>
> If you believe from the evidence that any one of the therapeutic claims as to the effect of these pills upon locomotor ataxia, St. Vitus' dance, sciatica, rheumatism, impotence, spermatorrhea, or partial paralysis, was false, and was made by the claimant with a reckless and wanton disregard as to whether it was true or false, you may find a verdict for the Government.

On the whole, we may say the cause was properly tried and fairly submitted, and finding no error in the rulings, charge, points, or answers in the court below, its decree is affirmed.

UNITED STATES v. G. F. HARVEY CO.

(District Court, N.D. New York, June 21, 1916)

N.J. No. 4980

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

The United States attorney filed an information against the G. F. Harvey Co., a corporation, Saratoga Springs, N.Y., alleging shipment by said company, from the State of New York into the State of New Jersey, of a quantity of an article labeled, in part, "Fluid Extract of Cinchona", which was adulterated and misbranded.

Adulteration of the article was alleged in the information for the reason that it was sold under and by a name recognized in the United States Pharmacopoeia, to wit, fluid extract of cinchona, and differed from the standard of strength, quality, and purity as determined by the test laid down in said Pharmacopoeia official at the time of the investigation and shipment of said article, in that said Pharmacopoeia specifies that fluid extract of cinchona shall contain 4 grams of anhydrous ether-soluble alkaloids from cinchona per 100 cc, whereas said article did not contain said amount of anhydrous ether-soluble alkaloids from cinchona per 100 cc, but did contain a less amount of said alkaloids, to wit, 2.97 grams per 100 cc.

Misbranding was alleged for the reason that the statement, to wit, "Fluid Extract Cinchona", borne on the label, was false and mis-

leading in that it purported and represented to purchasers that said article was fluid extract of cinchona, a product well-known to contain 4 grams of anhydrous ether-soluble alkaloids from cinchona per 100 cc, whereas, in fact, it was not, but was a so-called fluid extract of cinchona containing a less amount of anhydrous ether-soluble alkaloids from cinchona per 100 cc, to wit, 2.97 grams of said alkaloids per 100 cc.

The following charge was delivered to the jury:

RAY, *District Judge.* Gentlemen of the jury: This trial has occupied many days and I have allowed to the defendant considerable latitude to the end that every question involved might be fully and fairly presented to the court and to the jury. However, the questions involved are narrowed so far as you are concerned to one, and that question is: Did the defendant, The G. F. Harvey Co., on or about the 8th day of November 1912, deliver for shipment in interstate commerce from the city of Saratoga Springs, in the State of New York, consigned to C. B. Smith & Co., at Newark, in the State of New Jersey, three 1-pint bottles containing an article designed and intended to be used as a drug and which was labeled, marked, and branded as described in the information, viz, " This preparation contains not more than 68 percent alcohol by volume. Assayed. Fluid extract cinchona, yellow cinchona calisaya, Weddell. 12312, 88405. Dose, 15 to 60 minims. The G. F. Harvey Co.", and did this fluid extract so offered for shipment in interstate commerce by the defendant differ from the standard of strength, quality, or purity as determined by the test laid down in the United States Pharmacopœia or National Formulatory official at the time of shipment, when the offense, if any, was committed?

It is conceded by the defendant by stipulation in writing and in evidence that the defendant is a corporation organized and existing under and by virtue of the laws of the State of New York and that its office and principal place of business is Saratoga Springs, in the Northern District of New York. That on or about the 8th day of November 1912 the defendant did ship from the city of Saratoga Springs, in the State of New York, to C. B. Smith & Co. of Newark, N.J., a consignment consisting of three 1-pint bottles containing a liquid designed and intended to be used as a drug, and which bottles were then and there designated as to the contents thereof and labeled, marked, and branded as set forth in the information in this case and which label and brand I have already recited. It is also stipulated and conceded and admitted by the defendant that the samples of this consignment consisting of the three bottles taken were sold by the said C. B. Smith & Co. to Herman Lind, an inspector of the United States Department of Agriculture, after being properly marked and identified by him with the marks, " I.S. No. 1649-e ", and that no change was made in said samples of three bottles from the time the same was sold and shipped in interstate commerce by the defendant to said C. B. Smith & Co. up to the time the same was sold and delivered by that company to said Lind.

The evidence shows without contradiction, so far as any evidence has been given on the subject, that Lind, an inspector of the United States Department of Agriculture, turned these three bottles of this mixture, fluid extract of cinchona, over to the Department of Agri-

culture at Washington, D.C., with seals, etc., unbroken, except as to one bottle which was assayed or tested by Mr. Darling, another employee of the Department of Agriculture, in the State of New York, for the purpose of determining whether or not it was up to standard. The evidence also shows that one of the bottles of fluid extract so purchased of C. B. Smith & Co. and shipped to that company by the defendant was returned with the seal, etc., unbroken to the defendant here so as to enable it to make an examination as to its strength, quality, etc. The other two bottles were retained by the United States and one of same has been produced in court. The evidence shows or tends to show that both bottles retained by the Government were examined and tested by it and that one of them has been broken, lost, or destroyed without fault on the part of anyone. On being tested and examined in the manner prescribed and pointed out by law the Government contends that the two bottles examined, tested, and assayed by it shows that the composition or fluid extract contains only, in round numbers, three quarters of the essential ingredients of such a mixture and that it was therefore far below the required standard and was adulterated within the meaning of the Pure Food and Drugs Act of June 30, 1906, as subsequently amended and as in force at the time of the sale and shipment mentioned. Two different chemists of experience and connected with the Department of Agriculture at Washington, D.C., Mr. Darling and Mr. Wright, tested and analyzed these two bottles and they have given the contents as to the essentials as follows: Mr. Darling, first trial, 2.97 grams, second trial, 2.95 grams; Mr. Wright, first sample, 2.87 grams, second sample, 2.99 grams, third sample, 2.84 grams per 100 cubic centimeters, when under the law it should have contained 4 grams per 100 cubic centimeters of the anhydrous ether-soluble alkaloids from cinchona.

The standard required by the law is 4 grams for the ingredients to which attention has just been called.

The third bottle which was returned to the defendant was examined and analyzed, it is claimed by Mr. Ellery, a chemist of the Union College at Schenectady, N.Y., and he found that it contained the following of the essentials referred to, viz, first sample, 3.786 grams, second sample, 3.902 grams, third sample, 3.766 grams per 100 cubic centimeters. He says he took three samples from the bottle and made three separate tests and that the results were as stated. This test made by this professor of chemistry employed by the defendant company shows, as you will readily see, that the samples or bottle of this compound or fluid extract tested by him contained less of the essential substances than is required by the standard set up in the statute. Professor Grose says he tested the contents and found: First test, 3.9 grams, and second test, 4.1 grams; but that this was made last Wednesday, the 14th of this month, and that the fluid extract had undergone changes.

The Government further contends that this bottle or these bottles of fluid extract so sold and shipped by the defendant, and which were but a part of a larger quantity, were not manufactured, compounded, and put up as they should have been to insure the required and necessary degree of strength as pertains to the essential ingredients and that the result was necessarily an inferior quality which differed considerably from the standard. The Government further contends

that when this fluid extract had been run through the percolator at the factory of the defendant it was found by the defendant itself and known to it that the fluid extract fell short of the standard and that offering it for sale and shipping it in interstate commerce at that strength would have been a plain violation of the statute and would have subjected the defendant to the fines and penalties prescribed by law.

The Government contends that thereupon the defendant undertook to remedy the defect by putting into the mass of fluid extract in one receptacle or container a quantity of quinine and cinchonidine in powdered form and stirring it in with a stick and that this mode of manufacture, thereby attempting to bring the fluid extract up to the standard required, was not sufficient and did not, in its results, bring the fluid extract up to the required standard. The Government says that even if the requisite amount of powdered quinine and cinchonidine was put in in the powdered form and stirred in with a stick that it was not properly distributed through the mass and dissolved and that while some portions thereof might contain enough, other portions would be liable to be deficient, and that, therefore, the fluid extract of cinchona put upon the market and sold in interstate commerce by the defendant at the time mentioned was adulterated within the meaning of the law in that it failed to come up to the standard; that is, that this drug was sold under or by a name recognized in the United States Pharmacopœia and differed from the standard of strength, quality, and purity as to ingredients mentioned, as determined by the test laid down in the United States Pharmacopœia official at the time of investigation or shipment. That it also lacked some of the anhydrous ether-soluble alkaloids, as only two were added when several were required.

The law itself, gentlemen of the jury, determines what shall be deemed a drug within the meaning of the law, and also determines when a drug shall be deemed to be adulterated.

By section 2 of the act of Congress referred to it is provided that the introduction into any State from any other State of any drug which is adulterated or misbranded within the meaning of the act is hereby prohibited; and that any person who shall ship or deliver for shipment from any State to any other State any such adulterated or misbranded drug shall be guilty of a misdemeanor and fined not exceeding $200 for the first offense.

By section 6 of the act to which attention has been called it is provided that the term "drug" as used in this act shall include all medicines and preparations recognized in the United States Pharmacopœia for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals. There is no question, gentlemen, or dispute that this fluid extract in question here is a drug within the meaning of the law.

By section 7 of the law to which I have called your attention it is declared when and under what circumstances an article or drug is deemed to be adulterated, and section 7 declares in express terms

> That for the purposes of this act an article shall be deemed to be adulterated; In the case of drugs:
>
> First. If, when a drug is sold under or by a name recognized in the United States Pharmacopœia or National Formulary, it differs from the standard of

strength, quality, or purity, as determined by the test laid down in the United States Pharmacopœia or National Formulary official at the time of investigation: *Provided*, That no drug defined in the United States Pharmacopœia or National Formulary shall be deemed to be adulterated under this provision if the standard of strength, quality, or purity be plainly stated upon the bottle, box, or other container thereof, although the standard may differ from that determined by the test laid down in the United States Pharmacopœia or National Formulary.

Second. If its strength or purity shall fall below the professed standard or quality under which it is sold.

In this case, gentlemen of the jury, there is no pretense or claim that the standard of strength, quality, or purity was plainly stated upon the bottles, boxes, or other containers of this fluid extract, and for that reason, as it was not made known what the standard of strength, quality, or purity was, it becomes a simple question in this case whether or not, as determined by the test laid down in the United States Pharmacopœia, this fluid extract did differ essentially from the standard of strength, quality, and purity as to the essentials to which I have called your attention as determined by that test. That this fluid extract was up to the quality required by law when or as determined by some other test than that laid down in the United States Pharmacopœia would constitute no defense if not up to the standard required by the test prescribed by law. The law is somewhat exacting, but it is the law nevertheless and provides in express terms that this fluid extract cinchona, yellow cinchona calisaya, must not differ from the standard of strength, quality, or purity required, as determined by the test laid down in the United States Pharmacopœia or National Formulary official at the time of the investigation, meaning time of shipment. That is, the one that was official at the time these simples were taken and the shipment was made.

This law, gentlemen, was enacted for a purpose, or for purposes, and one of the purposes was to keep adulterated drugs out of interstate commerce and to insure to the purchaser and user of the drug shipped in interstate commerce an article that was up to and which complied with the standard prescribed by law. This would insure the purchaser and user of these drugs shipped in interstate commerce against fraud and imposition and would give to the purchaser that which he purchased and which he understood he was purchasing, and it would insure to the physician who prescribed it to a patient, or who would use it in other compounds that he was giving to the patient, or putting into the medicinal compound just what he supposed he was putting in and just what the needs and conditions of the patient required. When an article of this kind, like fluid extract of cinchona, is purchased in the market, having been shipped in interstate commerce, with this law in force the purchaser has the right to assume that he is receiving a preparation of a certain well-defined strength, quality, or purity, as the case may be, and neither he as a user, nor the physician, nor the druggist who gives it to others is under any obligation to make tests for themselves but may rely to an extent at least upon the article being of the strength, quality, or purity fixed by this standard. The manufacturer who compounds them and puts them on the market in interstate commerce is bound at his or its peril to see to it that they are up to the standard fixed by law not only when made and shipped but are so compounded

and put up for sale that they will be of the required standard when shipped interstate commerce for sale to the consumer or user.

This law, gentlemen, assures to the user and consumer and to the physician in a degree not only a safeguard in the respects to which I have called your attention, which may affect the health of the patient and have to do with his proper treatment, but that he gets his money's worth; that is, what he pays for. It is not for you, gentlemen of the jury, or for this court to question either the propriety or the wisdom of this law. It is the law of the land, and if violated by this defendant, and you are so satisfied beyond a reasonable doubt, then it is your duty to so say by your verdict. The court has no alternative. It is its duty to instruct you as to the law as it finds it. In the opinion of this court this was and is a wise and a necessary law, and, gentlemen, it is not necessary for the Government to show the adulteration here complained of was deleterious and injurious to the health of the user and consumer.

There is no question of intent, gentlemen, involved in this case. No question, necessarily, of evil mind or purpose. It is not a question whether or not the defendant *intended* to comply with the law, but whether it *did* comply with the law. It is no defense to the charge contained in this information that this defendant intended to bring this fluid extract of cinchona up to the required standard and supposed and honestly believed it had done so when it sold and shipped the same in interstate commerce, if you find that it was in fact below the standard required—that is, not up to the standard required by the law. In this case, as in all cases of this character, it being a criminal charge, the defendant is presumed to be innocent until proven guilty beyond a reasonable doubt. Hence the burden of proof was upon the Government to establish that this fluid extract of cinchona in question here was below the standard. If it has done this and you are satisfied of that fact under this proof beyond a reasonable doubt, then that presumption of innocence, of course, would be overcome and would disappear, and it would be your duty to say "Guilty." If, on the other hand, you have a reasonable doubt whether or not this fluid extract was below the standard and are not satisfied beyond a reasonable doubt that it was below the standard when shipped, then, of course, it would be your duty to find the defendant not guilty. But, gentlemen, you are to take the evidence as it is and not surmise, guess, or speculate or theorize that this fluid extract may have been up to the standard if the evidence proves it was not. A reasonable doubt, gentlemen, is not a surmise, a guess, a speculation, or a speculative theory that a thing may not be so. A reasonable doubt is not a speculative theory. A reasonable doubt is just what the term implies—a doubt founded in reason, and for which a reason can be given by the jury if called upon to do so. It may arise from the lack of evidence or from the uncertainty of that presented. It may arise from the character or quality of the evidence given; that is, the character of the witnesses giving it may be such that the jury does not give credence to the testimony. The witnesses may be impeached in some one of the modes known to the law, or the witness may be so uncertain or unreliable or contradictory or unreasonable in his statements that the jury fails to place reliance on what he says. However, gentlemen, a jury has no right to disregard the testimony

of an unimpeached witness who knows whereof he speaks, who has the facts within his knowledge, and who is disinterested and fair and consistent in giving his statements, and whose testimony is consistent with the other known and proved and conceded facts in the case.

In a criminal case the evidence must exclude every reasonable hypothesis except that of guilt, and if just as consistent with the innocence of the defendant as with its guilt, then the case is not made out.

Considerable has been said here about allowances, variations, and tolerances, meaning, I assume, that allowances and tolerations may be made for differences in results obtained when the formula or mode of procedure pointed out by law is followed in making an analysis of the article being analyzed. Of course, you, gentlemen of the jury, on this evidence and from this evidence, are to determine and say on your oaths as jurors, whether or not this fluid extract of cinchona compounded and sold and shipped in interstate commerce; that is, from one State into another State of the United States—from New York to New Jersey—did contain, when so shipped and sold, 4 grams per 100 cubic centimeters of the anhydrous ether-soluble alkaloids from cinchona. If it did, then the statute was not offended against or violated in this respect. If it did not contain 4 grams of such anhydrous ether-soluble alkaloids, but a lesser quantity of such alkaloids or ingredients, then the statute was violated by the defendant and your verdict should be "guilty", as charged in the first count of the information, irrespective of whether the defendant knew of the deficiency or intended the deficiency or not. The statute is imperative, as I have stated, and absolute in its requirements, and demands that this drug, or fluid extract of cinchona, shall contain when sold and shipped in interstate commerce—that is, from one State to another State—at least 4 grams per 100 cubic centimeters of these anhydrous ether-soluble alkaloids from cinchona as determined by the process or analysis described in the work mentioned. That, gentlemen, is the standard fixed by law for determining the contents of the fluid extract, and no other analysis can be substituted and furnish evidence which will constitute a defense when the analysis made according to law and pursuant to the mode prescribed by law shows to your satisfaction that the article was not up to the standard required.

And, gentlemen, it will not do to say that a lesser quantity of these anhydrous ether-soluble alkaloids from cinchona per 100 cubic centimeters is or may be just as good and just as efficient as the quantities of these ether-soluble alkaloids required by the statute. Congress has the right in the interest of the general public and in the exercise of its control over interstate commerce to prescribe the standard up to which certain drugs when shipped in interstate commerce must come, and in this case it has done so. This drug, fluid extract of cinchona, is a drug sold under and by a name recognized in the United States Pharmacopœia or National Formulary, and the statute expressly declares that such drug "shall be deemed to be adulterated if it differs from the standard of strength, quality, or purity as determined by the test laid down in the United States Pharmacopœia or National Formulary official at the time of investigation," and neither the court nor the jury is at liberty to surmise, guess,

theorize, or speculate that the drug would be just as good if it did differ from that standard of strength, quality, or purity and contain a lesser quantity of the ingredients to which I have repeatedly called your attention—those being the essential ingredients of the fluid extract. Of course, the variation from the standard fixed by law must be real and not imaginary or the result of guesswork, but if it does vary to any substantial amount in strength, quality, or purity from the standard fixed by the statute, then the case is made out irrespective of intent, as I have already stated, and irrespective of the effect of such adulteration on the health of the consumer.

The credibility of the witnesses who have testified in this case as well as their accuracy is for the jury to determine. Were the tests or analyses made carefully, honestly, and intelligently by competent persons who knew how to do that which they undertook to do? You are to consider the experience and skill and knowledge of the men who made these tests of these fluid extracts in question. You are to note and consider the fact that the Government's chemists expert in this business as well as Professor Ellery, from Union College, agree that in the respects named as to these essential ingredients as shown by their tests the fluid extract fell below the standard fixed by law.

You are to consider the fact that the chemist from Union College concedes that he threw away the wrapper and marks and writing thereon on the bottle of fluid extract given to him by the defendant and from the contents of which he made his analysis. It is for you to say whether or not the bottle given him and from which he took the samples which he subjected to is analyses and from which Mr. Grose and Mr. Kirschberg took theirs was the same bottle or container returned to the defendant by the Department of Agriculture. If the wrapper with the writing put there by Mr. Lind had been preserved it would have been better, but, gentlemen, the force and effect of this evidence, in view of all the evidence produced and circumstances in the case established to your satisfaction, is for your consideration and determination.

So you are to consider in determining what the strength of this fluid extract really was in the respects named; the mode and manner adopted for bringing it up to the standard when found, after coming from the percolator, to be below that standard which is required by the law. The law would not be complied with if the defendant adopted an improper method of bringing it up to the standard, one which by mixing in the powder in the manner described brought certain parts of the fluid extract up to the standard and left other parts of it below the standard. You have heard the evidence on that subject as well as a description of the mode and manner or process by means of which fluid extract of cinchona is properly made. You have heard the evidence as to the three essential anhydrous ether-soluble alkaloids found in fluid extract of cinchona. Considering the method used to raise the standard of this fluid extract after it came from the percolator it is for you to say, under this evidence, did this fluid extract on being bottled and shipped in interstate commerce contain the anhydrous ether-soluble alkaloids from cinchona required, viz, 4 grams per 100 cubic centimeters? In short the methods pursued in the manufacture are to be considered as well as the

method adopted for bringing it up to the standard when found deficient as well as what was done in the various analyses made by the several witnesses who have given testimony in this case.

One or more of the witnesses for the defendant was employed by it to make a test or analysis, and one said that he knew something was depending on the result of the analysis he made. Did or did not this induce him to take any measures which would cause his analysis to show more of these essential alkaloids than it really did? And did he in fact have the sample that came from the Department of Agriculture? The chemists who gave evidence for the Government are in the employ of the Government and it is for you to say whether or not this fact has in any way affected them in giving their testimony and induced them to vary the test or analysis to any extent or in any way favorable to the Government.

This case is one of importance not only to the Government but to the defendant, as it involves the imposition of a fine on the one hand and the maintenance of the law, if it has been violated, on the other hand.

You are to act fairly, fearlessly, and impartially, and if satisfied beyond a reasonable doubt that this fluid extract of cinchona offered and shipped in interstate commerce by the defendant on or about the 8th day of November 1912 did not then contain 4 grams per 100 cubic centimeters of the anhydrous ether-soluble alkaloids from cinchona, then say " Guilty " as charged in the first count of the indictment.

If, on the other hand, you find from the evidence that the fluid extract mentioned did in fact contain 4 or more grams of the anhydrous ether soluble alkaloids from cinchona per 100 cubic centimeters when shipped, then your verdict will be " Not guilty."

It may be of interest, gentlemen, for me to say to you that a centimeter is a measure of length and is one hundredth of a meter, or 0.3937 of an inch, which is considerably less than one half an inch, while a gram is the unit of weight in the metric system, or 15.43 grains troy weight. Cinchona is the name of a tree, and from its bark is extracted certain anhydrous alkaloids or ingredients which are soluble in ether, and one of these is what we know as quinine, useful in medicine and especially in certain fevers. Ether-soluble alkaloids include quinine, quinidine, and chinchonidine.

You take the law from the court, of which the court is the sole judge. This is your sworn duty. You are sole judge of all the disputed facts and of the inferences to be drawn from conceded or proved facts. Conceded facts you are not at liberty to question, but when the evidence conflicts you are to decide. This is your sworn duty, guided by the principles of law to which your attention has been called. The credibility of the witnesses—their truth and accuracy—is for you.

The following requests by the defendant for charge to the jury were refused by the court:

8. This method laid down was not followed by the witnesses who testified for the plaintiff.

No. It is for you to say, gentlemen, in this evidence what the process used by the Government experts was; and was it the process described in this law as I have read.

9. The assays made by the witnesses for the United States are therefore not to be relied upon as giving correct results.

No. It is for you to say did this process followed give correct results.

19. That the result obtained by analysis by the Government chemists is not entitled to any greater consideration or respect by the jury than is the result obtained by other chemists of acknowledged standing and ability in their profession.

No, as written, but yes with this addition: "For the reason they are Government employees of [or] Government chemists. You are to consider their interest, if any, their character, their knowledge and skill and experience, and the care exercised by them in making their analyses; and say whether or not they were correct in view of all the evidence in the case, including that of defendant and its witnesses, and whether the defendant's witnesses were incorrect and inaccurate in their results."

The jury thereupon retired, and after due deliberation returned a verdict of guilty, and the court thereupon imposed on the defendant company a fine of $200.

UNITED STATES v. BOWERS

(District Court, E.D. Tennessee, Sept. 19, 1916)

N.J. No. 5072

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of acquittal.

SANFORD, *District Judge* (charge to jury). Gentlemen of the jury: This defendant is charged in this case with violation of the Food and Drugs Act, commonly called the Pure Food Law, charged by criminal information, which has the same effect as an indictment. It contains two counts, the first count charges that he shipped in interstate commerce, as oil of birch, a certain article of food which was adulterated in that it contained methyl salicylate, which had been mixed with it so as to injuriously reduce its quality and strength and in which methyl salicylate had been substituted in whole or in part for oil of birch [which] the article purported to be.

In the second count he is charged with shipping the same article of food which is alleged to have been misbranded in that it was a solution of oil of birch and offered for sale under the name of oil of birch. There is no dispute in this case about the fact that this defendant shipped these four cans, which contained the articles in question seized.

Now, I charge you that if oil of birch, as from the proof, is an article which is used as one of the ingredients entering into the composition of root beer, that then it is an article of food within the meaning of the Food and Drugs Act.

It has been testified to by the Government witness, the chemist, that an examination of these four cans showed that it was not composed exclusively of oil of birch but that about 75 percent of it was another substance known as methyl salicylate, at least 75 percent; oil of birch being the natural product resulting from the distillation

of birch bark, methyl salicylate being what is called a synthetic product, that is, an artificial product made from coal tar. Now, there is some question in this case as to whether or not methyl salicylate put in oil of birch would injuriously affect it, whether it makes any substantial difference in the food. You need not bother about that question, because it is immaterial because it is involved in another paragraph of the same first count. It is charged that it was substituted in whole or in part for oil of birch, so that is sufficient. Now then, this defendant insists he sold it, offered it for sale as oil of birch. Now, of course, the first thing for you to find is that oil of birch is an article of food. If you find it is an article of food, as I find it is, you have then got to find whether the methyl salicylate was substituted. The Government has to prove that or it has no case at all. That rests on the undisputed testimony of the chemist. If you believe his testimony, that proves that fact; if you don't believe it, it is not proved at all; but if you find this article of food oil of birch, and that methyl salicylate was substituted, then you come to the real question about which the contest is chiefly based in this case, as shown in the testimony and argument of counsel, whether or not the defendant knew or had reason to know that this article which he shipped or which is shipped by his clerks was an imitation of oil of birch in that methyl salicilate had been substituted to the extent of about 75 percent. That is the point in this lawsuit about which the real contest has been.

Now, this defendant is entitled to the presumption of innocence, with which the law shields every defendant tried on a criminal charge; he is not to be found guilty by you unless after careful consideration of the evidence you are satisfied of his guilt and have no reasonable doubt in your mind about it. If you are not satisfied, have a reasonable doubt about it, then it will be your duty to acquit him. I charge you as a matter of law, in regard to the criminal intent under this statute, as well as other statutes that if he does it without knowledge of the fact that otherwise makes it unlawful, unless he had knowledge of the fact or facts that brought knowledge home to him, then he is not guilty. A man, of course, might ship anybody, might ship any article that was misbranded or adulterated with certain things and unless he had reason to know it was a misbranded or adulterated article he would not be guilty under the criminal law, he can't be made criminally liable unless he knew or had reason to know that it had been adulterated or misbranded, otherwise he would be innocent. So then the real point in this case is whether or not this defendant knew or had reason to know that the so-called oil of birch he offered for sale or shipped, either through himself or his clerks, that it was an imitation or that it contained this methyl salicylate which had been substituted. Of course, if his clerks carried on that sort of business and shipped it for him he would be just as guilty as if he had done it himself, as he instructed them to do it. If, on the other hand, his clerks had carried on this business and shipped any of it without his knowledge, and he was entirely innocent of the matter he would not be guilty under the act, not criminally responsible for his clerks. The Government says he must have known that and that he had been engaged in the oil business, and the Government has shown him to have bought in the last year or two, I believe, I don't remember how much, it seems that the

witness says 1,500 pounds in 1913 and 1914. He bought this methyl salicylate, and that he must have been buying it according to the Government's theory, because he was using it for this very thing, for the purpose of adulterating oil of birch. The way prices were then running there was a large profit in it. If that theory is supported by the facts, if you believe that is what really happened, and you find this is an article of food and had methyl salicylate in it, [which had] been substituted for the oil of birch, the natural oil of birch, then you will find him guilty.

Now, on the other hand, his theory is that nothing of that sort did happen; that his clerks bought a large quantity of it in his absence; that he believed and they believed, so far as he knew, that it was real oil of birch; that one of the men from whom he bought it told him that and gave him an affidavit and he believed that to be true, and he continued to sell it because he acted in good faith believing it was real oil of birch. He did buy this methyl salicylate in large quantities, he does not know exactly how much he bought; that he was buying that for entirely different purposes, mainly for purpose of selling to people up there as a remedy for rheumatism, selling it to people at Elizabethton and any other place, and that is the way he disposed of this large quantity of methyl salicylate by selling it to people who wanted it. That he never sold it to anybody connected with the manufacture of oil of birch so far as he knew, and he had no reason to suspect it. It is for the jury [to say] whether his clerks adulterated it or the mountain men adulterated it; I am not sure, the argument was not clear on that point. I presume the theory would be the distillers adulterated it; that was not brought out by counsel or in the defendant's testimony, but I presume he would say the mountain men and not his clerks. The Government says that explanation is wholly unreasonable and uncorroborated. That is the substance of the Government's argument. That it is too unreasonable for the jury to believe and that the only reasonable explanation is the methyl salicylate was put in with his knowledge for adulterating this oil of birch. That is the Government's position. I extend no view to you whatever on the facts in the case to be passed on by the jury. You take into consideration, as to the weight to be given to them, and, of course, then the main question is as to the veracity of this defendant. He has appeared before you, you heard him testify and you must judge of the reasonableness of his statement on the witness stand and as to whether or not you believe the statement, consider the impression he made on you, also to remember he is the defendant and is interested in the case. The case must to a great extent turn on the effect he produced on you. It is a question of fact, if you believe from this evidence that he knew, had reason to believe that the product was shipped and was oil of birch, but knew at the time it was really in a large quantity composed of methyl salicylate, and was an article of food, if you believe that, have no reasonable doubt about it, he is guilty and should be so found under both counts.

If, on the other hand, you don't believe that, you don't believe he knew it, or had reason to believe such adulteration, he did not know it or had any reason to believe it and acted in good faith, if you have reasonable doubt about it, then it is your duty to acquit him.

There are the two reasons, I submit them to you with[out] expression of opinion.

UNITED STATES v. 1,367 CASES OF PORK AND BEANS

(District Court, W.D. Michigan. Oct. 31, 1916)

N.J. No. 5059

Libels under section 10 of the Food and Drugs Act. Jury trial. Verdict in favor of the United States.

SESSIONS, *District Judge* (charge to jury). Gentlemen of the jury: At the outset you should disabuse your minds of any feeling or belief that by this suit the Government is making an attack upon the bean industry or the canning industry of this State. An impression seems to have been sought to be created that in this proceeding the Government is attacking one of the important industries and businesses of this State. That is not true in any sense or to any degree, and the verdict and judgment in this case, whatever they may be, will not in anywise affect the business of the bean grower, the bean dealer, or the bean packer, and will not in anywise affect the industry or product of any other canning concern than the claimant, the Oceana Canning Company, and will not affect its industry in any way except as to the canned pork and beans involved in these particular shipments. No claim is made and no charge is made by the Government that the processes employed in canning pork and beans are defective, or that there is anything wrong with them.

The specific claim that is made by the Government in this case is that in the packing and canning of the particular pork and beans involved in this controversy beans of an inferior and defective grade, or of an inferior and defective stock, were obtained and used, and that the beans were so inferior and so defective that they were partly decomposed and rotten and came within the ban of the act of Congress known as the Food and Drugs Act, the purpose of which was and is to protect the public against deception, imposition, and injury with relation to foods and drugs. That is the issue and the only issue in this case.

Congress in its wisdom has seen fit to prohibit the transportation in interstate commerce (that is, from one State to another) of adulterated foods, and Congress has declared in unequivocal and unambiguous terms what shall constitute adulterated foods. Congress has seen fit to enact that adulterated food shall not be permitted to go into the channels of interstate commerce; that it shall be forfeited and condemned, and, so far as the Government can prevent, shall not be permitted to be consumed by the public.

In this consolidated case—and it is four suits consolidated into one and treated as one suit—the Government seeks to condemn and forfeit 1,169 cases and 58 cans of pork and beans which were manufactured or canned by the claimant, the Oceana Canning Company, at Shelby, Mich., and which were transported in interstate commerce; and its right to forfeit and condemn the product involved in this controversy is based upon the claim that these cans of pork and beans consisted in whole or in part of decomposed vegetable substances, or a decomposed vegetable substance.

This is not a criminal case. The Government does not seek the conviction and punishment of any person or corporation for the com-

mission of a criminal offense; and, therefore, the rules of evidence applicable to criminal trials do not prevail in this proceeding. As you all know, in a criminal case the Government, or the people, must establish a case beyond a reasonable doubt to warrant a conviction. That is not true in this case, because it is not a criminal suit. This is a civil suit, but it is of an unusual nature, in that the Government does not here seek to recover a money judgment or to recover property for itself. It does seek to condemn and forfeit certain articles of food which it claims are within the prohibition of the act of Congress known as the Food and Drugs Act. So that in this case the Government is not required to establish its cause of action by evidence which satisfies you of its right to recover beyond a reasonable doubt. It is necessary, to warrant a verdict in favor of the Government, that it shall have established its case and each and every essential element thereof by a fair preponderance of the evidence, and by evidence which is clear and satisfactory and convincing to you. No greater burden than that rests upon the Government. To warrant a verdict in its favor the Government must have so established—

First. That the article sought to be condemned is a food or a food product;

Second. That it has been transported in interstate commerce, that is from one State to another;

Third. That at the time of its seizure, having been transported, it was still in the unbroken or original package, or unloaded; and

Fourth. That at the time of the shipment and seizure the article was adulterated within the meaning and purview of the act of Congress here under consideration.

The first three elements of the Government's cause of action are established by the evidence in the case. It does appear by the undisputed evidence that canned pork and beans are articles of food. It does appear by the undisputed evidence that the cans of pork and beans, or cases of pork and beans involved in this controversy have been transported in interstate commerce. It does appear that at the time of their seizure by the Government they were still unloaded or in the original and unbroken packages.

So that the sole question for your determination is whether, within the meaning and purview of the Food and Drugs Act of Congress, these cans of pork and beans were adulterated.

Something has been said with relation to the pork and beans in controversy being unfit for food, or deleterious to health if consumed by human beings. Those are questions with which you have no concern; those are questions which are not involved in this controversy, and they are matters which do not constitute an element of the Government's cause of action which it is required to establish.

Again, Congress in its wisdom and in its discretion and in the exercise of its power has declared the rule and the standard in those regards. In certain sections of the Food and Drugs Act, Congress has seen fit to provide that before the Government will be entitled to condemn or forfeit the article under consideration and in controversy it must establish that the article is deleterious to health. The term "unfit for food" is not used in the statute; but in the section and provision of the statute here involved Congress has declared what the rule shall be, and has not limited or restricted the right of condem-

nation and confiscation to such articles of food as are found to be adulterated to an extent to render them deleterious to health. In other words, as I have said, Congress has made the rule and established the standard and has declared that any article of food which consists in whole or in part of a decomposed vegetable substance shall be deemed adulterated and shall not be permitted to go into the channels of interstate commerce. Thus the issue is narrowed to the one question: Did the cans of pork and beans involved in this controversy, and which have been seized by the Government, at the time of their seizure, consist in whole or in part of a decomposed vegetable substance?

The term "decomposed" as it appears in this act of Congress is not confined to its technical or scientific definition. Strictly speaking, or scientifically speaking, an article may be said to be decomposed when it is broken down, when it is separated into its constituent elements; but as the term is here used that is not the final test. If it were, foods which are produced by the decomposition of some other food substance would be within the ban of the statute. To illustrate, I think we all know, as a matter of common knowledge, that sauerkraut is produced and manufactured partially by the decomposition of cabbage, and yet sauerkraut is a food and it is not decomposed so as to be within the prohibition of this statute, or the meaning of the term as it is used in this statute. In the same way butter, and cheese, and buttermilk result from the decomposition of milk, and yet they are not decomposed or adulterated articles of food. So that there must be some other or some additional meaning of this term "decomposed", as it is used in this act of Congress; and it means decayed, or rotten as these terms are commonly and ordinarily understood. I think nothing can be added to that definition that would be of aid or assistance to the jury. You all know what is commonly meant by a decayed or rotten vegetable substance.

It has been said in the course of the argument that, that being true, there was no necessity for the testimony of experts and scientists in this case. That conclusion does not follow at all from the premise. The testimony of the experts and the scientists who have testified in this case is of great importance to you in determining the question which is presented to you for your determination. I think I may safely say that we all know a rotten apple, or a partially rotten apple, when we see it, if it has decayed and become rotten to such an extent that the decay or rot is visible or can be detected by the senses. But I doubt if any one of your number would be able to tell or define what produced the rot in the apple, or the kind of rot that existed in the apple, or what its effect might be upon another vegetable; I doubt if any one of you could tell what it consisted of or whether it was a mold or a fungus growth. Those matters are not within our ordinary experience, and it becomes important for us to learn from those who are versed in such matters what the cause of the rot is, what produces it, and then applying the information so obtained to this particular case it enables us, and will enable you, to determine whether the beans contained in the cans of pork and beans involved in this controversy were decayed or rotten or partially so. So that in determining the question presented to you it will be your duty carefully to consider all of the testimony and all of the evidence

in this case, that on the part of experts as well as that on the part of nonexperts.

Something has been said in this case as to there being a difference between dry rot and wet rot. The statute does not recognize any such difference. You have all in your experience and in your observation seen and found rot that was not a so-called wet rot, and yet it may have been rot. While I am not an expert, I presume to say that the question of whether a rot is a dry rot or a wet rot depends pretty largely upon the nature of the substance upon which it is acting. We have all of us seen rotten wood, which was not a wet rot; nevertheless it was a true rot and we could all tell it if we saw it. We have all of us seen both dry and wet rots in vegetables of different kinds. So that the test in this case is not whether this was a dry rot or a wet rot which affected these beans, nor is the test whether the rot was active or inactive at the time of the seizure of the beans. The test is, was a part of the substance of which those cans of pork and beans consisted rotten or decayed at that time; not whether it was wet or dry, or active or inactive, but under the testimony in the case it is for you to determine whether a part of the beans in those cans were decomposed or partially decomposed, and whether the cans of pork and beans consisted partially of decomposed beans.

Some other terms used in this statute ought to be defined. The term "consists of" is employed. That term means something more than the word "contains." The term "contains" ordinarily means something added to or embraced within the original substance. The term "consists of" as here employed means a part of or a constituent element of the product; in other words, there must be something more than a trace of rottenness in these beans. There must be such an amount or such a degree of rottenness in the beans as to be definable, measurable, and appreciable. It need not be of any particular degree, but it must be something that can be found substantially in the article of food under consideration.

At the risk of inaccuracy and mistakes as to details, but for the purpose of aiding you if I can to a correct conclusion in this case, I will try and give you some illustrations of the effect of this statute as regards the transportation in interstate commerce of adulterated foods. A carload of potatoes is shipped in interstate commerce; a few of the potatoes in that carload are rotten. You would at once say that the Government would not be justified in condemning that whole carload of potatoes because a few of the potatoes therein were decomposed and rotten; because decomposition, to some extent, is going on all the time in a vegetable of that kind after it has ceased to grow. Why may it be true that a carload of potatoes containing a few rotten potatoes is not subject to forfeiture and condemnation? As I view the law this is the reason and the foundation for it: In that instance each potato is a unit, and each potato is treated by itself before it is used or consumed as an article of food, and each potato must be so treated, that is, by itself, before it is consumed. But suppose that that carload of potatoes as a whole, the good and the bad and the sound and the rotten, was converted into potato flour, and there was in the potato flour made from that carload of potatoes an appreciable and definable and substantial amount of rotten potatoes, that flour would be subject to condemnation and

forfeiture. And why? Because the rotten substance therein, or the decayed substance therein is not capable of separation from the rest of the mass and it is all to be consumed by the consumer. I am simply giving you this as a rough illustration. In the same way a barrel of apples containing a few rotten apples might not be subject to condemnation, at least we have not that question here before us for determination. But suppose that the entire barrel of apples, the sound and the rotten, were converted into apple sauce, or apple butter, or apple jelly, and the rotten substance derived from the rotten apples in that apple sauce, and apple butter, and apple jelly, was an appreciable, measurable, and definable amount, then that food product would be subject to condemnation and forfeiture if it was transported in interstate commerce.

The same way with tomatoes. A crate of tomatoes containing a few rotten tomatoes might not be subject to condemnation and forfeiture; but if those tomatoes, the rotten and the sound, the good and the bad, were manufactured into tomato pulp or tomato catsup, then the rotten substance therein could not be separated from the sound, from the wholesome; the unadulterated could not be separated from the adulterated, and the whole mass would become adulterated and liable to confiscation if shipped in interstate commerce. To go a step further, if you had a carload, we will say, of ears of corn and some of the ears of corn to an amount that would be definable and appreciable and measurable were rotten and decayed, the Government might not have the right to condemn that whole carload of corn—I do not say that it would not, but at least it might not; but certainly if that corn was shelled and the whole carload of corn, including the rotten and the sound, was converted into cornmeal for human consumption and then shipped in interstate commerce it would be liable to condemnation. And to bring the illustration to this case: Field beans as they come from the field, some of them discolored—if decomposed, and that is the question for you to determine—in the dry state might not be subject to confiscation or condemnation if shipped by the farmer or the warehouseman in interstate commerce, for the reason that it appears by the evidence in this case that those beans are treated, they are picked in order to separate the discolored beans from the white beans, and we all know, as a matter of common knowledge, that whether beans have been hand-picked or mechanically picked, when they come to the housewife and the cook they are picked over before they are cooked and placed upon the table for consumption. For that reason and because the good may be separated from the bad, it may be that beans that are field run or cull beans, designed to be used as a food product, may not be subject to condemnation in the dry state. But when those beans are canned, processed, and if those discolored beans are decayed or rotten—and as I have said that is the question for you to determine—if they are decomposed within the meaning of this statute, then the can of beans becomes the unit, and in the ordinary course of consumption the discolored beans are not separated from the white beans and the whole mass is consumed, the discolored with the others. So that if discolored beans are decomposed within the meaning of this statute, then such a can of beans transported in interstate commerce comes within the ban of this statute.

It is not necessary for the Government to show that there were any beans in any of these cans which were wholly decomposed or rotten, because if a bean is partly decomposed and partly rotten, that rotten part which goes into the can is a decomposed substance just as much as the whole bean would be if entirely discolored. I do not mean that it would be the same quantity, but the decomposed part would still be decomposed, notwithstanding that it did not affect the entire bean.

So that the issue is a narrow one. It is for you to say from the evidence in this case: Did these cans of pork and beans as they were canned, as they were shipped in interstate commerce, as they were seized by the Government, consist in part of a decomposed substance? In other words, were the beans, some of them, contained in these cans of pork and beans, partly rotten or decayed? That is the question for you to determine. If you find from the evidence in the case that these cans of pork and beans consisted in part of a decomposed vegetable substance, your verdict will be in favor of the Government. If you find that they did not, your verdict will be in favor of the claimant.

In form your verdict will be, if you find for the Government: We find for the Government and that the canned pork and beans ought to be condemned. If you find for the claimant: We find for the claimant and that the canned pork and beans ought not to be condemned.

Mr. Clerk, you may swear an officer.

Mr. MASTER. We desire to except to the charge of the court which eliminates the elements of unfitness for food and deleteriousness to health as not constituting an element of the issue in this case. Also, on account thereof, that the issue is narrowed to one question.

We desire to except to the illustrations given relative to the potatoes in the car of potatoes, the apples and apple jelly, tomatoes and tomato catsup, as being within the ban of the statute, when there is no reference to unfitness for food or deleteriousness to health.

We desire to except to the refusal of the court to charge as asked for by claimant in its additional requests to charge and numbered 1 to 12, inclusive.

We desire to except to that portion of the charge which states that the decomposition involved did not depend on whether the rot was active or inactive.

Mr. WALKER. I don't know whether I ought to take any exceptions at all; it would be simply to the failure to give the Government's requests to charge as preferred, 1, 2, and 3. The other three were covered by the general charge, and I think perhaps these were.

UNITED STATES v. WEDELL

(District Court, District of Utah, Nov. 22, 1916)

N.J. No. 5608

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty. Motion in arrest of judgment and for a new trial overruled.

JOHNSON, *District Judge* (charge to jury). Gentlemen of the jury: The defendant, Walter B. Wedell, is charged in this case by the United States on an information filed by the district attorney with the violation of what is commonly called the Food and Drugs Act of Congress. The charge is in two counts, the first of which is, beginning with the charging part,

That Walter B. Wedell, of the city of Hot Springs, State of Utah, did within the Judicial District of Utah, and within the jurisdiction of this court, on or about the 25th day of October, in the year 1913, then and there, in violation of the Act of Congress of June 30, 1906, known as the Food and Drugs Act, unlawfully ship and deliver for shipment from the city of Hot Springs, State of Utah, to the city of Denver, State of Colorado, consigned to W. B. Wedell, for delivery to the Western Fruit and Vegetable Company, a certain consignment, to wit, 630 boxes containing an article designed and intended to be used as an article of food, to wit, apples, which were then and there denominated as to the contents thereof and labeled, marked and branded as follows, to wit: "Gano Extra."

That said article of food, when shipped and delivered for shipment as aforesaid, was then and there adulterated within the meaning of said act of Congress in that it consisted in whole or in part of a filthy vegetable substance; all of which was and is contrary to the form of statute in such case made and provided and against the peace and dignity of the United States of America.

The second count charges

That said article of food, when shipped and delivered for shipment as aforesaid, was then and there misbranded in that the following statement regarding the article and the ingredients and substances contained therein appearing on the label aforesaid, to wit, "Gano Extra," was false and misleading in that it indicated to purchasers thereof that the said article consisted of apples of gano type or variety, which were of extra or superior quality, when, in truth and in fact, the said article did not consist of gano apples of extra or superior quality, but did consist of, to wit, gano apples which were in whole or in part wormy, worm eaten, and otherwise filthy; and the said article was then and there further misbranded in that it was labeled "Gano Extra," so as to deceive and mislead the purchasers into the belief that the said article consisted of apples of gano type or variety, which were of extra or superior quality, when, in truth and in fact, the said article did not consist of gano apples of extra or superior quality, but did consist of, to wit, gano apples which were in whole or in part wormy, worm eaten, and otherwise filthy; all of which was and is contrary to the form of statute in such case made and provided and against the peace and dignity of the United States of America.

The statute governing in this case, gentlemen of the jury, in so far as it is material to the issues, reads as follows:

That the introduction into any State * * * from any other State * * * of any article of food which is adulterated or misbranded, within the meaning of this act, is hereby prohibited; and any person who shall ship or deliver for shipment from any State * * * to any other State * * * any such articles so adulterated or misbranded within the meaning of this act, shall be guilty of a misdemeanor.

* * * * * * *

The term "food," as used herein, shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound.

* * * * * * *

That for the purposes of this act an article shall be deemed to be adulterated:

* * * * * * *

Sixth. If it consists in whole or in part of a filty, decomposed, or putrid animal or vegetable substance.

Under the second count the language of the statute reads as follows:

That the term "misbranded," as used herein, shall apply to all * * * articles of food, or articles which enter into the composition of food, the pack-

age or label of which shall bear any statement, design, or device regarding such article, * * * which shall be false or misleading in any particular, * * *

That for the purposes of this Act an article shall also be deemed to be misbranded:

* * * * * * *

In the case of food:

Second. If it be labeled or branded so as to deceive or mislead the purchaser.

Under this statute I charge you, gentlemen of the jury, that a shipment made from Hot Springs in this State to Denver in the State of Colorado, by railroad, would be a shipment in interstate commerce.

You will observe that under this statute and under the two counts in the information the defendant is charged in the first count with a shipment of an article adulterated as defined in the statute. Under this count the matter of labeling is immaterial. The only question that you have for consideration in determining your verdict upon this count is, were the apples, or any part of them, alleged to have been shipped by the defendant, adulterated as defined under the statute, which means, as defined under the statute, did the said apples, or any part of them, consist in whole or in part of a filthy vegetable substance.

There has been evidence offered in the case for the purpose of tending to prove or show that some of the apples contained in these boxes shipped by the defendant were what has been termed "wormy" apples. And it is claimed by the prosecution that wormy apples fall within the definition "as consisting in whole or in part of a filthy vegetable substance." Whether or not these apples shipped by the defendant were wormy, or whether, being wormy, they contained matter filthy and a vegetable substance, is a question of fact, gentlemen of the jury, for you to determine from all of the evidence offered in the case.

The word "filthy" has its ordinary and usual signification. I shall not attempt at this time to define the word by the use of other language. It is a term that is familiar to you and of common use and is used in its ordinary and usual acceptation.

If, upon a consideration of the meaning of the word, you shall find that these apples were wormy and that they were or contained a filthy vegetable substance as a result of being wormy, then, under the definition as given by the statute, they were adulterated and their shipment was and is prohibited by the terms of the statute in interstate commerce trade.

If you shall find that these apples, or some part of them, consisted in whole or in part of a filthy vegetable substance, then I instruct you, gentlemen of the jury, that the defendant would be guilty upon the first count. If, however, you shall find that they were not or did not consist in whole or in part of a filthy vegetable substance, then I instruct you that your verdict should be, upon that count, not guilty.

The defendant is charged in the second count, as I have already stated to you, with misbranding the boxes of fruit or apples shipped by him, in that they were so labeled or branded as to deceive or mislead the purchaser.

By the words used in the statute "the purchaser" is meant not only the wholesale dealer who might buy the apples or the retail dealer who might purchase them but includes also the ultimate consumer who might purchase them for use.

It is charged in the information that they were misbranded in that they were labeled "Extra Gano" or "Gano Extra", and that they were misbranded in that they were not in fact Gano Extra, but an inferior apple. The name or expression "Gano Extra," it is claimed by the prosecution, has a distinctive meaning, that it characterizes apples of a certain variety or quality, and it is claimed that these apples shipped by the defendant in this shipment were not of the quality which the name "Extra Gano" designates.

Evidence has been introduced in this case tending to show or to prove this designation, and it is for you to determine, gentlemen of the jury, from all of the evidence in the case what is the distinctive meaning of the language or words "Extra Gano" or "Gano Extra."

It is also claimed by the prosecution that these apples were not of the quality which this name designates, but were of an inferior quality, in that they were wormy or worm-eaten. Now I charge you, gentlemen of the jury, that if the name "Gano Extra" or "Extra Gano" designates an apple which is not wormy, and if you shall find from the evidence that the apples shipped by the defendant in this case were, in whole or in part, wormy apples, then the apples would not, in fact, correspond to the designation, and those words being considered alone, if a purchaser seeing a box of the apples with this label was deceived or mislead with respect to their quality, then the defendant would be guilty of misbranding, and if that were all in this case, would be guilty as charged in the second count of the information. But, gentlemen of the jury, it appears in this case that this box of apples shipped by the defendant had upon them brands or labels placed there by certain officers of the State; the language of the statement contained upon these brands or labels reads, as I now remember it: "This fruit has been condemned by the State of Utah and is shipped to be used in the manufacture of byproducts."

Now it is claimed by the defendant in this case that notwithstanding the use of the words "Extra Gano", assuming that some of these apples were wormy and were not of the quality which that name designated, that nevertheless by reason of these brands or stamps placed upon the boxes by the State officers, a purchaser would be so informed as not to be deceived or misled with respect to them. Whether that contention is or is not true, gentlemen of the jury, I shall submit to you as a question of fact to be determined in this case by you. For the determination of that particular question you may take into consideration the language used upon this State label or brand, its size, its location on the box, and from all of these facts as they may appear in the evidence before you determine whether or not a purchaser of a box of these goods with this label placed there by the defendant "Extra Gano" and these other labels or brands placed upon the boxes by the officers of the State, would be misled or deceived with respect to what he was buying. If such a purchaser would not be deceived or misled and would reasonably know that notwithstanding the stamp "Extra Gano" that he was not getting "Extra Gano", then I charge you, gentlemen of the jury, that there would be no misbranding in this case and the defendant would not be liable; but if, on the other hand, after a consideration of all the matters to which I have called your attention you shall believe that

a purchaser, and by "purchaser" I mean, as I said before, anyone who might buy, a person of ordinary and reasonable intelligence, if such a person would be misled and deceived and fairly and reasonably suppose that he was buying "Extra Gano" apples, then the defendant would be guilty as charged in the information.

The question of the intent of the defendant in this action or his motive with respect to this shipment or the labels or stamps placed upon the boxes is immaterial. Under the first count the question is, Were these apples adulterated within the meaning of the statute? Under the second count were they misbranded within the meaning and language of the statute?

In all the matters concerning which I have instructed you that you must find in this case in order to convict the defendant, I now instruct you that it is necessary that you find each and all of such facts beyond a reasonable doubt.

A reasonable doubt is a doubt based upon reason and which is reasonable in view of all the evidence. It is a fair doubt growing out of the evidence or lack of evidence in the case. It is not a mere imaginary, captious, or possible doubt but a fair doubt based upon reason and common sense., and if after an impartial comparison and consideration of all the evidence in the case you can not candidly say that you are satisfied of the defendant's guilt, you have a reasonable doubt, and if such is the condition of your mind after considering all the testimony you should find the defendant not guilty. But if after such impartial comparison and consideration of all the evidence you can truthfully say that you have an abiding conviction to a moral certainty of the defendant's guilt, you have no reasonable doubt. A doubt to justify an acquittal must be such a doubt as would cause a reasonable, prudent, and considerate man to hesitate and pause before acting in the graver and more important affairs of life.

The defendant in this case is presumed to be innocent until he is proven guilty, and this presumption, gentlemen of the jury, accompanies each defendant in a criminal case throughout its entire course and until that presumption is overcome and overthrown by evidence offered in the case.

You are the exclusive judges of the facts proven, of the credibility of the witnesses, of the weight and effect of the evidence and of the inferences to be drawn therefrom, and in determining these matters you are to exercise your best judgment based upon your experience in life as men and your knowledge of the motives which influence persons in their statements.

You have a right to take into consideration the conduct and manner of the witnesses while testifying before you, their intelligence and means of observation, their opportunities to know and capacity to remember and to state the facts to which they testify, their interest or lack of interest, if any has been shown, in the result of the trial, their prejudice or bias, if any has been shown, the state of mind of any witness at the time of the occurrence of the things to which he has testified insofar as the evidence enables you to judge it, and the probability or improbability of the truth of these statements in view of all the other evidence.

You are not bound to believe the testimony of any witness or any number of witnesses. You are to search for the truth, believing only such testimony as carries conviction of its truth to your minds.

If you shall believe that any witness has willfully testified falsely as to any material fact in the case, you are at liberty, but not required, to disregard the whole of the testimony of such witness, except in so far as he may have been corroborated by credible witnesses or credible evidence in the case.

If there is a conflict in the testimony of witnesses then it is your duty to reconcile such conflicts in so far as you can, but it is still for you to determine for yourselves what the ultimate truth of the case is.

It is your duty to consider the evidence all together fairly, impartially, and conscientiously. You should arrive at your verdict solely upon the evidence introduced before you upon the trial. You should not consider or be influenced by any evidence offered but not admitted by the court, nor any evidence stricken out by the court or withdrawn by counsel.

When you retire to your jury room you will elect one of your number to act as foreman and when you have agreed upon your verdict your foreman will sign it as such in behalf of all of you.

Forms of verdict will be furnished you, gentlemen of the jury, providing for the acquittal or conviction of the defendant upon each of the counts or both of the counts, as your deliberations may result.

At the request of the district attorney I will say to you, gentlemen of the jury, that it is not necessary for the Government to prove any concrete case of a purchaser being deceived or misled. As I stated to you in my instructions heretofore, a purchaser might be any person, as I explained to you, who might buy these apples.

What is a filthy apple, gentlemen of the jury, is a matter for you to determine from all the evidence in the case of course, from your own common experience; you have the right to take that into consideration as well as what you hear. If you hear something that you know is not true of your own experience, you have a right to consider it.

Mr. Cook. I think this suggestion should be made in that connection: the language of the count is "consisting in part of filthy vegetable substance."

The Court. Oh, yes; the whole apple does not have to be filthy. The language of the statute is, the language of the charge is, and my instruction is, I think throughout the instructions, "in whole or in part."

Mr. Cook. So the whole apple, even though wormy, does not need to be filthy, if it consists in part of filthy vegetable substances.

The Court. It would have to contain filthy vegetable substances.

Mr. Henderson. The question for this jury to decide is whether a wormy apple is a filthy apple.

The Court. That is the question for them to decide, certainly.

Mr. Henderson. It is for this jury to decide that question.

The Court. That question is submitted to them.

The jury thereupon retired and after due deliberation returned a verdict of guilty. Thereupon the defendant, by his counsel, filed his motions in arrest of judgment and for a new trial and on January 20, 1917, said motions were denied, as will more fully appear from the following decision by the court (Johnson, *D. J.*):

In this case the defendant was convicted on two counts; the first count involved the question which counsel has discussed as to a filthy substance; the second count involved misbranding.

That these apples were misbranded, as charged in the second count of the indictment, I have not any doubt. The boxes were labeled "Extra Gano", and the proof showed that "Extra Gano" was a term that signified the apples were extra good, and at least were not wormy. As I understood it at the time, the only reason that counsel for the defendant contended that they were not misbranded was that certain other brands or notices were stamped on the boxes. I think the court properly left to the jury whether or not these other brands modified the main brand. The fact is I have some doubt in my own mind whether I should have left that question to the jury at all. Just why these apples were put into boxes that had the name "Extra Gano" on them, or why this brand was put on after they were put in, it is not necessary to discuss. The apples could have been shipped without any brand on the boxes at all, except such as the State put on. But those words were there, and I think the defendant got all under the instructions that he was entitled to, and possibly more.

Now, whether or not the statute is intended to cover wormy apples is a question, of course, that is open to discussion. It is like the construction and scope to be given any other statute—the Mann Act, the Safety Appliance Act, and a great many others. I do know this, that the Supreme Court of the United States has shown by its interpretation of these various acts a very liberal interpretation as to their scope and purpose, and in view of the interpretation of the court of final resort upon statutes of this character I think that this court would be abusing its power to undertake in this jurisdiction to put a narrow construction upon a very useful statute.

However, I should be very glad, indeed, to have counsel review this case in the court of appeals. It is important, of course, to determine whether or not wormy apples can be shipped in interstate commerce. It is important to every grower of fruit and every shipper of it. In this case I am inclined, so far as this court is concerned, to accept the verdict of the jury as final.

Upon each count the motion in arrest of judgment and the motion for a new trial may be denied, and the judgment of the court is that the defendant pay a fine of $100 upon each of the counts upon which he stands convicted.

UNITED STATES v. KOSHLAND

(District Court, N.D. California, Jan. 5, 1917)

N.J. No. 5246

Information alleging violation of section 2 of the Food and Drugs Act, Jury trial. Verdict of guilty.

DOOLING, *District Judge* (charge to jury). Gentlemen of the jury: The defendant is charged in an information, filed October 2, 1916, with a violation of the act of Congress of June 30, 1906, known as the Food and Drugs Act.

It is charged that the defendant did unlawfully ship and deliver for shipment from the city and county of San Francisco, State of California, to the city of New York, State of New York, with instructions to notify James Chieves & Company, a certain consignment, to wit, 612 sacks containing an article designed and intended to be used as an article of food, to wit, horse beans, which were then and there, unlabeled; that said article of food, when shipped and delivered for shipment as aforesaid, was then and there adulterated in that it consisted in whole or in part of a filthy, putrid, and decomposed vegetable substance.

The second count of the information charges a violation of the same statute, at the same time and place the consignment therein being 707 sacks of horse beans, which were adulterated in the same manner as the beans charged in the first count.

In the third count it is charged in the same manner as aforesaid, that at the same time and place a consignment of horse beans, 912 sacks labeled, marked, and branded "Monte 418" "20567" and "A", was shipped unlawfully, and also were adulterated. The act provides that any person who shall ship or deliver for shipment from any State or Territory to any other State or Territory any article adulterated within the meaning of the act, shall be guilty of a misdemeanor.

If as much as 25 per cent of the beans in question contained weevil, larvæ, or grubs, such beans would be filthy within the meaning of the statute.

The act nowhere requires proof of intention by the use of the words knowingly, willfully, or like words. It would be destructive of the act itself and nullify it entirely to allow the intent of the person violating it to be considered as a defense; it is therefore unnecessary to prove that the defendant had knowledge that the article shipped by him was obnoxious to some provision of the act. He is charged with a knowledge of the condition of the article.

The fact that the defendant did not intend to violate the law is not a question here. The question is, was the law in fact violated?

For the purpose of the act an article shall be deemed to be adulterated: if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance. The shipment of the beans here is admitted, and the question for you to determine is whether they were adulterated within the meaning of the act.

The Food and Drugs Act provides that any person who shall ship or deliver for shipment from any State or Territory to any other State or Territory any article adulterated within the meaning of the act, shall be guilty of a misdemeanor.

The burden of proof in this case is upon the Government, and it is not necessary for a defendant to offer evidence in disproof of any allegation of the information until the facts proven, if unrefuted by him, are sufficient to establish his guilt, beyond a reasonable doubt. The law presumes the innocence of a defendant, and that presumption abides with him through the trial and extends to every fact necessary to constitute the offense, and continues until his guilt is finally established by the evidence beyond a reasonable doubt, and determined by your verdict. A reasonable doubt arises when the jury, after a fair and impartial consideration of all the evidence in the

case, are unable to say that they feel an abiding conviction to a moral certainty of the truth of the charge; a certainty which satisfies the reason and directs the understanding of those who are bound to act conscientiously upon it. If, therefore, after a full consideration of all the evidence presented, the jury entertain such a doubt as to any fact or element necessary to constitute the offense charged, they must resolve that doubt in his favor by an acquittal. That is to say, if you have any doubt as to whether the beans were shipped by him, or any doubt as to whether they were adulterated within the meaning of the statute, you must give the benefit of that doubt to the defendant. But you will not understand from this that the Government is called upon to make a case free from any possible doubt, that is, to prove the defendant's guilt to an unassailable demonstration. Such is not the law, for such proof is rarely obtainable in dealing with human transactions. In other words, the doubt which will justify your hesitation must be based in reason and arise upon the evidence and not consist of a mere fanciful hesitation growing out of your sympathies, or based upon something other than a fair and impartial consideration of the evidence in the case.

The purpose of this act is to protect the public from the manufacture, sale, or transportation of adulterated or misbranded [foods and drugs] or [those] below a certain standard. The burden is upon the seller or shipper to know the condition of the article which he ships.

It takes the concurrence of all of you gentlemen to agree upon a verdict, and when you have so agreed you will have such verdict signed by your foreman and returned into court.

(The jury returned at 4:20 o'clock p.m. into court for further instructions.)

The COURT. Gentlemen, have you reached a verdict?

A JUROR. We would like to have the instructions re-read.

The COURT. I have stated the contents of the information which you have in your possession. The Food and Drugs Act provides that any person who shall ship or deliver for shipment from any State or Territory to any other State or Territory any article adulterated within the meaning of the act shall be guilty of a misdemeanor; and that for the purpose of the act an article shall be deemed to be adulterated if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance.

The shipment of the beans here is admitted, and the question for you to determine is whether they were adulterated within the meaning of the act.

It is the opinion of the court that if as much as 25 percent of the beans in question contained weevil, larvæ, or grubs, such beans would be filthy within the meaning of the statute.

The act nowhere requires proof of intention by the use of the words knowingly, willfully, or like words. It would be destructive of the act itself and nullify it entirely to allow the intent of the person violating it to be considered as a defense; it is therefore unnecessary to prove that the defendant had knowledge that the article shipped by him was obnoxious to some provision of the act. He is charged with a knowledge of the condition of the article.

The fact that the defendant did not intend to violate the law is not a question here. The question is, was the law violated?

You have been instructed that the burden of proof is upon the Government, and it is not necessary for a defendant to offer evidence in disproof of any allegation of the information until the facts proven, if unrefuted by him, are sufficient to establish his guilt, beyond a reasonable doubt. The law presumes the innocence of a defendant, and that presumption abides with him throughout the trial and extends to every fact necessary to constitute the offense, and continues until his guilt is finally established by the evidence beyond a reasonable doubt, and determined by your verdict. But you will not understand from this that the Government is called upon to make a case free from any possible doubt; that is, to prove the defendant's guilt to an unassailable demonstration. Such is not the law, for such proof is rarely obtainable in dealing with human transactions. In other words, the doubt which will justify your hesitation must be based in reason and arise upon the evidence and not consist of a mere fanciful hesitation growing out of your sympathies, or based upon something other than a fair and impartial consideration of the evidence in the case. The question is whether these goods were shipped in interstate commerce by the defendant, and whether they were adulterated within the meaning of the act. If you find they were so shipped, you should bring in a verdict of guilty, and if you have any reasonable doubt, it is your duty to return a verdict of not guilty.

It requires the concurrence of all of you to agree upon a verdict, and if you so agree you will have such verdict signed by your foreman and returned into court.

UNITED STATES v. 5,060 CANS OF TOMATO PULP

(District Court, N.D. Illinois, Jan. 16, 1917)

N.J. No. 5527

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict in favor of the United States. Motion for a new trial overruled.

LANDIS, *District Judge* (charge to jury). Gentlemen of the jury: In this case there is one fact for you to find, and that fact is whether or not the product involved in this inquiry was composed, in whole or in part, of decomposed or filthy vegetable substance. That is the issue which is tendered to you in this case. The matter comes into the Federal court because the substance was transported in interstate commerce, and solely because it was transported in interstate commerce. If it never had left the confines of the State of Indiana, it would be a matter for State determination, but being an interstate transaction, it falls within the jurisdiction of the act of Congress known as the Pure Food Law, and therefore the obligation and the authority of the Federal Government attaches to it. And the authority to seize having been exercised by its officers charged by law with the enforcement of its provisions, has set in motion the machinery that has cast upon you now the obligation of determining the fact whether or not the articles, as stated before, in whole or in part, are decomposed or filthy vegetable substance.

This is a civil action, and being a civil action the rule is that the case of the United States is to be established by the preponderance of the evidence, or the greater weight of the evidence, as distinguished from what the rule would be in a criminal case where the doctrine of presumption of innocence, and the doctrine of reasonable doubt control.

Now, by preponderance of evidence is meant not which side has the greater number of witnesses, but it is that side of this controversy on which is the believable statement of facts, as distinguished from the other side. One hundred witnesses testifying to a thing that is obviously untrue, or to a thing that is obviously an error, does not give to that side the preponderance of evidence against one witness testifying in favor of a thing that is obviously true. So, it is not to be determined solely by the number of witnesses.

Now, in determining here where is the preponderance, whether the preponderance is in favor of the accusation against the product, namely, that it is composed in whole or in part of filthy or decomposed vegetable substance, bring to bear upon this controversy that common sense and judgment that would characterize your consideration of a controversy away from court, at home, or in your business, dealing with a matter of concern to you personally.

The seizure in this case was made at Sycamore, Ill. The product seized is called tomato pulp. It was found in upward of 5,000 sealed cans. The charge of the Government, as I stated before, is that the pulp contains decomposed or filthy vegetable matter. The fact, therefore, for the witness is whether or not at the time the product entered interstate commerce—that is to say, when it was put aboard cars at Brownsberg—it was in part filthy or decomposed in its contents.

Now, to determine the question, to elucidate to you the question respecting that matter, the United States presented a number of witnesses who testified as to examinations made by them of the product after its arrival at Sycamore—microscopists, biologists, and other expert witnesses—and they testified to you what they found, and they gave you, on the basis of that testimony, including in that testimony other evidence given by other witnesses of conditions, their judgment as to whether this commodity contained in part decomposed or filthy matter. There was evidence as to tests made by one or more of the Government's witnesses, in the tomato pulp manufacturing industry at canneries covering a substantial period of years, one witness dealing with tests made in the United States and in Italy, in connection with the preparation and manufacture of this article.

Now, the defendant, the manufacturer, or superintendent, secretary and treasurer of the manufacturing concern testified as to conditions at the plant, the treatment of tomatoes up to the time they went into the boiling vat, including inspection, cleansing, and so forth. For the defendant, the witness Wesner testified. He gave you no evidence of tests such as you have in mind when you think of expert tests, that is to say, he did not use a microscope. He made no technical bacteriological test; he made no chemical test; there was no such evidence introduced by the defendant, that is to say, no expert evidence, the evidence being evidence based upon the test made by the witness who subjected the articles to an examination by the three senses, taste, smell, and sight.

There was introduced by the United States in rebuttal, after the close of the defendant's case, four bottles of an article testified to be pulp, and the witness testified that he manufactured it, and gave you the condition under which it was done. Those four bottles were submitted to the witness Wesner while he was on the stand, and he subjected them to the same test that he had previously testified he had subjected most of the articles in question hereto, and which tests he made in your presence, and you recall his evidence as to the content of those four bottles, or jars. Now, I make no comment upon it, as to what that means in view of the evidence as to the content of the four bottles, what went into it, how it was made, what it was made of, but, I call it to your attention as being worth your while to recall and determine it, the weight of the evidence of the witness Wesner as to the sufficiency of the eye test and smell test of an article of this kind in an effort to determine its content with a view to answering the question, does it contain decomposed or filthy matter in whole or in part. Now, so much for that.

There were many witnesses called by the prosecution. In determining the weight you will give to their evidence, you have in mind many other things—I will include all the witnesses in this for the prosecution and the defense, experts and everybody else—having in mind first, the kind of witness he is, the kind of man, how the witness appears to you here, whether the witness seems to be engaged in an effort to deceive or mislead you to a false judgment in this case; and in determining that fact, ask yourselves the question about the various witnesses, what interest has this witness in deceiving and misleading the jury; what is to be gained by deceiving you. Then have in mind the intelligence of the witness as disclosed by his demeanor in the court room and on the stand, whether he knows what he is talking about, apparently. You are not obliged to accept the statement of a man that is inherently improper, that is repulsive to your intelligence, merely because he swears to it. Ultimately it is for you to put it in the scales and weigh it and to appraise it, what it is worth. What I have said in that respect applies to witnesses on both sides. If you find that any witness has started out here, or, being a witness has entered upon the enterprise of telling you something that is not true, of getting into your mind a judgment about this controversy that is false or erroneous, you excuse that gentleman from this case entirely, respecting everything that he said, except insofar as any of the testimony he has given is corroborated by other witnesses, whose testimony you believe, or by facts and circumstances proven on this trial. In other words, in determining what the fact is here, decomposed or not, filthy or not, approach the controversy as I said a while ago, just as you would a controversy of concern to you at home or in your business.

Now, it is not a question solely whether this stuff—I do not use that word "stuff" in any significant way—this article, is fit or unfit for food. I will tell you why I say that. The evidence is this article is sterile; that means the contents has its injury-producing qualities killed by heat; so that even though this article was 5 percent bad—that is, 5 percent bad tomatoes, and 95 percent good tomatoes, or 10 percent bad tomatoes and 90 percent good tomatoes at the time the tomatoes went into the boiling vat down there in Brownsberg—the evidence in this case is, if you eat this tomato pulp, the 5 or 10 per-

cent rotten tomatoes have undergone such treatment that their power to injure you has been killed by the heat. I will say no more upon that. You gentlemen all understand that principle.

So I say, the question is not whether it is fit for food. The question is, whether or not, in manufacturing, the 10 percent bad tomatoes did go in, or the 5 percent bad tomatoes did go in. That is the question. And if you find it did, your verdict will have to be against the tomato pulp, even though you believe, even though you know, that you could eat the whole cargo of the product without suffering any evil consequences.

I do not know whether I ought to say anything about the high cost of living which my brother Batchelder talked about. I hesitate to speak upon the subject that a lawyer brings in in his argument, with the broad latitude given a lawyer. I expect probably nobody ever enjoyed that latitude any wider or further than I did when I was practicing law, but it is your business and mine not to be enticed away from our duty, when we have submitted to us a question to decide, by getting into closing argument, that suggests to us considerations that may have a tendency away from court to induce use to take a liberal or broad view of subjects. There may be men on the jury that raise tomatoes; certainly there are men on the jury that eat tomatoes. Don't consider this controversy from the standpoint of either the man that raises tomatoes or the man that eats them. Denude yourself of that, and decide this question as though you never would or had raised tomatoes, or never would or had eaten tomatoes. You can do that thing. The high cost of living has got nothing to do with this thing. At all events, counsel did not mean to solve the problem of the high cost of living by having us eat bad tomatoes. He did not mean that.

Of course, if there is an order of destruction here, somebody has got to lose. That has not anything to do with your judgment. In a criminal case, if there is a verdict of guilty, somebody is punished, but in determining the question of fact whether or not the man is guilty, in determining the question of fact whether in this commodity there is filthy or decomposed vegetable substance, it won't afford you the slightest aid in finding the fact in this case to have in mind that if you reach a certain verdict somebody will lose. What happens to this tomato pulp in the event of a verdict of guilty—a verdict of condemnation, a verdict that it is composed in whole or in part of decomposed or filthy matter, is of no concern to you. It is to me. Wisely or unwisely, the law has cast upon the judge the authority and responsibility in the event of a verdict against the pulp by you, of disposing of the matter. And in deciding the question which the law has submitted to you, of course you will not be influenced even to the slightest extent by any thought or speculation as to what I may do with it, in the event you reach a verdict a certain way.

Any exceptions, Mr. Batchelder? Any suggestions, Mr. Prosecutor?

Mr. DICKINSON. I have none, Your Honor.

The COURT. I neglected to give the technical legal names of the litigants. In this case, in this kind of a proceeding, the paper that

is filed by the United States, which contains the formal accusation against the pulp is called a libel; in a criminal case an indictment; in a civil action for damages, a declaration; in this case it is called a libel. The Government in this case is called the libelant, the person that brings the action the libelant. The claimant in this case, represented by Mr. Batchelder and his associates, is called the claimant. That is the person that represents the article against which the libelant proceeds for condemnation.

So, if you find against the tomato pulp—that is, that it is composed in whole or in part of decomposed or filthy vegetable substance—the form of your verdict will be, "We, the jury, find the issues for the libelant." If you find for the tomato pulp—that is, that it is not composed in whole or in part of filthy or decomposed vegetable substance—the form of your verdict will be, "We, the jury, find the issues for the claimant." That means for the pulp.

You may retire, gentlemen.

UNITED STATES v. RUSSIAN MONOPOL CO.

(District Court, E.D. New York, Jan. 19, 1917)

N.J. No. 5542

Information in three counts alleging violation of section 9 of the Food and Drugs Act. Jury trial. Two counts withdrawn. Verdict of guilty on one count.

The United States attorney filed an information against the Russian Monopol Co., a corporation, Brooklyn, N.Y., alleging the sale by said company, in violation of the Food and Drugs Act, under a guaranty that the article was not misbranded within the meaning of the said act, of a quantity of an article labeled in part, "Vodka for Passover", which was a misbranded article, and which said article, in the identical condition in which it was received, was shipped by the purchaser thereof, on or about March 4, 1915 [1914], from the State of New York into the State of Pennsylvania, in further violation of the said act.

Misbranding of the article was alleged for the reason that the following statements appearing on the labels, regarding the article and the ingredients and substances contained therein, to wit (translation) "Vodka for Passover. * * * Under the supervision of the Rabbi Joseph Michel, of Vilna, overseer of the seals. * * * Vodka for Passover, Rectified. I come to make acquainted that during the time of my traveling from Boston, I turned over my duties of taking care of this vodka, which is made in Zurad, to my friend who is now Rabbi in Boston, and I have found out that he is a great, learned man, also full of knowledge", together with the general appearance of the label and other statements in the Russian and Hebrew languages, were false and misleading in that they indicated to purchasers that the said article was imported vodka, produced in the Empire of Russia; and for the further reason that the article was a domestic product and had been manufactured in the United States of America.

CHATFIELD, *District Judge* (charge to jury). Gentlemen of the jury: I am going to be very brief as to some of these matters and explain more in detail only those which are actually questioned.

In the first place, this is a criminal case; that is, the Government has seen fit to bring this corporation into court, charging that it has violated a statute, and that immediately puts upon the Government the burden of satisfying a jury beyond a reasonable doubt as to every material matter that enters into the charge. So that you start with the proposition that there is nothing against the defendant except as you have heard the case here from the evidence. It is merely present in court, and the Government starts out to show what it charges against it, and presents that for you to listen to, and if they make out a case so as to show you beyond a reasonable doubt that the defendant broke the law in the sense I shall explain later to you, then, of course, your verdict would be guilty. If the Government does not prove the case to that extent, if you have a doubt in your minds as to whether the defendant broke the law in the sense we are to consider, if you cannot determine the matter, or if it is evenly balanced in your minds, that means you do not reach the point where you can say they are guilty beyond a reasonable doubt, and in that case your verdict would be for the defendant.

So long as it is a corporation you can see you don't have to give thought to whether it was convicted before, or is of good reputation or bad. A corporation has to use men to do its work. Those men may be good men or bad men. They may be men who abide by the law, or lawbreakers, but that would not affect the corporation, unless the corporation did something which of itself broke the law. If any witness testifies, he submits himself to you. You can determine whether or not he is telling the truth. The test of all this evidence you have heard is whether, in your mind, it conveys certain facts that you find to be the truth, so that you take those facts and hold them in your memory, so as to use them in reaching this determination, or opinion, as to whether the Government makes out its case. You can see, in doing that, that you must scrutinize as carefully as you can—weigh as carefully as you can—the testimony of everyone who appears in the case. If he is connected with the Government and his duties are such that it affects his opinion in some of these matters, take that into account, so as to scrutinize it with the idea of determining what you take as facts. When one of the men connected with the defendant testifies you are to take into account that he is interested from the sense that the result of the case will indirectly affect him, and you have to judge what he says from the standpoint of his connection with the defendant and the standpoint of the way he testifies and what facts he tells you about himself. You can see by that that it is not the quantity of the testimony. There were more witnesses for the Government than the defendant, and yet if the Government does not make out a case to the extent that I have told you, the number of witnesses does not make any difference.

What I have charged with respect to any corporation is, of course, the law with respect to this particular charge, and so, looking at the evidence—the testimony you have heard—weighing the statements of the witnesses from that standpoint, just fixing these facts

so as to see what you do determine, do agree, and thereby arriving at matters which you may consult about together (because you cannot reach a verdict until you go to your room and your twelve minds work one with the other so as to result in one verdict), then you will by that process of elimination get certain things which you start out with as the facts which you find, and then, from those, consider next what is the charge against this company, and then see whether the facts prove beyond a reasonable doubt that the charge is made out.

This Pure Food and Drug Law, of course, has purposes that in general I think everyone approves of. It is to benefit, or help, the public. It is to prevent the use of articles of food or of drugs that will do harm through the lack of information on the part of those who use something that they think is different from that which it actually is. We need not go into all those possibilities.

In the case of foods, it is intended to do two things: One, to enable the persons to get exactly what they think they are getting, and in the next place to prevent their getting something that may do them harm or may defraud them by making them pay an additional price, or will cause them to be cheated in the various ways that are defined in the statute, by covering up the sale of one thing in place of that which the article purports to be.

In these particular sections we have to do with there are in general two propositions—one as to adulteration and the other as to misbranding. In this particular case on trial we are concerned with misbranding.

When the Government presented the case in court on this information they had three counts. They have withdrawn two of them because of the particular words on which the count was based, and we have one left, which refers to the same act, the same transactions, as those expressed in the other two, and so far as you gentlemen are concerned any one of the three counts would leave the same question to you because, in addition to the statement of it as presented in this paper which is on file, the matter has gone on and been heard upon the testimony, and you are to consider the case as presented from what you heard, not from the way the district attorney or some one in his office may have chosen the language that went into this particular paper.

In count 2, which is the one going before you, they have attempted to charge a case of misbranding. In addition to the fact that it has to do with the question of the sale and use of food products, I must call your attention to the way it gets into this court.

The Constitution gives Congress the right to make certain laws. You understand that the States, for instance, have the right to make police regulations as to a person's conduct (if he is going to commit a burglary or that sort of thing here in Brooklyn), and that the United States, under the Constitution, has the right to make such laws as those stating how a person coming from Vilna, Russia, would get into the United States. There is a definite marked boundary line between the laws that are within the States' jurisdiction and the laws that are applicable to the whole country, and one of those boundary lines is drawn with reference to what is State commerce; that is, business within the boundaries—as far as we are concerned—of New York State, and business that is interstate; that is, for in-

stance, the acts of the people of New York who conduct business with people in some other State. When that happens, the business goes across the State line, and then the Constitution says the United States courts, which will apply the law according to the same standards and feelings in either State, will hear the case, or will have to do with the matter, instead of having the matter determined, perhaps, for a resident of New York by a court in New Jersey. So, where this interstate commerce, where the matters of business (products) are going from one State to the other, Congress has the right to make regulations and to provide for criminal provisions, criminal laws, criminal penalties, for the violation of those laws, so long as it is a regulation of the actual passage of the commercial articles from one State to the other or the acts of parties who are sending the articles from one State to the other, and who thereby are taking part in something that the United States can control.

So this law was passed with reference to the regulation of food products and drugs, and the acts of persons who were dealing in food products and drugs which went from one State to the other, and intended to do that when they were put into commerce.

You can see that if this Russian Monopol Company was making vodka, that they knew was going to be drunk on the premises, or drunk in Brownsville, it would have nothing to do with commerce in New Jersey, Pennsylvania, Connecticut, or the rest of the world. It would not be interstate or foreign commerce. It could not get out of the State until after it was drunk, and therefore, the commerce part would be local. But if they sold this product to a dealer, like the jobber, Mr. Storm, and he should take a boat, automobile, or wagon and go in Connecticut and peddle it, the vodka would get out of the State and into interstate commerce. And yet, the Monopol Company would have nothing to do with the way it got there except that they made it and started it. So the law made a provision in section 2 of the statute that the introduction into any State from any other State or Territory of any article of food or drugs, which is adulterated or misbranded within the meaning of the act is thereby prohibited. That means that the shipment of the goods is made illegally. The goods could be stopped in shipment if Congress provides the machinery for so doing, and when Congress passes a statute about that they become contraband.

Then the statute goes on to say that if any person shall ship or deliver for shipment from one State to another State, in original unbroken packages, any such article so adulterated or misbranded within the meaning of this act, or who shall offer for sale in the District of Columbia, or the Territories and so on, any of these misbranded or adulterated articles can be seized and the shipper punished.

You can see that if these goods are sold by a jobber, as you have heard in this case they were sold by the Russian Liquor Company (which has the word "Russian" in it, but aside from that it might be New York Liquor Company or anything else) if it was sold by that company to this man in Philadelphia, and if the liquor company did the packing and the shipping and took the goods to the express company or the depot, then the Russian Monopol Company, the manufacturer, never had any idea until they came in court as to

just what party got this liquor or what party would drink it. So you can see, if you are merely considering the statute, "No person shall ship or offer for shipment any of these articles," you would immediately say that was the liquor company, and the manufacturer had nothing to do with it. So in order to prevent the manufacturer from sending out something adulterated or misbranded and then having an innocent third party or second party do the shipping, and thereby get in trouble with this statute, Congress went on and said that no dealer (that is, jobber) shall be prosecuted when he can establish a guaranty signed by the wholesaler or manufacturer from whom he purchased the article, to the effect that the same is not adulterated or misbranded, and the guaranty shall show the name and address of the party or parties making the sale, and in such case the said party or parties shall be amenable to the prosecution, fines, and other penalties which would attach in due course to the dealer under the provisions of the act.

So by this statute the responsibility for the transshipment of misbranded or adulterated vodka is, if it is shipped, for instance, to Philadelphia, transferred to the party who manufactures it and sells it, so that he may be brought into the shipment. So that knowledge of what is going to be done with it, or how it got there has nothing to do with the case, and this defendant is brought here in court to answer such a charge. I only explain this because you can dismiss all that part of the case out of this question.

This defendant is brought here charged with this: That it, on a certain date which you have here, here in Brooklyn, manufactured an article which they—I do not mean manufactured, I mean they sold an article, not whether it was actually made by them or bottled by them—that they put it into commercial form, and that they sold it with the idea that it should be put into consumption, and knowing, if it was consumed in New York, or retailed in New York, that the laws of New York would apply; and if anyone sold it out of the State, that the laws of the United States would apply, and they, therefore, attempted to comply with the statute of the United States by giving his guaranty so that the articles could go into interstate commerce, and this they put upon the bottle in print, the guaranty by the Russian Monopol Company, which, of course, shows they are the persons who stand in the position of maker or dealer rather than jobber, "Guaranteed by the Russian Monopol Company under the Pure Food Act", and then it is torn off "30, 1906." So that makes this defendant responsible for whatever happens if you are satisfied beyond a reasonable doubt that the article did go through interstate commerce, and was in the condition that it is brought in here when it went through interstate commerce.

As to that you have the right to consider the testimony of the witnesses, and if you do not believe that this bottle was found in Philadelphia, that it was sold to a Philadelphia man, and that it ever went into interstate commerce, if you are not satisfied of that beyond a reasonable doubt, of course, your verdict will be not guilty.

But there is no serious dispute made of that. Most of the facts as to that were admitted, so you can assume that the defendant is here in court defending or justifying the label and the statements that are upon the bottle upon the facts which, if you believe them as

they were stated, indicate that it had furnished a guaranty. You can assume that the goods went into interstate commerce, that thereby the United States has jurisdiction, this statute applied, and that thereby a charge of misbranding would be made out if this article was misbranded so that it would come within the statute. So, if the Government establishes that beyond reasonable doubt, that brings us to the question of what constitutes misbranding and whether or not the defendant is shown beyond reasonable doubt to have sent out this article misbranded.

Now, there are a number of provisions in the law about this term of misbranding. I do not want to read all of that. Section 8 says that the term "misbranded" shall apply to articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article or the ingredients or substances contained therein which shall be false or misleading in any particular. And in the case of food it shall be deemed misbranded if it be an imitation of or offered for sale under a distinctive name of another article. That is, if the label be branded so as to deceive or mislead the purchaser or purport to be a foreign product when not so, and if it shall not correctly state the quantity and weight, and so on, or improperly show the ingredients of which it is made. That presents the question you have here. I am not going to go into all the testimony.

You will have to take this up step by step, as I have indicated, and see if the Government has proved beyond reasonable doubt each step, and when you come to consider this last step or question, as to whether there is a misleading label which would make this purport to be a foreign product, and whether it would inform the purchaser as to what were the sort of contents, as to whether it would inform the purchaser so as not to be false and misleading, then you would render your verdict after having reached a conclusion as to the other matters according to the way in which you would answer the question whether the Government has proved beyond a reasonable doubt that this exhibit, this bottle, does have upon it a label that was misleading or which would indicate it was a foreign product when it was not, and whether it is false in any material particular.

Now, then, I must refer to one thing about that. That question you will see does not include this question of knowledge or intent, except in this way: This being a corporation, we can assume that human beings—that is, men—have to do the work, and that, therefore, whoever bottled this liquor, put the labels on, did it with the exercise of some mental process; even if it was done by machinery, somebody had to run the machine and provide the material for it. A corporation could not do that without some service; and although the defendant is a corporation, you must look at it from the same standpoint as if it were a man and that he had done all these acts himself. And the question is this, whether this defendant, assuming the total of its acts is the same as the acts of an individual, used a label which was actually false and misleading and purported to show that this was a foreign product and was intended to deceive people into purchasing it or considering it a foreign product when it was not. And that, of course, involves a proposition or understanding of the language on the label, the way in which the goods would be used

and the character of the persons who would buy the goods and the circumstances under which it might be sold.

That brings you to another point. If they had an order to sell these goods to a professor in some college who was known to have a chair for a teaching of the Hebrew language and the Russian language, if they sent this bottle to him, you would judge of the act from the standpoint of the intelligent knowledge of the person who sent it, or who shipped it, and of the person who was going to use it. If the product was going to be sold to the public generally (you have heard testimony enough to indicate as to whether that public constituted those who can read Russian and those who can read Hebrew and those who can read English) those who were interested in a Russian or kosher product to be used by a Jew or sold to some one who wanted spirits, whisky, vodka, or schnapps, or whatever they call it—it contained a fairly large percentage of alcohol—and who was purchasing it without reference to the name or label upon it, simply because of the amount of alcohol in it.

All those customers are within the knowledge of possible intent. Insofar as they told you what the customers were, you can judge of the knowledge of those customers. You can view whether this label could not be misleading and whether it was not a label for that purpose at all, whether it was a label that might receive somebody, or whether it was intended to be misleading, deceiving, and would purport to show something not in the bottle to those who would be deceived. You can see if they took an old tomato catsup bottle and put this product in it and the words "Tomato Catsup" were blown in the bottle it would be ridiculous for somebody to charge it was not tomato catsup unless we had other facts to raise that question. But if they sell a product that is called tomato catsup as a liquor, and when it is sold to anyone who wants that kind of liquor, you are to consider whether it would mislead or deceive, or purported to be some other article, to any of those who might have occasion to purchase it upon the statement on the label or the oral statement of those who passed it off with that label.

That brings us to the contents of the label. You have had the testimony of the picture of the rabbi, and this statement that it is all right for Passover use, so the Jews would be satisfied. You have had the statement that it has Russian in print upon it, so those who have learned to use vodka or had something to do with the kosher vodka, because they had some tie-back to Russia, would understand that this had also had some tie or connection with the Russian product. You have heard the testimony that the certificates that the rabbis put on were so that the Jews would be satisfied it was all right for them, and also that there was a rabbi who was either in Vilna, or had been in Vilna, or had been made a rabbi in Vilna, or had some connection with Vilna, so that he said he was "from Vilna", so that this substance would be connected by analogy with the substance that the people would consider Russian.

There is no harm in any of that. That does not bring them within the statute. That simply explains the way this link or tie was to be used here and the product known in Russia was made.

When you come down to the express wording, the express language upon the label, and the way in which it was printed, then you have

to consider generally this question: If instead of printing these labels all in Yiddish or all in Hebrew or all in Russian and then putting on another label which should be all in another language (for instance, if Russian were used first, if they put on a complete label that would have all the reading in Hebrew, and then another label for Yiddish, and then a fourth label, perhaps, which would have it all in English, which you know is one of the ways of conveying the information to anybody who might use it), if instead of so doing they used one langauge for each line or statement, and then when they got to the next line or statement they used a different language (as, I say, if some of the characters are Russian, some of the characters are Jewish, some of the characters of Yiddish), so it would evidently indicate only a part of the information to those who would recognize only a part of the characters, then the question comes directly to you, gentlemen of the jury, as to whether you see any misleading or deceiving method or choice of words, choice of print, choice of arrangement, or whether any of the statements would inform persons dealing with this or purchasing it that it was not actually Russian vodka. You have to see if that is proven beyond a reasonable doubt.

Now, you have had some testimony as to the price of imported vodka, or as to the use of imported vodka—if people could get it, or wanted to get it, or wanted to pay the price for it—and the issue really is a comparatively narrow one.

If the Government satisfies you beyond a reasonable doubt, having made out the other things I told you must enter into the situation, that this label and the paster and the words on the inside or backside of the label were written in the form they were so as to indicate to any of the people of these different races or nationalities that this article was something other than they would suppose it to be; and if they were misled either in buying it for something else or in paying a greater price for what was not worth so much, or in assuming they were getting one thing when they were getting another; and if the Government proves beyond a reasonable doubt that the labels were put on and created in this form, so as to make it possible to do that, then the defendant is guilty of misbranding.

On the other hand, if the Government does not prove the case to that extent, or if the testimony indicates that these labels and the way they were printed, and so on, represent merely a haphazard attempt to describe the product by issuing something that could be read or located or understood by those of the different races that were trying to identify the product; and if the label merely would sell the goods to those who did not care where they came from, and would not be deceived in what they were buying, or who would pay no attention to what they were buying; and if, therefore, this label was not prepared so as to work a deception in cases where it could deceive or would be likely to deceive, then your verdict should be not guilty.

It practically comes down, as I say (if you believe the testimony of the witnesses as to the undisputed points, and if you have got definitely in your minds the purpose and extent of this statute) to this simple question of fact, as to whether or not the labels and language were put on and sold, and whether the intelligent or knowing use of this form of bottling and the words on the labels that were put

on there was such that it would come within the prohibition of the statute and deceive persons who were buying something they thought was something else because of the way it was printed. If the Government proves that beyond a reasonable doubt, your verdict should be guilty.

I have said quite a lot about it because it is not a matter that could actually be stated in a few words. There are too many points in the case, but when you get down to the issue, if you get the idea, it is a simple question, and that rests with you.

Mr. ALTMAN. I think the charge was so eminently fair to both sides that I have nothing to add. However, the district attorney in summing up said that if the Government had produced witnesses to show that they were deceived, or received an article which they did not ask for, or asked for Russian liquor and received this, that they would not have been permitted to so testify. I ask Your Honor to charge that it is the law if persons had been produced who went and asked for any kind of liquor, they could have testified as to what they received and asked for, and whether they were deceived or not.

The COURT. I shall simply charge the jury that if there had been any witness here who could have testified, so that it could be evidence, as to just how he purchased an article, just what he understood about it, just what intelligence was conveyed to him either by what was said or by the label, I might let him testify. But, on the other hand, what I should charge if a man came here and said he could not read this thing at all but that he understood enough from something or other, I should probably exclude the testimony on the ground that he was not giving facts but that he was giving a sort of conclusion, not evidence. I could not charge on that proposition. We did not have this witness. You have the question: What would be the effect upon these ordinary individuals described in the testimony? And you have got to create a sort of purchaser in your minds, as well as what he would understand.

Mr. SMITH. In that connection, I will ask the court to charge that it was not necessary for the Government to produce persons to testify in actual instances that they had been deceived by the label.

The COURT. No. I do so charge that.

Mr. SMITH. I ask Your Honor to charge that as to the interstate shipment the jury can take into account the admissions of the guaranty and the testimony of Dr. McIntyre, who purchased this bottle.

The COURT. That is not disputed. There is no evidence to contradict it. The jury does not need to believe the evidence at all if there is anything in the case that leads them to believe the case was made up and the things charged did not happen. But the shipment and sale is not disputed, and undisputed testimony should be believed unless you see some reason to disregard it. The positively false statement appears on the labels.

Mr. SMITH. I ask Your Honor to charge that if the jury is satisfied beyond a reasonable doubt that this label, or these labels, as a whole or in part, are likely to create the impression—a mistaken impression—that this is a foreign product, they may find the offense of misbranding was committed, although no positively false statement appears on the labels.

The COURT. Yes. If the effect of the whole would cause that, you do not have to find any particular word or statement on which to base your opinion. I so charge. I think I have.

UNITED STATES v. ATLANTIC MACARONI CO.

(District Court, E.D. New York, Jan. 22, 1917)

N.J. No. 5521

Information in two counts alleging violation of section 2 of the Food and Drugs Act. Plea of guilty as to one count. Jury trial. Verdict of guilty as to other count. Motion to set aside the verdict overruled.

The United States attorney filed an information against the Atlantic Macaroni Co., alleging shipment by said company from the State of New York into the States of New Jersey and Ohio, respectively, of quantities of an article labeled in part, "Macaroni Savoia Brand Gragnano Style", which was adulterated and misbranded.

Adulteration of the article was alleged in the information for the reason that it was an inferior macaroni prepared in whole or in part from a flour other than semolina prepared from durum wheat, the material from which the best grade of macaroni is made, and the same was colored with a certain dye, to wit, naphthol yellow S., to simulate the natural appearance of macaroni made wholly from semolina prepared from durum wheat, and in a manner whereby the inferiority of said article was concealed.

Misbranding was alleged in substance for the reason that the statement, to wit, "Macaroni Savoia Brand Gragnano Style", the word "Style", appearing in such inconspicuous type and so placed on said label as to be undecipherable unless closely scrutinized, together with certain pictorial designs and devices suggesting the Italian coat of arms and Italian scenes, and the shape and style of the package, all and singular, were false and misleading in that they purported and represented that said article was a foreign product; and for the further reason that it was labeled as aforesaid so as to deceive and mislead the purchaser into the belief that it was a foreign product, to wit, a macaroni manufactured in the Kingdom of Italy, whereas, in truth and in fact, it was not so, but was a domestic product, to wit, a macaroni manufactured in the United States of America.

The defendant company entered a plea of guilty to the charges of misbranding, allowing its plea of not guilty to the charges of adulteration, theretofore entered, to stand. The case then came on for trial before the court and a jury upon the charges of adulteration.

CHATFIELD, *District Judge* (charge to jury). Gentlemen of the jury: We have a considerable amount of testimony in this case. Part of the subject matter is very interesting from the standpoint of the average juryman because of what we are talking about. Part of it is interesting from a scientific standpoint because of the way in

which the tests were made, and because of the exhibits that are produced. Part of it is interesting from the legal question that is presented under this statute.

But everything that has been allowed to go into the case as evidence for you to consider has to do with some part of the issue that is presented for you to consider. And so you cannot divide the case into that which sounds important, or that which sounds interesting, or that which seems to you perhaps has nothing to do with the question as it was originally presented. You must weigh all the testimony from the standpoint of the question that is finally shown and which I have allowed to go to you as a question of fact upon everything that has been said. It is a criminal charge and, therefore, you have to look at the matter from the standpoint of a criminal case. Now, that means that certain rules must be observed by you in weighing the testimony, and also in considering the issue of the case.

The Government is not concerned with this case in the sense of a person who is bringing an action merely to recover damages, and even though you can see that the Government and its officials and the witnesses have some interest in whether or not the routine of the Department and the work of the Department is upheld and carried out, nevertheless this case comes here (with the United States bringing the parties into Court) because of a statute of Congress under which the United States simply makes the parties appear in the court room; then it presents evidence against them, and then it is the jury's duty to see whether the United States presents sufficient evidence to prove a case beyond a reasonable doubt, or else the verdict would be in favor of the defendants, and the defendants would be free of the charge. So, in that way you have to hear all the testimony and scrutinize everything that has been said and everything that has been allowed to go into the case in just testing the question of whether the Government proves its case beyond reasonable doubt—by that I mean a doubt that you 12 men in discussing this case would consider what you would call a reasonable doubt with reference to a matter of this sort—whether the Government proves beyond such a reasonable doubt in your minds that the defendant has done that which is specifically charged in the form in which I shall outline the question to you.

Now, that makes it necessary for you to immediately bear in mind another thing. The defendant could have sat there—of course, it is a corporation, and when I refer to the defendant you will have to understand that it is illustrated by Mr. Calandara, although Mr. Calandara might not have been here. No officer, nor any particular person, need have appeared at all. If Mr. Brown, as counsel, had presented the defendant's case, without anyone from the defendant sitting beside him, you would have to assume that the defendant was there, and that Mr. Brown was talking for a person, which in that sense constituted a corporation which had to work through persons, whose acts therefore you could consider just as if the person were here, but remembering the difference between the individual and a corporation—so I say the defendant could have remained in the court room and at the end of the Government's case could have simply said "I have nothing further to present for the jury to con-

sider", and the jury would have considered whether or not the Government had made out its case upon what it had heard. But the defendant here has gone further than that and has put in some testimony which you also have heard, and so you must now consider all that has gone before you. If there is contradiction consider the testimony, weighing one thing against the other. Where the testimony agrees, that is, if you believe the statement as the witness made it, and where there is no contradiction assume that that proves the facts, unless something in the testimony makes you throw out entirely that particular piece of evidence. Thus consider the whole matter to see if the Government has shown beyond reasonable doubt that the defendant did do as charged in the indictment, and in the form in which I shall leave it to you.

Now, from that you can see, by another step in reasoning, that it is not the number of witnesses, nor the amount that they may say, nor the particular kind of thing that they are talking about that will furnish belief in your minds as you consider it. It is the worth of what is said, and it makes no difference who says it, or how it comes out. If the Government officials, the Government witnesses, through their work in the department, and their connection in the case have some feeling, either of pride in what they are doing, or of interest in their work, or feeling that they are right because of the way they do their work, then take that into account in weighing what they said, so as to see whether you find the facts according to what they say. In the case of the defendant, consider the relations of those who are connected with the business and what they say, from the standpoint of their employment, and from what they were doing at the time these acts were charged, just what point of view they testify from when they tell you about these matters. So, you see it is not merely what they may now believe or think which you should have in your mind, but determine for yourselves just what are the facts and what were the facts and just what weight and application those facts should have, in considering the issue from the standpoint of everybody connected with the matter.

Now, one or two things more I want to refer to in that general way. As I have indicated, some matters are not contradicted and are presumed to be correct, unless there is some reason in your minds to disregard the entire testimony. We have one or two matters in this case as to which there seems to be no question but they ought to be inquired into carefully, and you can see that if you once get through with a question and it is not material to the case, then you must remember the testimony, but you can disregard the steps by which we got there. For instance, these questions as to identity of the particular exhibits. Miss Doyle produced a vial here and told us that it was macaroni from box no. 1, while it apparently was of considerably larger size, so if it came from box no. 1 the yeast must have made it grow, or something else, and when we come to inquire about that, the evident situation was that the analysis, the figures that were given, applied to the other one of the two boxes, if they were kept straight prior to the time that Miss Doyle had a chance to analyze them. It is evident she has produced a sample of the other one of the two things that were analyzed at the same time, and she has given you information as to the article which she analyzed. If

it is the same one as that which she produces, then she has given you testimony as to the object which she produced and you have testimony that it was one of the two boxes coming from Cincinnati, under the circumstances that were described. If she has given you testimony as to the analysis of the other sample which she had and if she has actually brought here the wrong sample and given you the right analysis, then you have the figures as to this other exhibit, but she has given you the wrong or second object to look at. Now, you can see that after hearing all about that, if you are satisfied that the boxes were properly found, that is, I mean that the identical box was found that they are talking about, it was marked, sealed, transmitted, and analyzed, and if you have the figures that you need know about, why then we can just dismiss the question of how these exhibits were marked, or how Miss Doyle happened to refer to that one, but you can take that into account in questioning the accuracy of either the marking or keeping track of the exhibits or analysis. In other words, take everything you heard in weighing the testimony of witnesses, so you can find the facts. If you do not find facts or do not have facts, from which to consider the questions of the case, then, of course, you will be unable to arrive at a conclusion.

Now, ordinarily an individual when he submits himself to the jury to testify allows the jury to consider whether or not he is telling the truth. Consider his judgment, the way in which he testifies, the way he appears, what he says. Weigh these in connection with the other matters. A corporation has to testify, just as it has to do its work, through men that it employs, or that have the authority, the actual representatives for the corporation in whatever they are attempting to do. Now, I have already told you that you should weigh the testimony of these individuals, in so far as they represent the corporation and have done the acts that are being considered as acts of the corporation. Then you need go no further (in so far as they are acts of the persons concerned, in so far as they are acts of the corporation) outside of those individuals who have testified. You will have to assume that a corporation acts through persons, and that whether or not the corporation was intending to do something one way or another way depends upon the intent and purpose of those who at the time were doing the acts for the corporation. So, whether or not there is knowledge or plan, whether a corporation has an idea of doing something in accordance with the law, or contrary, may have to depend upon the circumstances under which the persons acted who were acting for the corporation at the time when the acts were committed. So in such a case as this you have to bear that in mind; bear in mind that a corporation is not like an individual, it does not have a reputation in the ordinary sense for truth telling, because it does not talk. You can weigh the *individuals'* testimony according to what you know about *them.* They are presumed to tell the truth, unless you disbelieve them; so a corporation is presumed to abide by the law, and you know nothing against it unless you find it from the testimony here.

So, you have to find whether the Government proves beyond a reasonable doubt that which the Government charges, and you should not reach that conclusion until you have gone up into the jury room; until you 12 men have talked about the evidence with each other so

as to see what is the finding of fact upon each of the material points, by you 12 men talking with each other. You have 12 separate minds, but those must all work in 12 parts so as to make one result, and no mind, of course, should assume that its one-twelfth is the whole, or that its one-twelfth can work without the help and the working at the same time of the other 11. So that, after you go to your jury room, determine just what you think did happen; what facts are proven in your mind beyond reasonable doubt; then consider what is the effect of these facts and whether or not the Government proves its case beyond reasonable doubt upon the whole matter.

Now, I have spoken of that longer than would ordinarily be necessary because of this question of a charge against a corporation, because of the length of time that has elapsed since the acts charged; because, also, you have heard some testimony that where a matter of this sort is brought to the attention of the Government and of a person or corporation, where there is any possible variation from the methods that were laid down by Congress, it frequently happens (as happened with relation to some of the matters that you have heard here) that the corporation or person then brings itself or himself entirely in line with the statute and so that the matter which is under consideration is not repeated. If the public have been injured at any time in the past in the way in which the statute has been intended to prevent, and if, in order to avoid repeated charges under the statute, the person whose acts are called in question (as to which there may be a hearing, as you heard, over in the appraisers' stores) after that person gets an understanding of what the Government requires it may then make its labels and its product comply with what the Government will require and then there will be no future question, but if at the time the act charged there was a noncompliance with the statute, the case may still come before a jury and the jury will have to consider whether that particular act and that particular situation was at that time a violation of the statute, without reference to whether or not it was trivial; whether it only lasted a short time; whether the effect of it was greater or less through outside circumstances and without reference to whether punishment should be severe or slight.

Now, I am going to come right back to that in just a moment when I speak of the question of misbranding, but before that I want to speak of this Pure Food and Drug Law. You understand that Congress, under the Constitution, has certain authority. It may pass a law prohibiting certain things and regulating certain matters, if the Constitution gives Congress the authority. Everything else of what we know as police matters, or health matters, belongs to the laws of the State where you live. So, in New York, if a commissioner of health, of the department of health, here in New York, wants to clean up some particular section in Brooklyn, he does it under the authority that the State of New York, through its legislature, gives to him. But if the department of health in New York City finds that some one is coming from Texas into New York, and that after he comes to New York disease arises here, they cannot stop that person or regulate the coming of a person until the person comes into the State of New York. So Congress has authority under the Constitution to regulate matters that go from one State into the

other in the sense of commerce. They have the power to regulate the passage of articles, that is, goods; they have the power to regulate the running of railroad trains; they have the power to regulate the traveling of persons who use those trains and thereby themselves constitute commercial intercourse between the States, and in the same way if cases arise in which your interest conflicts with the interest of a person in another State, that case can be heard in the United States court, and Congress has the power to make a law about it. Now, that is where this statute started. Congress had power to pass the law prohibiting the transfer or sale, that is the commerce, from one State to the other of food or drugs that did not comply with certain established standards as created by this statute, which, as you have heard, was passed and went into effect in June 1906 and which has been amended in some respects since.

Now, it covers two things—foods and drugs. I am not going to refer to the question of drugs. There are a number of provisions specifying just when drugs shall be misbranded, or adulterated, or put out in such a way that they deceive the public. There are a number of provisions relating to foods, and by section 1 of the statute it is made an offense to manufacture an article of food or drug which is adulterated or misbranded within the Territories, or in the District of Columbia, where the United States law is exclusive of the State law. Then, in section 2 it provides that the introduction into any State or Territory or the District of Columbia, from any other State or Territory, or from a foreign country, of any article of food or drugs, which is adulterated or misbranded within the meaning of the act is prohibited. That means that the article is made contraband, and its transmission can be stopped, if Congress provides the machinery for doing that, and the treatment of that article will then go on according to acts of Congress, as, for instance, in this case, you have heard that a certain lot of boxes were seized under the provisions of this act and treated as contraband goods. Now, whether or not Mr. Koch or the defendant here could take up with the Government the question of the manner of that seizure, get some of the goods back, get the value of the goods, whether the goods were properly condemned or not has nothing to do with you in this case. All we know is that, under that section of the law, at a certain time, these inspectors went to Mr. Koch's store and actually took into their custody certain articles of goods and from that time on they were treated as in the custody of the Government on a claim of the Government that it was contraband. The controversy between the defendant and Mr. Koch as to how they should pay for the goods we have nothing to do with, because that has straightened itself all out. You have merely learned what became of the goods.

Now, the next provision is: Any person who shall ship or deliver for shipment from any State to another State any article so adulterated or misbranded, within the meaning of this act, commits an offense, and it says that an article, for the purposes of this act, shall be deemed to be adulterated in the case of food, first, if any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength; second, if any substance has been substituted wholly or in part for the article; third, if any

valuable constituent of the article has been wholly or in part abstracted; fourth, if it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed; fifth, if it contains any added poisonous or other added deleterious ingredient which may render such article injurious to health; sixth, if it contains putrid animal matter, decomposed animal matter, with which we have nothing to do.

If this macaroni was made in certain localities or countries it might come within the sixth section, but apparently not when made in Brooklyn. The indictment makes no claim in this case that this defendant's factory is not well conducted and is not clean—that the product is not clean. No charge is made that the product is a filthy or decomposed substance, or anything that makes it filthy, injurious to health, in the sense of poison. Then there is a provision that the term misbranded shall apply to all articles of food the packages or labels of which shall bear any statement, design, or device regarding such article or ingredients or substances contained therein which shall be false or misleading in any particular. It says, for the purpose of the act, an article shall be deemed misbranded, in the case of food, if it be an imitation of or offered for sale under the distinctive name of another article; if it be labeled or branded so as to deceive or mislead the purchaser; or if the contents have been removed and others put in their place; or if it contain certain drugs; if the weight and the contents of the package are not plainly stated; or if the package containing it or its label shall bear any statement, design, or device regarding the ingredients or substances contained therein, which statement, design, or device shall be false or misleading in any particular, provided that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed adulterated or misbranded in certain cases, that is, where they are labeled as compounded or blended.

Now, I have had to read that for this reason, that when this information was filed, and the Government brought this charge, they included four counts. Two related to each of the shipments of which the Government claims exhibit 1 in the Cincinnati case, and exhibit 5 in the Newark case were a part. Count 1 charges that by means of a delivery wagon, on or about the 1st day of August 1913, in violation of this statute, the defendant shipped, by means of this delivery wagon, from Long Island City to H. Koch Co., 180 boxes each containing 22 pounds of something that was designed for an article of food, and that they were labeled and marked, as you have seen, "Macaroni Savoia Brand, Gragnano Style. Guaranteed under the Food and Drugs Act," with a picture of the Bay of Naples, and so on. That said article of food when shipped and delivered for shipment as aforesaid was then and there adulterated within the meaning of said act of Congress in that it was an inferior macaroni prepared, in whole or in part, from a flour other than semolina prepared from durum wheat, the material from which the best grade of macaroni is made, and the same was colored with a certain dye, to wit, naphthol yellow S., to simulate the natural appearance of macaroni made wholly from semolina prepared from durum wheat, and in a manner whereby the inferiority of said article was concealed. Now the third count which you have before you charges

exactly that same offense with relation to the other exhibit, which it is said was shipped by rail to Cincinnati, and as to which you have heard testimony, and the charge is that that was shipped on or about the 10th day of October, 1913, in violation of the same law. Now count 2 provided, or charged, that the shipment of the boxes sent to Koch in Newark were misbranded in that the labels did not show the purchaser that these goods were artificially colored and did not show the purchaser that there was anything in that except semolina. Count 4 charged, in the same words, in the same fashion, that the shipment to Cincinnati was misbranded in that the boxes did not show that it was artificially colored and that it was not made from a semolina of durum wheat. When that was brought to the defendant's attention, this question as to whether or not the goods had been shipped with or without the rubber stamp, the defendant immediately admitted, so far as the record is concerned, that these boxes, which apparently they had sent out, did not bear the rubber stamp, and that therefore they were not branded as the defendant stated it had intended to have them branded when they were shipped. They, therefore, said that they were responsible under this statute for having shipped to Cincinnati and Newark goods that were not stamped as they themselves stamped them so as to comply with the law, and a plea of guilty as to the responsibility for sending out those shipments, without the rubber stamp on the label, was entered.

Now, you can see that under this statute the same article may be charged to be adulterated in that it does not show of what it is constituted, and that the lack of material, or change of material, is covered up, and the same article may be misbranded in that as it was sold to the public its true contents were not disclosed. The purpose of both of these acts may be to defraud the public, or to harm the public, either in the sense of making them pay more, or of getting a poorer article, or of not getting what they think they are buying, but there is a difference when you come to consider the acts themselves, and you must carefully distinguish whether you should charge that the product is merely misbranded or whether it is adulterated. Now, let me illustrate. Suppose an article is sent out and sold for the purpose of killing potato bugs and is labeled paris green. If, instead of containing paris green, it merely has some green coloring matter and is made out of earth, and whether potato bugs would like it, or it would do them no harm, then if that is sold for paris green, of course, it is misbranded, and would come under the misbranding section. At the same time, if it is not paris green, but is some harmless material, then there is a substitution or some imitation of a product for the genuine, and at the same time there has been an adulteration in that, and a substance is sold which is inferior in quality or strength, and in which the inferiority is covered up by the use of the green coloring matter to make the public think it is something else.

Now, this defendant, then, having been brought into court on a charge that they were doing both, both misbranding the product, in the sense that shipments were made which were not attended to as they should be, so as to see that the label was all right, and being charged also with having sent them out so that the purchaser would get an article that was adulterated, or where the inferiority was

covered up, they took the consistent position which they should take if they were innocent, (and which they should properly be in if you should render a verdict of not guilty, that is, if the Government does not prove beyond a reasonable doubt that they were adulterating) then they took the proper position as to the misbranding because this statute does not provide that these acts must be done knowingly. If the head of a great drug company assumes that he is selling paris green, and some of his clerks are substituting something else and the company should be benefiting from it, then the company may still be held responsible for the shipment. If the clerk was not profiting by it, but if he was doing it for the benefit of the company, the company could still be held responsible for the shipment.

If decomposed animal matter is allowed to form in the article that is shipped, the question whether the person who ships it knows it is there does not prevent the seizing of the article, or avoid a charge for shipping that kind of article without preventing the contamination if it comes within the statute, so that this statute is purposely framed so that it will protect the public, whether the public wants to be protected or not in the first place, whether or not the shipper intentionally evades the law, or whether a defendant is found evading the law even though he intended or thought that he was complying with it; so, I say that if this defendant is innocent of the charge of adulterating, they did the proper thing under these circumstances in coming in and saying these goods were found without the rubber stamp that constitutes a violation of the statute of misbranding, and we, therefore, plead guilty to that. We will avoid it in the future. We will change our label and the matter is trivial, and the court should impose a penalty that corresponds with the occurrence.

Now, that part of the case is left in that condition up to the present time. I have had to go into this at length, because this case is simple as to issue, but there is a whole lot to it as the matter is left to you. There is lots of evidence, lots of matters for you to consider. This case, at the present time, stands just upon the position of the defendant as I have outlined it saying that they admit the court must deal with this question of not having the rubber stamp on from the standpoint of misbranding, and that they have done no more wrong and, therefore, they say the Government has not proven the charge that is brought against them. So, now you must come to the question of whether there was any other element, any other act, because if this is all there was to it, then this question of adulteration and addition would be not only trivial, but the case would not fall under the adulteration side of the statute.

The Government then says this: Assuming that these particular boxes did go out, and assuming that no officer knew about it, and assuming that that particular leaving off of the rubber stamp was not intentional, then we still make the charge that the goods were sold for the purpose of supplying a dealer who would not buy artificially colored macaroni for what appeared to him to be natural colored macaroni—that is, macaroni made of this durum semolina, which would give that color—and that he was influenced to buy this because the price was not as high as it would be if the color were produced by the use of a durum semolina, and he was induced to buy this because he had a trade which wanted that kind of macaroni,

or macaroni of that color, and in order to make this particular sale the goods were sent out without anything to indicate to this customer that he was getting something that was not up to the standard which he was buying in quality and in color. Now, if such a charge as that is brought against a man under this statute, and if by accident or by carelessness two boxes went to Cincinnati and two boxes went to Newark, or even if 113 or 160, whatever the quantities were—you will take the testimony, because you must recollect the testimony as the witnesses give it, not take what I say, by way of illustration, because neither Mr. Brown nor Mr. France nor I are trying to give you the testimony, but we have referred to it, as when I point to a box and call it a box, and if you want to qualify my statement that it is a broken box or a poor box you could do so, but I am illustrating—as I say, if this shipment of 113 boxes or 60 boxes, whichever they were, got to Cincinnati or to Newark with something wrong in the labeling or packing, so that, for instance, they were marked as macaroni from durum semolina, but were in fact macaroni from wheat *flour*, and these Cincinnati people or Mr. Koch did not find that out, and if thereby he was misled into buying it for something else, even if the defendant admitted that a mistake was made and that in the future they would avoid mistakes, yet they were within the prohibition of the law. It would be for the court to say how they should be punished and whether it should be treated as a casual matter and they should be absolved, provided they did not do it again. But this particular charge assumes seriousness for the reason that even though these other dealers who have testified in court told you they do not compete in the sale of these particular products—that is, that they did not put on the market products which would compete with this particular trade—nevertheless there has been testimony that there is a trade with certain people that have been educated from the Italian or foreign standards and wish this material colored—macaroni. They wish it made either with or without color, according to what they do wish, but those who want it without color do not want to buy that which is artificially colored. Those who do want artificially colored, or who are willing to take artificially colored, are entitled to know under the statute what they are getting, so that the price will correspond to the goods that they receive.

Now, when the Government charges this defendant with conducting its business in such a way that it is putting on the market a product which will be sold to the jobber for sale to the customers who want a yellow product, which is uncolored, and to a trade that would consider a product inferior, or lacking in strength and in quality that they are trying to buy, if that yellow color is not produced by durum wheat semolina, if this defendant was deliberately supplying that trade with something that from that standard was inferior and was using the method of misbranding the boxes, or accidentally allowing a foreman of the label room to be careless in not checking up the product upon which these labels were going, and if that was occurring, then this defendant was doing something which assumed importance and illustrates to you the wide difference between the charge of misbranding and the charge of adulteration. As I say, if this case had involved nothing more than whether or not those two boxes might be called adulterated as well as misbranded, the matter might easily have been left to me to say whether or not

there should be a severe penalty or a trivial penalty because of the accident. So, the question of misbranding has been left to me properly by the defendant, and you cannot take from their admission that these two boxes did not have the label on; that therefore they violated the statute as to adulterating. You cannot take that admission as any evidence against them at all, because it is in their favor. In the same way, if the Government had not accepted, not presented the charge that they were adulterated (and therefore coming within this statute) for the sake of selling their product in a way that they could not have sold it otherwise, the whole matter would have been disposed of upon the same statement by the defendant that these two boxes might come within the statute, but if so, it was accidental and made no difference, and you would not have to consider the question. But the Government, instead of doing that, charges that this defendant was violating the statute in sending out a product that would be sold to a certain trade that required a certain standard, or a certain quality, or a certain kind of product in the goods which it would buy, and that therefore this product is adulterated and that it was meant to be adulterated, and that it was meant to be sold as natural colored goods, that therefore the Government charges that it was inferior, and that the inferiority was concealed by the way in which it was colored, or through the addition of this coloring matter.

Now, I referred early in the case to the matter of the Lexington Milling Co. in which some flour was bleached; that finally went to the Supreme Court of the United States, and they decided that under this fifth section an added poisonous or deleterious ingredient which might render the article injurious to health required proof that the bleached flour was harmful to health, and that if the bleaching material was so small in quantity that it would not have any effect on the health, the mere change of appearance in the flour did not bring it within that particular section. In deciding that case the Supreme Court of the United States referred to these other provisions and they used language which seemed to bring in all of these sections. They seemed to say that if the inferiority, or the substitution, did not produce some article or have some effect which would damage health, that the article was not adulterated, but if you look into the case carefully, and examine the section under which it comes, you will see that in the flour case they were talking about the addition or *poison* which would be harmful to health and that we have something entirely different here, because there is no accusation that this coloring matter would affect health, or that the use of one ounce in 12,000 pounds would make any difference under this health section. This charge comes down solely to the question of using an adulterating material (that is an artificially added material) so as to cover up inferiority in quality or strength by the change in color, and up to that point the question is simple of statement and plain of meaning. That is the charge that is made, but when you get into this question of what is inferior in quality or strength, then you have got to have a standard.

Congress had the power to pass that law. Congress had the power to use this language, and you jurors and I must apply that law according to what Congress says. When Congress provided that if it was injurious to health it would come under one section, and if not injurious to health it would come under that other section, the

Supreme Court was bound to follow Congress by saying that something that was not injurious to health was not adulterated *by a poison.* So, when we consider the proper section as to what is "inferior in quality or strength", we must try to find out what Congress meant. If there were anything to indicate that Congress meant if it should be inferior in bran or in gluten, or in the materials that are classified as protein in building up the body, if that were the general meaning of the word inferior, then you can see that the argument would come down to a definite limit. On the other hand, if the word inferior meant something cheaper in price, and there were anything in the law to indicate that Congress meant it was inferior in price or cheaper, then we would be limited to that meaning of the word inferior. If there were anything to indicate that when they were talking about paris green (that is not a food—I use it, you see, as an illustration) they should say paris green that was inferior for suiting the appetite of some particular striped potato bug, instead of one that had spots, why we would have to take that as a test. The charge here is that this is an inferior article of food for the purpose for which it is to be used as an article of food. If it is to be put on the market or sent out to a market where a person sending it knows that its saleability will depend upon the demand by Italians who want to purchase articles that have a certain color and desire the goods purchased to be made in a certain way (even if the process involves additional steps and a little increase in cost is involved in order to effect the sale of the goods even at the expense of that little increase in cost), so as to make it inferior in quality or strength from the standards that it is to be measured by in being put upon the market for that particular trade, and if any concern sends out goods so as to meet that particular demand by something that has other articles, or has coloring matter put in, so as to sell goods to meet that particular demand, then he would come within this definition of inferior in strength and quality from the standards or standpoint of the purpose for which it is to go.

So here in this case you must decide whether these shipments were made, you must decide whether the articles that were taken by the inspectors were the articles that were shipped, whether the articles taken by the inspectors were the ones that are produced here and that have been analyzed. You must decide whether or not the analyses are correct and the facts are the way the witnesses present them to you. So far as matters are not disputed (and so far as this plea of misbranding is concerned, the defendant did not question making the shipment), inasmuch as they told you that the shipment was made, of course, you can assume that is proven. You have to then go on and see when the articles were shipped, if you find that they were shipped, as I have said, whether this adulteration was intended or whether they were sent out in just a casual way so that we would have to consider whether or not the label was accidentally put on. The charge is, the matter you have to consider is, whether or not the defendant was putting on the market, and intended by this shipment to put upon the market, goods which were inferior in quality and strength to those which that market to which the goods were being sent would require, and whether thereby they were selling something which was inferior in quality and strength to that which was being bought so far as the people who bought it knew,

and whether the label upon the boxes was the means of covering up the misbranding so that the fact of the adulteration, if you find that it was adulterated, in that sense, was covered up, and if the Government proves beyond reasonable doubt that the defendant was sending out boxes or allowing its clerks to send out boxes that did not disclose properly the contents so as to comply with the statute, and if these articles were therefore misbranded in that sense, then if the misbranding was a part of putting these goods on the market so as to dispose of the goods that were adulterated in the sense that I have referred to in that part of the statute, if the Government shows all that beyond reasonable doubt, then your verdict should be guilty, and the question would rest with the court as to how the matter should be treated. If the Government does not prove the case to that extent, if you have a reasonable doubt as to any material step in the proof that leads you up to the question of determining a verdict, then your verdict should be not guilty, and, of course, you will have to remember and distinguish between counts 1 and 3, count 1 being the Cincinnati transaction and count 3 the Newark transaction, so that you could render a verdict of guilty or not guilty as you might find the facts as to either count or as to both.

Now, what requests and exceptions have you?

Mr. BROWN. I ask Your Honor to charge the jury this: That if the rubber stamps "artificially colored, made in the United States" were on these two boxes, exhibits one and five, that the contents would neither be misbranded nor adulterated?

The COURT. That is, if the goods were sent out?

Mr. BROWN. The same goods. Which is saying, that they were artificially colored so that people could buy them or not, as they saw fit, in that respect then they would not come within the statute at all because they would be just what this particular box would be purported to be.

The COURT. I so charge. It is evident that this box did not have the rubber stamp on, and therefore we come down to the serious question as to the way they went out, not simply the mere sending out of these two particular boxes.

Officer sworn and jury retired.

Jury returned with a verdict of guilty.

Mr. BROWN. I move to set aside the verdict on the ground it is against the weight of evidence; also move to set aside the verdict on the ground there was absolutely no proof of any intent on the part of the defendant, and that the verdict of the jury is not found in accordance with the charge of the court, and is contrary to the law as laid down by the court in its charge.

The COURT. I will deny your motions and give you an exception in each.

Mr. BROWN. I renew my motions to set aside the verdict on the ground that there was no proof of the commission of any crime within the contemplation of the statute.

The COURT. You may have an exception.

The jury thereupon retired and after due deliberation returned a verdict of guilty upon the charges of adulteration. The defendant company thereupon filed its motion to set aside the verdict, and said motion was denied by the court. On February 17, 1917, the defendant company was sentenced to pay a fine of $398 upon the plea of

guilty as to the charges of misbranding and upon the verdict of guilty returned by the jury as to the charges of adulteration, as will more fully appear from the following remarks of the court (Chatfield, *J.*):

The record shows that the defendant was brought into court upon an information based on two interstate shipments. There were four counts, one as to misbranding and one as to adulteration with respect to each shipment. The two counts as to misbranding were disposed of by the plea, and the two counts as to adulteration were disposed of by the verdict of the jury. The maximum would therefore be four penalties which, for a first offense, would be $200 each. It appears from the record of the court, and the fact is not contested, that this defendant was previously indicted and punished for a charge of misbranding, with relation to substantially a similar form of label, in this court. The charge of misbranding in the previous information should have brought home to the defendant the meaning of the statute and the purpose for which the law was intended. It makes no difference whether in the particular instance injury to an individual or harmfulness as a food product is actually shown. The court does not consider that a second offense is a part of the crime, nor does it consider that a person should be put on trial before a jury upon the issue of whether or not it is charged with a first or second offense. That question has entirely to do with the remedy, and if the accusation of the second offense is disputed it can be summarily heard by the court, or the court may have a doubt and impose sentence within the maximum of the first offense. The second offense provision is not a mandatory change in the nature of the crime. I shall therefore treat this matter as consisting of two offenses, one relating to the shipment to Cincinnati, and the other, the shipment to Newark, N.J., and shall consider that it is possible to impose a fine for four separate violations, and that on two of these the maximum would be $200, and as to the other two a maximum of $300 would be imposed which would make a thousand dollars in all. Recognizing the circumstances, I think that a fine of $398 divided in two parts of $199 each, so as to bring the sentence within the specific first-offense sentence upon the two adulteration counts, also stating that the total of the fine is imposed because of the nature of the second offense, and also because of the presence of the charge of misbranding as well as of adulteration, is sufficient to indicate the application of the statute to the matter. The Government may have judgment upon the sentence if it desires.

UNITED STATES v. PULMONOL CHEMICAL CO.

(District Court, E.D. New York, Feb. 10, 1917)

N.J. No. 5535

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

The United States attorney filed an information against the Pulmonol Chemical Co., alleging shipment by said company from the State of New York into the States of Massachusetts and Minnesota,

respectively, of quantities of an article labeled in part, "Pulmonol," which was misbranded.

It was alleged that the article in each shipment was misbranded for the reason that certain statements appearing on its label falsely and fraudulently represented it as a remedy for all pulmonary diseases and all forms of consumption, and as effective for improving nutrition and relieving night sweats, when, in truth and in fact, it was not. It was further alleged in substance that the article was misbranded for the reason that certain statements included in a circular accompanying the article falsely and fraudulently represented it as effective for preventing hemorrhages and breaking up all severe colds, as a cure for consumption and tuberculosis, and as a remedy for night sweats, when, in truth and in fact, it was not.

CHATFIELD, *District Judge* (charge to jury). I think that the present case in many ways one of the most serious and one of the most important matters which I have ever been called upon to submit to a jury. In the ordinary criminal case the question is whether one individual should be held to have been shown beyond a reasonable doubt to have violated something which Congress has said should constitute a crime, and the personal liberty or liability to a fine of that individual is the limit of risk in the particular case. Insofar as the case may establish a doctrine, or insofar as the case may form an example, it may be used or not used—as the case may be disposed of if it is appealed or as Congress may legislate upon a matter of the same sort—when another case comes up. When a statute is passed it is made the law of the country, on which the act of one individual may be in a sense the test as to whether or not the opinion of a great many people or of a few people is correct, when the application of that test may mean the life or death, the health or sickness, of many people, and when you have the position of one man protesting for his ideas against the general opinion of those who are supposed to know about the subject. When a jury of 12 men are called upon to consider whether or not the ideas of the man as against everyone else, or nearly everyone else, are correct, or when the jury finds itself in a position of considering whether or not the opinion of the world up to the present time is correct, you have a very serious subject to consider, and the court has a very serious duty in deciding just how the matter shall be left to you and just what shall be left to you.

Now, the Supreme Court of the United States, in the case from which the district attorney has just read to you, said that it had been decided in other cases that Congress by this statute deliberately excluded the field where there are honest differences of opinion between schools and practitioners. It said that the statute did not intend to invade the domain of speculation. The Supreme Court has held in other cases that this statute, that the laws of the United States, do not attempt to decide whether or not a belief of one person or the belief of many persons is right, and that those laws do not bring up such a test in these criminal statutes. If I may use a plain illustration, I think if at the time that the whole world believed in witchcraft one person should have advertised something that contradicted the doctrine of witchcraft, the United States Government, under the Constitution and under its method of enacting law as it

exists at the present time, would not allow a person's liberty to be brought into jeopardy under a criminal statute by the mere decision as to whether or not witchcraft was true or false. That comes in the domain of freedom of opinion or of belief. I am inverting the case because now everyone believes that witchcraft does not exist, and no person, perhaps, could be found that would oppose that idea.

In the case at bar it is the opinion apparently of the medical world generally, and of most individuals, so far as they have gained their ideas from doctors and from the investigation of the doctor's statements that have been made—it is the idea of the world that tuberculosis, as has been stated, is a disease that comes from the presence of a germ or bacillus that is substantially always present and which may progress if circumstances give it the opportunity. Now, you have heard that it is not the general opinion that any particular medicine can keep away or remove this opportunity for these germs to develop in the lungs (because we are not talking about joint tuberculosis and other matters of that sort). You have heard from the testimony that if, according to the general opinion of doctors, after these germs have started their development and have proceeded upon this awful course that Mr. France has tried to explain to you, which I am not even going to try to follow, if they have gotten to the point where a person would say that one lung was gone, whatever that means, then the general impression and opinion as indicated by the testimony of the witnesses, and what has been stated to you, of the world today is that no medicine will either stop the going of the lung or bring the lung back from where it has gone, but that, as has been said, these germs may be stopped—that is, arrested and stay inert or dead, whatever it may be—by certain treatment that removes their opportunity to continue active. Now, when you are considering whether generally everybody is right and that the medicine does not actually do the arresting (and I think that Dr. Payne told you from his standpoint the medicine itself does not act like a policeman and cause this arrest), when you consider that, and then attempt to determine who is right in forming an opinion and reaching a conclusion as to just what medicine may have to do with the conditions which will be present if fresh air and the proper amount of exercise, and the proper number of eggs and other food are taken—when you are considering just what medicine will have to do with the creation of these conditions, and just what medicine will not have to do with the creation of these conditions, and attempt to say whether one doctor is right in saying that you should have two eggs, whether another doctor is right in saying that you should have no eggs, whether one doctor is right in saying you should have no medicine, and whether the other doctor is right in saying that you should have pulmonol with those things—these matters have nothing whatever to do with this case.

This is not a case in any sense where the practice of using pulmonol is in question. It is in no sense a case whether the Pulmonol Company should sell pulmonol. It is in no sense a question whether Dr. Payne should continue to prescribe pulmonol. We have nothing to do with whether he may convert everybody to his opinion. I can say to you, as a matter of law, that if Dr. Payne is right, we should help him convert the people to that opinion; that if he is

right, and it is a matter of opinion, the whole world should agree with him. So, I have let him put in the testimony. I have let him state these cases to you so that you should see that, viewing the facts and viewing the patients and viewing the situation, looking at it from Dr. Knopf's standpoint, looking at it from Dr. Payne's standpoint, there is a difference of opinion, as to which the two men may be as honest in their variances as may be and they may each believe absolutely that the other is entirely wrong. I do not mean entirely wrong, because they agree on some of the conditions, but I mean, wrong in saying that the other is on the wrong track. We can leave that all out of the case, but it was necessary to let that testimony in, to allow this situation to get before you so that you gentlemen, as jurors, would not be disposing of this case on a question of opinion as to whether pulmonol may be a good medicine or not. So, as the Supreme Court has said, Congress recognizes that they would not decide between one form of religion and another, as to which may be the best assistance to the doctor in administering medicine. It would not make any difference as to whether, so far as Congress was concerned, the man's wife is a Christian Scientist, or whether the man's wife is a Roman Catholic, or a Presbyterian, or a Jew, so far as his mental make-up is concerned. If he takes a dose of Epsom salts his mental attitude may have something to do with the situation. The doctor told you there was a psychology in this, and if the man would have greater psychology if he goes to one church and thinks of it one way and have less psychology and just as much of Epsom salts if he went to another church, you as jurors can leave that out, because Congress has left it out and it is not in the statute. Congress, as the Supreme Court says, used the words in order to leave no doubt upon that matter, that the statement must be false and fraudulent. In other words, there must be intent to deceive people so as to make them engage in commerce—that is, spend money or the equivalent of money—because they are misled and deceived, and that brings me to this statute itself and to what this case is about.

Perhaps some of you were here in some of these other cases that had to do with foods. Some of you may have been here in ordinary negligence cases where you heard something about the regulation of interstate commerce. But bear in mind that this is a criminal charge. At the outset this paper, which has been called an information—you can see that there is much paper in it. It costs more than one sheet would, as you can see, and the price of that paper might cost more today than it did a month ago, but that has nothing to do with this case—that information is merely a sheet of paper which notified the Pulmonol Company that they were to be here, because a jury was going to listen to their case; and they are here and you are hearing the case, and you must judge the case only from the evidence that has gone to you in the case, using your intelligence and the knowledge that you have gained throughout your lives in passing upon that evidence. So the Government must present evidence or else, of course, there would not be any case. The Government must show what will satisfy you beyond reasonable doubt that the defendant has done what it charges or else you cannot get to the point where you could render a verdict for the Government, and

therefore, of course, I charge you that, as this is a criminal matter, you must weigh everything that has been said so as to see if it was proven beyond reasonable doubt that the defendant did that with which it is charged and which I shall specifically in a moment state. You have heard what does not ordinarily happen in a case. You have heard a good many more witnesses for the defendant than for the Government in this particular matter. You must take into account not how many there were or how fast each one talked nor how many words they said, but take into account what they said which is material to the issue in the case. Consider how they said it, who they are, what relation they have either to the result of the case, or to the subject matter, and use all that as light, just as you use their appearance and their intelligence and the way of saying things to throw light upon your minds in determining how much you believe, in order to decide of what you are satisfied as to all the facts as to the different things, and then see if those facts, that you find from the testimony, prove beyond reasonable doubt that the charge is made out.

This corporation, so far as we know anything about it, is supposed to be reputable. Its connection, you have heard, with the Salvation Army; that may be considered by you as something in their favor, as to honesty in their intentions, and, so far as you know anything about this company, consider whether their intent is to defraud. Dr. Payne has testified. He has told you he is the president; he has told you he is the medical officer; he has told you he is the salesman; he has told you that he does everything that is necessary for the company and therefore he has given you a chance to judge of the company's intent and its dealings insofar as he might advertise the drug of this company or the merits it had. So from that you can determine these questions of fact as to what their purpose, their knowledge, and the meaning of their acts are. And so you come down in this case to a determination not as to whether pulmonol is a good medicine, not to a determination as to whether one person is right in thinking that it will cure consumption, not to a determination as to whether other people are right in thinking that it has no effect upon pulmonary consumption, or that it has no effect as a tonic. You come down to a determination in no way of whether or not fresh air and treatment, without medicine, is the only specific. But assuming that people generally and the public who buy medicine have been of the impression that tuberculosis is to be treated only by fresh air and change of climate and food and care, then if a remedy is presented which it is said will cure tuberculosis, and if that remedy is sold to them, and if they are thereby induced to purchase the remedy, you have to consider whether or not the statements upon the bottle and upon the papers in the package in which it is sold, in the first place, according to one paragraph of the statute, whether the package or label bears any statement, design, or device regarding such article or the ingredients or substances contained therein which is false or misleading in any particular.

Now, this statute, as I have said, was passed by Congress because they have the power to provide police regulations as to the way in which goods shall be sent from one State to another. As to how one State shall deal with another in a commercial way, Congress

has the power to decide what is good; that is, what will have a beneficial effect in this matter of police regulation upon the people of one State when they are dealing with the people of another, in the sense of regulating the goods that they may exchange. So that Congress can stop the transmission of opium from one State to another, if Congress reaches that conclusion. That is a police regulation. So Congress may legislate that liquor shall be stopped in interstate traffic. Congress has the power to say that pulmonol shall not be shipped from one State to another, if Congress reaches the conclusion that pulmonol shall be prohibited in its statute. But these statutes have not gotten down to that refinement. This general statute says that no food product and no drug shall be sent from one State to another which bears upon it a false label, or a label that is misleading as to matters of fact, as distinguished from those purely of opinion, where it is made plain that it is opinion. You have heard them talk about codeine and derivatives of opium. If a medicine contains those derivatives and they are not stated, or if the preparation is incorrectly stated so that the label is misleading, then Congress says that this shall not be sent from one State to another because those who purchase it would not know what they are buying. So under this first main section of the statute this defendant is charged with having on these two occasions, which are admitted, sent from the State of New York to another State packages of pulmonol that bear this language, which has been read to you, and the Government charges that some of those statements in there are false and misleading as facts as distinguished from opinion.

At the time when this law was passed, in 1912, apparently there was some necessity that came into the view of Congress for stopping the traffic in drugs where the statement on the label was not false as to the contents of the package, or not false as to what the package was or meant to be, but where the statements were false as to the effect of the package generally. The idea that Congress was considering was what is popularly known as the sale of patent medicines, or put-up drugs, as a matter of business where people buy them without knowing what they are. To come back to the illustration of liquor again. If an article was put out as a medicine and there was a statement that it would cure certain diseases, and if in fact it was a beverage which was furnished to people so that they thought it was a medicine, so that they either did not know it was a beverage or that they did not recognize its effect, and if that article could be shown to be sold because people would buy it to drink, and if it could be shown that it had no medicinal effect, then that article would come within the prohibition of this statute. Now, we might come to a long discussion as to whether alcohol and medicine had any medicinal effect. We will not discuss now whether a person might be charged with having misbranded an article because he said it contained 15 percent of alcohol and the alcohol would help cure a cold, or a thirst, whichever it might be. That would be a matter of opinion. But if he stated that alcohol was a cure for baldness, or if he stated that the bottle of something or other was a cure for baldness, and all it proved to be was that it was good for drink, then it could be stopped under this statute.

Now, I am using illustrations that do not come very close perhaps to this, but I do not want to come too close, because I am going to leave the question to you. The question is what the effect of this particular article may be as viewed from the statement of facts, distinguished from those of opinion. So in 1912 Congress, in order to reach the kind of cases that I have referred to, added the section that said if the label contained anything which was false or misleading—in fact that was already in the statute—and added this: If the package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic power of such article, or any of the ingredients or substances contained therein, and if that statement is false and fraudulent, then it would be treated as constituting a crime, in the same way as before, when the statute said "if it contained misstatements of fact." So that we have here a change, of course. If you find it proven beyond reasonable doubt that this label contains in it any statement of fact (as distinguished from a statement of opinion, or as distinguished from a statement of conclusion as to the recovery of a patient) which is false, then it would be within the main part of the statute. Then, if you should find that the label contains any statement as to the curative or therapeutic effect—from our standpoint therapeutic and curative are substantially the same—and if that statement is not only false; that is, if you find it is not based on fact, but if the persons who made the statement knew or should have known or must have known that the statement was false, and if they put that there for the sake of giving out a false statement and of making a statement to people which would cause them to buy something because they did not know the truth, then that would come within the second portion of the law, and if the Government proves that beyond reasonable doubt, your verdict should be guilty.

Now, this case, as has been said, is not a test as to whether or not the Pulmonol Company can do business or whether it can sell this medicine. It really is only a test as to whether or not the particular label that is upon the medicine at the present time is misleading and intentionally false and fraudulent, and whether it contains statements that are contrary to fact. If so, then, if proven beyond reasonable doubt that this was so, the defendant would be liable to the penalty of having to correct its label so that no one would be misled in that respect, and be punished in such a way as the court might see fit, according to the amount of intent in the misstatements that the package contained. It is for that purpose that Dr. Payne was notified by the Department to tell them what he knew about the contents of the article and the accuracy of the statements upon the article. If there had been a provision there that the liquid in that bottle was red, white, and blue in color, and it proved to be all red, and Dr. Payne had gone down there and they had said, "Why do you say it is red, white, and blue?" and he said, "Well, it is. When you mix it, it is first white, and then blue, and then red. I did not intend to give the impression that it was red, white, and blue all at once", the Government would have said, "Well, you should say it is first white, and then blue, and then red, and as long as it is red it is in a condition in which people can take it." He could have rebranded his label in that respect and the Government would con-

sider whether or not the company should be prosecuted for the use of the previous label, or whether it was something that did not necessarily mean that a person should be charged criminally with having put out something that is fraudulent. So, in that way this matter was called into discussion. The situation behind it, as to this disagreement between Dr. Payne and the other doctors, as to his standing in this society which is formed by physicians, and in which they attempt to regulate or control the action of those who are practicing as doctors, let us entirely leave out. The question whether you agree with them, or disagree with them, their methods, or their actions in dealing with some one who runs counter to their ideas, has nothing to do with this case, unless it affects the credibility of one of the witnesses, or unless it shows interest or bias on the part of one of the witnesses so that his statements here are not to be taken for their face value. You jurymen can weigh all those things so as to see whether a man is so certain that a person is a wrongdoer that he would not listen to anything properly that might be said in the man's favor or might be true when said about a man. On the other hand, a man who is being criticized may feel that the others were wrong to such an extent that he will not entirely give full consideration to what a third party may be doing without having the slightest interest in the difficulties between the first two.

So far as the Government is concerned, you may start with the assumption that the district attorney, and in this case the Government, in presenting this question leaves to you in no way an opportunity or idea of siding with the other doctors or with Dr. Payne. That has nothing whatever to do with the issue. Whether the Department of Agriculture learned Dr. Payne's analysis and suggested to the chemists that they look it over and see if they could find something they had not found before has nothing whatever to do with whether or not the statement on the label is all right; it only has to do with whether or not the chemists followed that suggestion. You have nothing to do with the question whether the officers of the Government may have been attempting to help the other doctors and hurt Dr. Payne (you can assume that they have been so misguided and blinded that they are not fair to one set or the other); but the thing for you to consider is whether or not their accuracy of observation in their analysis of the product is correct, as you have heard all the testimony, and then consider whether their analysis is correct. They have told you what is in the product. Then see whether this label contains anything that is false, that is, in the sense of inaccuracy or misstatement as to what the medicine is made of or as to what it is. For instance, if it said it was a solid and not a liquid you could pass on that as a question of fact. If it said that it was beneficial in certain diseases, and the bottle was empty, you could pass on it as to whether it would be beneficial to take nothing where they said you must take something. If it were proven that the bottle contained merely water and they told you that the patient must take something, why then (unless they could tell you that this psychology entered in so that if they took sugar instead of medicine and the sugar was coated with pink, it would be healthful merely because the patient thought they were getting something) then you could take into account that the statement would be false, when it

claimed that the medicine was healthful; but, if the statement is that this pink-coated sugar contains quinine, and it does not contain it, then you have a question of fact.

You have got to be very careful all the way through here to dispose on one side of all the matters of opinion and on the other side of all questions of fact. Dr. Knopf has gone through this label and in response to my question has taken up clause by clause the different statements of what is in the medicine and of its action. In most respects, perhaps in all respects, as he said, the sentences as composed of words in the English language and as stating something with relation to the contents or to matters that are used as medicine, are true. He differs when he gets to the proposition that this particular medicine is of any effect as a medicine in tuberculosis cases, and there is a question of fact for you. If the medicine has no effect and if it is sold merely because people are anxious to buy a remedy, and if they deceive themselves into thinking that remedy is doing them good (even if they thereby help themselves); or if the remedy, because they take care of themselves, does not have any effect of itself; in other words, if it is just the same as if there was so much water in the bottle and if it was sold with the intent of making people pay for water, that is, pay for an inert substance and induces them to exercise the psychology of curing themselves, and if this label you find contains a statement of a cure that does not cure as a matter of fact, with the understanding that people would get in buying it, why then the label is false and misleading, and you would consider whether you are satisfied beyond reasonable doubt that under this third section of the statute it was intentionally made false and misleading in that way.

Now, the information has two counts, one relating to the package that was sent to Boston, Mass., on or about October 4, 1913, and the other which was sent to St. Paul, Minn., on or about March 1, 1914. Of course, as I have already charged you, it would be interstate commerce to sell a bottle of medicine to some one in either Boston or St. Paul, to send it from Brooklyn to comply with the sale. There is no dispute as to the language that is upon the packages because they have been submitted to you. The counts have not been separated into a charge as to whether this is intentionally false and fraudulent as to distinguish it from merely misleading or false. In fact I have tried to distinguish that by telling you that if the Government satisfies you beyond reasonable doubt that the intent was to put out something that was false and misleading with the idea of deceiving for the purpose of disposing of it as an article of use, not necessarily of sale, then, of course, the matter would come within the language of the information. If you find that there was no intentional fraud, no intentional presentation of a false statement, and if you should still find that the language upon the package was false and misleading as to facts as distinguished from opinion, it would still come within the language of the statute. If the Government should satisfy you as to that beyond reasonable doubt, the charge would still be made out in that sense. And as I told you, it is all a question of whether you find as a fact one or two of these matters. One, that this label was intentionally false and fraudulent and sent out for the purpose of deceiving, as distinguished from an honest belief that it was helpful and that the statements made were true.

The other point is, if you find that the statements upon the paper itself state as facts what is not so in any material sense or particular, according as you determine those questions (of course, recognizing the proposition that if any witness willfully deceives you here within the court room, it is within your power to pay so much attention to what he says as you see fit, weighing all the testimony) then see if the precise charge under this information is proven beyond reasonable doubt, and do not speculate upon these matters of medical science; do not determine for yourselves whether or not you want to buy this medicine or have somebody use it, or whether you would try it as a last resort. Keep that out of the case. Simply see whether the defendant has done something that brings it within this statute and whether that is shown beyond reasonable doubt.

The Government requests me to charge:

(1) It is unnecessary for the Government to prove that all the statements on the label or booklet or circular were false and fraudulent. If you believe from the evidence that any one statement as to the curative or therapeutic properties of this compound was false in fact and that the defendant knew that it was false, then you may find the defendant guilty. I so charge.

(2) If you believe from the evidence that as to any one of the ailments for which this compound is recommended by the label or booklet or circular and which is set forth in the information this compound would have no beneficial effect whatever, and the defendant knew this, you may find the defendant guilty. In the way that I have defined fraud I do charge that, yes. If the defendant sent these out knowing that he was making a false statement, that would be a fraud.

(3) If you believe from the evidence that any one of the therapeutic claims as to the effect of this compound upon all pulmonary diseases, for all forms of consumption, for hemorrhages or for night sweats, was false and was made by the defendant with a reckless and wanton disregard as to whether it was true or false, you may find the defendant guilty. I so charge.

(4) If you believe from the evidence that any one of the therapeutic statements upon the label or booklet or circular as set forth in the information was partly true, but was so artfully worded as to convey a meaning as to the compound's therapeutic properties which was wholly false, and that the label and booklet and circular was so worded for the purpose of deceiving the public, then that statement would be false and fraudulent, and you may find the defendant guilty. I so charge. If this paper or label was made up in such a way that people would get the idea of false facts as distinguished from either a correct or incorrect opinion of the person making the statement, if that paper was gotten up so as to present false facts to people or to make them believe things were false as facts as you find them, and if sold and put on the market for the purpose of selling by means of false statements of facts, that would bring it within the section.

Now, Dr. Payne, if you think that I have stated the matter incorrectly from either standpoint of the law or of the testimony, you want to get it on the record now.

Dr. PAYNE. I have nothing to say.

UNITED STATES v. 462 BOXES OF ORANGES

(District Court, District of Colorado, Feb. 21, 1917)

249 Fed. 505; N.J. 5402

Libel under section 10 of the Food and Drugs Act. Trial before the court. Decree in favor of the United States.

On December 18, 1916, the United States attorney for the District of Colorado, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel for the seizure and condemnation of 462 boxes of oranges, consigned on December 6, 1916, by S. M. Guthrie, Lindsay, Calif., remaining unsold in the original unbroken packages at Denver, Colo., alleging that the article had been transported from the State of California into the State of Colorado, and charging adulteration in violation of the Food and Drugs Act. The article was labeled: "Lindsay's Favorite Brand Ivan C. McIndoo, Lindsay, Tulare County, California." Adulteration of the article was alleged in the libel, for the reason that it consisted in part of decomposed oranges.

Thereafter Ivan C. McIndoo, Lindsay, Calif., claimant, filed his answer, denying the allegations in the libel. On February 14, 1917, the case came on for trial before the court, a jury having been waived, and after the submission of testimony it was held that the oranges were adulterated within the meaning of the Food and Drugs Act.

LEWIS, *District Judge.* There is no doubt about the facts in this case, but I think there is question as to whether or not the facts bring the shipment within the terms of the act of Congress. We declined to meet this question heretofore in connection with a shipment of apples; that is, we refused to issue the writ of seizure. The charge was that some of the apples were rotten, but on preliminary inquiry it appeared that many of them were sound—were in good condition for use, and could be readily seen and separated from the unsound. It is pretty difficult to free our minds from the idea of deception in the sale of this kind of fruit in the condition that the evidence shows these oranges are, and yet that element ought to be eliminated, because the act of Congress in no sense undertakes to reach the purpose of the act by bringing within its terms any fraudulent conduct in the sale of the article. You cannot determine the condition of an orange from looking at it as you can an apple. Now, the evidence, I take it, does bring the shipment within the literal terms of the act; the oranges were decomposed in the sense that on account of prior freezing they were undergoing a deteriorating change; that is, a large percent of them. I presume there is a process of decomposition going on when an apple is passed through the stages of what is popularly called mellowing; it is hard when picked and is kept for several months or weeks before it becomes highly palatable. You would not count that—if that be decomposition—as being within the meaning of the act of Congress, for that is a process purely of nature itself, normal to that fruit.

It is true that freezing does not destroy the wholesomeness, immediately, of fruit—either fruit of this character or other fruits—but it starts the process, which, in a short time, will destroy it for all food purposes; and I conclude from this evidence that would be true in this case of a great percent of these oranges. On account of having been frosted they would from that cause alone within a reasonable time become wholly unfit for food purposes; within a time less

than required to render them unfit for food if they had not been frosted. There is evidence that they were not hurtful if eaten—nothing poisonous about them—nothing harmful in any degree; but there is also evidence that frosting may cause them to have a bitter taste. However, we must conclude that freezing, as already said, through the necessary processes of nature that immediately follow, would lead to the total destruction of this shipment as a food product. Now, if that be true, is it not decomposition within the meaning of the statute? There is no doubt about the facts, that these oranges were frozen before they were shipped from California where they grew, and that rendered them increasingly unfit as a food product. From the time they were frozen they became increasingly less wholesome on that account.

I believe that is decomposition constituting adulteration within the statute. I think you expressed the true issue in the case, Mr. Lee, when you said the sole question is whether or not the facts, which are undisputed, bring them within the intent and purpose of the statute. My judgment is that in the sense of the statute they were adulterated when they were seized at Denver on the 18th of December.

You may take a decree of condemnation without costs.

UNITED STATES v. SIX BARRELS OF GROUND PEPPER

(District Court, S.D. New York, Feb. 27, 1917)

N.J. No. 5547

Libel under section 10 of the Food and Drugs Act. Trial before the court. Decree in favor of the United States.

The United States attorney filed a libel for seizure and condemnation of 6 barrels of ground pepper, alleging that the article had been shipped by McCormick & Co., Baltimore, Md., and transported from the State of Maryland into the State of New York and remained unsold in the original unbroken packages; and that the article was adulterated and misbranded in violation of the Food and Drugs Act. The article was labeled in part "Pure Ground Black Pepper, McCormick & Co. Baltimore, Md."

Adulteration of the article was alleged, in substance, in the libel for the reason that added pepper shells had been mixed and packed therewith so as to reduce and lower and injuriously affect its quality and strength, and had been substituted wholly or in part for the article.

Misbranding was alleged in the libel for the reason that the statement, to wit, "Pure Ground Black Pepper", was false and misleading in that said article was an imitation of, and was offered for sale under the distinctive name of, another article, to wit, black pepper, when it was not; and for the further reason that it was labeled and branded so as to deceive and mislead a purchaser in that it purported to be another article.

MANTON, *District Judge.* On the 17th of April 1916, 10 barrels of pepper were sold by the claimant to Samuel Wildes Sons Co. under an order calling for "10 barrels pure ground black pepper." The

shipment was so marked and it was conceded by the claimant, indeed, so claimed, that the pepper sold and shipped was pure ground black pepper. On the 24th of February 1916, 6 barrels were seized by the marshal, and on the 27th of May 1916, they were sampled by the libelant and thereafter experimentation with the samples was made as hereafter stated. The samples were taken by the Government inspector at the house of Wildes, a hole was bored about a quarter of an inch in bore through one of the staves of each of the barrels by a brace and bit. The samples so taken were from various parts of each barrel. Care was taken in the preservation of these samples, and they were given to the Government chemist, Seeker, for analysis in his laboratory. He, together with an assistant, Cummings, conducted the experimentation with the results herein stated. The claimant contends that this pepper was Lampong pepper, a high grade of black pepper grown in the southeastern end of the island of Sumatra and commonly used in this country. The claimant, McCormick & Co., are large importers of pepper, perhaps the largest in this country, and have been engaged in business in Baltimore for a long period of years.

Pure ground black pepper is defined in Circular 19, issued by the Department of Agriculture on June 26, 1916, as follows:

PEPPER

Black pepper is the dried immature berry of *Piper nigrum* L. and contains not less than six (6) percent of nonvolatile ether extract, not less than twenty-five (25) percent of starch, not more than seven (7) percent of total ash, not more than two (2) percent of ash insoluble in hydrochloric acid, and not more than fifteen (15) percent of crude fiber. One hundred parts of the nonvolatile ether extract contain not less than three and one-quarter (3.25) parts of nitogen. Ground black pepper is the product made by grinding the entire berry and contains the several parts of the berry in their normal proportions.

The Department of Agriculture officially advised McCormick & Co. on August 1, 1916, that—

Ground peppers will be regarded as adulterated and misbranded, if, upon examination, they are found not to comply with the standards in Circular 19, Office of the Secretary of Agriculture.

The Government has taken the position generally, in the enforcement of the Federal Food and Drugs Act of June 30, 1906, that a ground black pepper conforming to the standards above mentioned, defined in Circular 19, is not a violation of the act. A product not made solely by grinding the entire black pepper berries and containing the several parts of the berry in their normal proportions, but containing also some added foreign substance, is not a pure ground black pepper, and if shipped in interstate commerce is in violation of the Federal Food and Drugs Act.

The Government's claim is that McCormick & Co., in order to gain an advantage in competition, adulterated its black pepper with foreign pepper shells and it contends that this adulteration was carried on only to such an extent that an analysis made of the product would find that such adulterated and misbranded pepper would come within the limits of Circular 19.

In Lampong pepper the ash and fiber are comparatively high, due to excess sand, twigs, and trash. Hence, to make room in Lampong

pepper for the addition of a larger quantity of shells, all of this excess trash, twigs, and mineral matter is taken out. If from 100 pounds of pepper there is removed 3 percent, or 3 pounds, of sand or gravel, leaving 97 pounds of pepper, there would be practically a negligible quantity of ash. By taking shells containing 8.21 percent of ash, 25 pounds can be added to the 97 pounds of clean pepper, and the result—122 pounds mixture—would give 95 pounds less ash than the original 100 pounds contained. This 25 pounds is, of course, in addition to the shells that might safely have been mixed in the pepper before the excess mineral matter was removed. Control of crude fiber could be illustrated in exactly the same way and with substantially the same result. It is claimed by the Government that by some such method of scientific control this pepper was standardized and kept as near uniform as possible. In other words, to each grind as much shell was added as could be put in with safety. After the grind customarily analyses were made, as Shoul testified, to ascertain whether the pepper as sold came up to the requirements of Circular 19. Both the Government and the claimant concede that if foreign pepper shells were added to the natural pepper berry such a mixture would be an adulteration and a violation of the act.

The sole inquiry, therefore, is one of fact, whether under the proof in this case this pepper sold to Wildes and subsequently sampled contained pepper shells as charged in the libel. This question of fact the court is called upon to decide.

It may readily be conceded that with the possibility of mixing pepper shells and the pepper berry the mix can be so arranged that it will contain the essential properties required under Circular 19. Therefore a chemical analysis alone is not sufficient as a method of detection. Apparently the Government recognizes this, for it conceived a method of detection and carried out its plan. It experimented, prior to endeavoring to carry out its plan of detection, and found that quinine alkaloid was no part of the properties of pepper or pepper shells. Such experiments were had that it was scientifically determined by the experimenting chemist that if quinine alkaloid were mixed with pepper and pepper shells, it could be subsequently detected in the laboratory on analysis.

Two well-known tests of obtaining such results are known to science. One is the so-called "modified Thalleioquin test" and the other the Hereapathite and Fluorescence tests. With this knowledge, after learning that McCormick & Co. were the consignee of 199 bags of pepper shells then at a dock in Baltimore, the Government inspectors on May 27, 1916, proceeded to the dock and there, with the use of a syringe, mixed quinine alkaloid with each of the bags of pepper shells, putting an equal quantity, 1 ounce, of quinine alkaloid in each bag.

After the samples were obtained from the barrels seized at Wildes house, the Government analysts, Seeker and Cummings, examined 19 separate samples from 7 different barrels of the shipment of pepper in issue, to determine the presence of quinine alkaloid. The modified Thalleioquin test was employed. Of the 19 samples so tested, 13 returned a negative and 6 returned a positive reaction. Of the first series of samples, 4 returned a negative and 3 a positive reaction. Of the second series of samples, 4 returned a negative and

2 a positive reaction. Of the third and final series of samples, 5 returned a negative and 1 a positive reaction. Three barrels returned a negative reaction upon every test. One barrel returned a positive reaction throughout. One barrel returned 2 positive and 1 negative reaction, and another barrel returned 2 negative and 1 positive reaction. The examining chemist explains that positive reaction refers to the red color obtained by the application of the test, and alleges that this demonstrates the presence of quinine alkaloid. In addition, the chemist, Seeker, testified that he applied the Hereapathite and Fluorescence tests on a composite sample of 400 grams of mixture, two samples from barrels A and B, and a third sample from barrel A. These last two tests returned a positive reaction. These tests were those applied by the chemist, Seeker, in his experiments prior to syringing quinine alkaloid into the pepper shells. From his previous experience, Chemist Seeker learned that a minimum of 2 mm of quinine in 200 grams of pepper sample would invariably return the positive red color reaction. Approximately 30 cc of quinine solution was injected into each of the 199 bags of pepper shells as previously described, and Seeker estimates that he can detect the presence of 6 percent at a minimum of the treated shells in this pepper, and concludes, upon the result of his examination, that this pepper contains from 10 to 28 percent of quinine-treated shells.

The inquiry, therefore, is whether this conclusion is positive and accurate. Cummings, the assistant to Seeker, gives corroborative testimony as to the findings.

The entire consignment of 6 barrels is all part of the same grind or mix, and the claimant concedes that if quinine alkaloid was found in 3 barrels, and that this indicates a mixing of pepper and pepper shells, the 6 barrels should be condemned. Learned counsel for the claimant argues that, assuming that the presence of quinine alkaloid in a part of this pepper has been conclusively established, it follows that before such evidence can be accepted as sufficient proof of the addition of quinine alkaloid-treated shells to this pepper, the Government must show the absence of any other reasonable possibility of quinine alkaloid finding its way into this pepper. In view of the concession that quinine alkaloid is not one of the properties of pepper and that McCormick & Co. were concededly using pepper shells, I cannot agree with counsel that it is incumbent upon the Government to show the absence of any reasonable possibility of quinine alkaloid finding its way into the pepper in any other manner.

The examination made of this pepper by Seeker is attacked as insufficient and inconclusive because it is said that the examination as made does not demonstrate the presence of quinine alkaloid with the certainty required. I cannot find that any of the experts called by the defense, and they were many, had ever actually experimented in detecting quinine alkaloid where it has been mixed with pepper shells.

A very general and severe attack is made, however, upon the sufficiency of the tests used by Dr. Seeker, but when the testimony is examined with care it will demonstrate that it resolves itself largely into a matter of opinion; opinion expressed by men learned in the science, but men who have not experimented. Drs. Pond and

Winton gave no testimony at all upon quinine tests. Dr. Penniman stated that the proof was not sufficiently conclusive and further that "you could not determine the presence of quinine with certainty unless you had pure quinine to test." But he did admit that if the Thalleioquin test were applied and the result obtained as claimed by Dr. Seeker, it would be some evidence of the presence of quinine and that positive reaction from the Hereapathite test would be evidence of the presence of quinine, and that the Fluorescence test would also give some evidence of the presence of quinine, and admitted generally that the three tests were of value in detecting the presence of quinine. He says that the density of the color obtained upon the positive reaction would be indicative of the quantity of quinine present and that the density would have some relation to the quantity. He then describes a method of making this test, which upon comparison with Dr. Seeker's, I find to be precisely what he did. This materially weakens the opinion evidence of Dr. Penniman.

Dr. Deghuee, another expert, on direct examination, expressed grave doubt of the sufficiency of the tests made by Dr. Seeker, but says that if both the Hereapathite and Thalleioquin tests were made, both together would "make out a little stronger case." Dr. Fuller admits that the three tests used by Dr. Seeker, if the observations of Dr. Seeker are correct, would be some evidence of the presence of quinine alkaloid. Dr. Winton's testimony is not at variance with this method of detection. Dr. Winton further testified that a microscopical examination "in itself" is not sufficient except in cases where a foreign ingredient such as almond or coconut shells or olive stones are used, and further that "if it were a carefully selected Lampong pepper, which had been cleaned and scoured and some of the natural elements removed, and those were afterward replaced by pepper shells," he would not expect to find from 10 to 28 percent of shells on a microscopical examination.

Such quibbling of experts expressing but opinion testimony in the absence of similar experimentation to that of Dr. Seeker cannot be said to overcome the observations of Dr. Seeker after his study, research, and labor which obtained a positive reaction indicating the presence of the detector which was used by the Government inspectors.

But it is said that the test of the microscope, as applied by Dr. Rusby, submitted by him, negatives the claim made here. Dr. Winston's doubt of the sufficiency of the microscopical examination "in itself" for the purposes of detection creates grave doubt as to its sufficiency. He admits that he cannot distinguish the shell of Lampong pepper from Acheen pepper. The latter, Acheen pepper, is a lower-grade pepper than Lampong, and it is hard to conceive of how the difference between the lower grade of Lampong pepper and a mixture of shells and the higher-grade pepper can be determined by the microscope. This witness produced slides in court and gave the court an opportunity to observe his various specimens. I do not think that this testimony overcomes that offered by the Government, which, I believe, shows by a fair preponderance of the evidence that quinine alkaloid was found in the pepper seized. Quinine alkaloid could not accidently have found its way into the 6 barrels seized. Mr. Shoul testified that no chemicals of any kind or foreign drugs could possibly get mixed in the pepper or pepper shells, nor can I

infer that by some possibility empty cinchona-bark barrels might have been used for packing the 6 barrels of pepper. Each of the barrels seized were lined with a heavy grade of paper, and there is no evidence in the record that the barrels were used for cinchona bark at any time. Shoul, who had charge of the grinding department, testified that no pepper shells could have accidentally found their way into this lot of pepper, and that if the pepper did contain added shells they must have been put in deliberately.

R. A. McCormick seems to have charge of the spice department of the claimant, while M. McCormick is in charge of the drug department. Shoul has been the sole head of the spice department. Large quantities of pepper shells were received within the preceding year of the date of the seizure, which are not satisfactorily accounted for by the evidence of the claimant. The original records produced did not show the disposition of the pepper shells and particularly of the quinine alkaloid marked pepper shells received in this lot of 199 bags. The only record produced of a shipment of pepper and pepper shells properly marked was to one Goldberg.

This, with the other testimony in the record, leads to the conclusion that the pepper in question was adulterated, and I will accordingly give a decree for the libelant.

UNITED STATES v. HALTIWANGER-TAYLOR DRUG CO.

(District Court, N.D. Georgia, Apr. 4, 1917)

N.J. No. 5901

Information in two counts alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty on one count.

The United States attorney filed an information against the Haltiwanger-Taylor Drug Co., a corporation, Atlanta, Ga., alleging shipment by said company, from the State of Georgia into the State of Florida, of a quantity of an article labeled in part "Dr. Biggers' Huckleberry Cordial Compound", which was misbranded.

It was alleged in substance in the information that the article was misbranded for the reason that certain statements, appearing on the label of the carton, falsely and fraudulently represented it as a remedy for children teething, cholera morbus, dysentery, and all affections of the bowels, when, in truth and in fact, it was not. Misbranding was alleged for the further reason that the statement regarding the article and the ingredients and substances contained therein, appearing on its label, to wit, "Huckleberry Cordial Compound", was false and misleading in that it indicated to purchasers thereof that the article contained a substantial and significant amount of a product produced from huckleberries, when, in truth and in fact, it did not; and for the further reason that the statement regarding the article and the ingredients and substances contained therein, appearing on the label, to wit, "Alcohol 10%", was false and misleading in that it indicated to purchasers thereof that said article contained 10 percent of alcohol, when, in truth and in fact, it did not contain 10 percent of alcohol, but did contain a less amount thereof, to wit, 2.54 percent.

NEWMAN, *District Judge* (charge to jury). Gentlemen of the jury: The first count in this indictment, which you have heard read, which is found under what is called the Food and Drugs Act, sets out, in the first place what is on the labels on these packages and then it says what is on the carton and what is on the bottles. It says that these statements "were false and fraudulent in this, that the same were applied to said article knowingly, and in reckless and wanton disregard of their truth or falsity, so as to represent falsely and fraudulently to the purchaser thereof, and to create in the minds of purchasers thereof the impression and belief, that it was, in whole or in part, composed of, or contained ingredients or medical agents effective, among other things, as a remedy for children teething, cholera morbus, dysentery, and all affections of the bowels, when, in truth and in fact, said article was not, in whole or in part, composed of, and did not contain, ingredients or medicinal agents effective, among other things, as a remedy for children teething, cholera morbus, dysentery, or all affections of the bowels; all of which was and is contrary to the statute."

That raises the question here. It is perfectly clear that if they represented it, as this says, on the cartons and on the labels and on the literature accompanying this preparation and put on it these statements and knew them to be false, they would be guilty under this first count in the indictment. As to its effect on children teething and curing cholera morbus, if they knew, or more than that, if they made them so recklessly as to their truthfulness as to amount to willful fraud or so recklessly, in the language of the district attorney here, who has given a request on the subject, which is correct, if it appears from the evidence, beyond a reasonable doubt, that such statement was made either with knowledge that it was not true, or in reckless and wanton disregard of the truth, that it amounts to willfulness, where it was so recklessly and so wantonly made without ascertaining the truth, it would really amount to willfulness, it would be the same as if they knew it, whether they knew it or not. If you believe that in this case and are satisfied beyond a reasonable doubt as to these labels and the statements as to the remedial effect of this preparation and the curative effect, they would be guilty on this question, on that count of the indictment and on that branch of the case. Whether he made them believing them to be true, made them honestly and in good faith, and whether he made them knowing them to be not true or so recklessly or wantonly as to their truth as to amount to untruth, and consequently a fraudulent representation as to what was contained in it; that is the question on the first count in the indictment, which you will see, when you read it, recites.

Mr. WESTMORELAND. Your Honor failed to state to the jury that it not only must be false but fraudulent.

The COURT. I assumed that to be true.

You would have to believe them to be false as well as fraudulent. I was giving the fraudulent character of it. Of course, if the statements made on these things are true then there would be no case against them at all, but if you [believe] that they are untrue, they must be false and fraudulent, and if fraudulent, made with intent to deceive or with such reckless disregard of truth, and he should

know that it would deceive the public. As to the character of the representation made, of course it must be both false and fraudulent, and it must be untrue. If these statements were not untrue there would be no case here at all, of course.

Now, the second count in the indictment deals with the statement as to the amount of alcohol in it. Now, in respect to this I instruct you, the only thing I have heard here in connection with this case which seems to me would excuse him, if this quantity of alcohol was misrepresented, is his statement as shown by these calculations he made about the quantity of alcohol in this grape brandy which he was using. I do not believe that would excuse him. I believe the question is whether he materially misrepresented in his label the quantity of alcohol in there. The statute provides that "if the contents of the package as originally put up shall have been removed, in whole or in part, and other contents shall have been placed in same package, or if the package fails to bear a statement on the label of the quantity or proportion of any alcohol (among other things) contained therein." Now, I think the statement as to the amount of alcohol in one of these packages of medicine must be substantially correct. You have the evidence about that here, and if you believe it is incorrect, I believe on that part of the indictment he would be guilty if there was a material difference under the evidence, or in your opinion from the evidence, between the amount of alcohol stated on the package and the amount contained in the package, I think on that he would be guilty. I think the law holds him absolutely and arbitrarily to stating, with substantial correctness, the amount of alcohol in the package. If he has not done that, as charged in the second count in the indictment, he would be guilty as to that part of it.

Now, the next thing is the use of the words "Huckleberry Cordial" and as to its being a preparation coming from the roots of the huckleberry instead of the berry itself. That is a question, I think, for you to determine, gentlemen. It is largely in your discretion under the evidence. That is, whether or not using a mixture of the root, which he used here, of the huckleberry root, as he says, would be an imposition upon the public, because, as the contention of the case is here, that means the extract or what is squeezed out of the huckleberry itself; that that is the impression it would make on the public. If he knew that or understood that, or if he had good reason to believe that it would create that impression on the public, that it was an extract extracted from the huckleberry itself, and he used an extract from the root, that would be a reason to convict him under the second count. If old Dr. Biggers and this defendant believed the extract of huckleberry root was, over long years, satisfactory to the public for use in making huckleberry cordial, I do not believe he should be convicted on that, but if its use was to make the public believe that it was taken from the huckleberry itself when in fact it was taken from the root, he would be guilty under that head. Both that and the alcohol are in the second count in the indictment; they are both charged. If you find him guilty on either of those two things, the alcohol or the huckleberry cordial, and it is alleged that that name was used to lead the public to believe that it

was real huckleberry cordial, made from huckleberries themselves, and was intended to convey that impression. If that was true, that would be a misrepresentation for which he ought to be convicted here. On the other hand, if they truly believed and had a right to believe that an extract from the root was not a thing that would impose on the public and that it was an assistant in the way in which he used it as an astringent, if he believed that it was fairly represented to the public or had good reason to believe that it was fairly represented to the public as huckleberry cordial, then he ought not to be convicted.

Those two things and the remedial qualities of the medicine, whether or not that was a false—the statements made about that, were they both false and fraudulent, as I have stated to you. You will have to believe that, and as to the alcohol, you will find from the evidence here whether there was a material, substantial difference between the amount of alcohol in the medicine or in this preparation and the amount put on the label, and as to the huckleberry root I have already instructed you.

Now, if you do not believe him guilty on either of these counts, say you find him not guilty. If you believe him guilty on both counts, say you find him guilty. If you believe him guilty on one count and not on the other, so express it in your verdict. You should be satisfied of his guilt beyond a reasonable doubt.

Some evidence has been offered about the good character of the defendant. That goes to the jury to be considered with the evidence in the case, and particularly on the question of intent to do right. It is said that good character, if thoroughly established, is sufficient of itself, in a proper case, to raise a reasonable doubt. It is for you to say whether or not that is true in this case.

Mr. WESTMORELAND. If Your Honor please, the second count contains two subjects, and if the jury should come to the conclusion, under Your Honor's charge, that the defendant should be guilty of mislabeling as to the alcohol and not as to the other, should they not specify in the verdict as to which?

The COURT. What do you say, Mr. Alexander? I think so.

Mr. ALEXANDER. Whatever Your Honor thinks about it.

The COURT. I think so, gentlemen.

Mr. ALEXANDER. There is one matter that Your Honor has not discussed. Aside from the matter of the huckleberry being made from the root, the cordial, I think the issue in the case is this: That even though they think that the root or extract from the root can justify the use of the words "Huckleberry Cordial", that that name cannot be used when it is insignificant in amount; if that particular item should be there in insignificant quantities that it would be misleading, under the statute, to give it that distinctive name.

The COURT. I do no think so, Mr. Alexander; I have considered that.

The jury thereupon retired, and after due deliberation returned a verdict as follows: "We, the jury, find the defendant guilty of misbranding as to the amount of alcohol under the second count of the indictment."

UNITED STATES v. NINE BARRELS OF BUTTER

(District Court, S.D. New York, Apr. 9, 1917)

N.J. No. 5375

Libel under section 10 of the Food and Drugs Act. Trial before jury of one. Verdict in favor of the United States.

The United States attorney filed a libel for the seizure and condemnation of 9 barrels, each containing 225 pounds of butter, alleging that the article had been transported from the State of Tennessee into the State of New York, and charging adulteration in violation of the Food and Drugs Act.

Adulteration of the article was alleged for the reason that it consisted in whole or in part of a filthy, decomposed, and putrid animal substance, to wit, moldy, rancid, filthy, and decomposed butter; and for the further reason that floor sweepings and chicken feathers had been mixed and packed with the article so as to reduce, lower, and injuriously affect its quality and strength.

The case came on for trial before the court and a jury of one, in accordance with the stipulations of the parties, and after the presentation of evidence the case was submitted to the jury, and a verdict was returned in favor of the Government by direction of the court, the claimants having admitted that the butter was substantially in the condition charged in the libel. Thereupon the matter was taken under advisement by the court, and a formal decision was rendered by the court upon the following statement of facts:

This is an action at law for the destruction of nine barrels of number two grade packing butter shipped from Nashville, Tenn., to New York and consigned to the claimant, New York Butter Packing Company. The butter was packed in nine barrels, stout and double-headed except two, which were covered on one end with burlap. When examined in New York they disclosed the presence in substantial quantity of dirt, feathers, paper, aniline dyes which ran from the paper, the excrement of rats, and cheesy particles, as well as a substantial volume of the butter gone rancid. The claimant depends for its defense upon two theories; first, that the title to the butter had passed to it at Nashville, Tenn., on or before the date of its delivery to the carrier, a fact which was conceded; second, that the butter was destined for retreatment by which most of the impurities were removed. This retreatment is known as "ladling", and consists in dividing the butter into small portions, a pound or more in size, and in manually picking out with a trowel such parts as show dirty to the eye of the operator. The amount so removed varies generally from 2 to 3 per cent but sometimes rises much higher. The butter thus cleansed is then put into a room at about 85° F., which makes it plastic and capable of being moulded into pats of proper size and homogeneous quality. It is then colored evenly and sold only to bakers. In baking the butter passes through a temperature of from 350° to 500° F., under which most of the rancid oils are volatilized and driven off. Under the evidence as given it must be assumed that the butter so used by bakers is not deleterious to the public health.

HAND, *District Judge.* The first point of the claimant is met and answered by the case of *Hipolite Egg Co.* v. *United States*, 220 U.S. 45, and needs no other discussion. In that case the eggs had been shipped by Clark & Company to themselves and were in storage at the time in question. That case was stronger for the claimant than the case at bar.

The second point is in fact also decided by the same case, which was almost precisely like this in that aspect. Doubts may arise where goods are shipped in interstate commerce which may or may not be articles of food, as their ultimate destination may determine, but this case does not raise them. By no chance can this butter be called anything but an article of food; by no chance can I avoid the conclusion that it was filthy and decomposed in part. As such it came within the terms of the statute even though it might be saved and reclaimed by being made clean and palatable. Questions of that sort arise under section ten and under that alone. Under that section I have the power to destroy, sell, or redeliver to the owner under bond. The conditions of redelivery therefore become the important question in the case; I may deliver the goods to the owner upon condition that they "ladle" the butter, or that they otherwise treat it so as to secure the health of the community, in either case subject to a bond.

As to "ladling", I shall not allow the butter to be so treated. Certainly some filth must remain, and while baking may remove any injury to health, the question is somewhat meagerly presented, and the claimant does not press its right to do so. There is, however, another and much more radical method of cleansing such butter, known as "renovating", which is as follows: The butter is melted to a fluid so that all solid matters fall to the bottom. It is then strained and blown into a spray, in which condition hot water is allowed to percolate through the butter oil. The water is then drawn off and an emulsion made with milk is then cooled into crystals, salted, and packed in containers. As such it is sold for table butter and in many instances is unquestionably a useful article of food, and is permitted access to the markets where it is not unlawful.

I shall allow this butter to be "renovated" by the process mentioned, and after renovation the plaintiff shall have opportunity to examine it, and if it will not pass it, to convince me that it is still filthy or decomposed and should be destroyed. Therefore the decree will be that the butter be destroyed, unless the claimant elects within five days to "renovate" the same, upon giving suitable security as hereinafter described. If it does so decide, the butter shall be delivered to said claimant and after renovation to be completed within a suitable time, shall be again submitted to the plaintiff for examination. If the plaintiff at that time is not satisfied with its purity, it may apply to this court for a writ of destruction notwithstanding delivery to the claimant. The claimant shall give a bond in the sum of two thousand dollars conditioned that it will renovate said butter within a time to be fixed and will submit the product to the plaintiff for inspection; further conditioned that it will satisfy the court of the identity of the renovated butter with the subject of this action, and will hold such renovated butter subject to any writ of destruction to be hereafter issued.

If a writ of error is taken, the claimant's option to renovate may be exercised notwithstanding the same, but the bond must extend to the determination of the appeal, in which case no writ of destruction will issue until that time.

The claimant will bear the costs under section ten.

UNITED STATES v. BELL & CO.

(District Court, S.D. New York, Apr. 9, 1917)

N.J. No. 5548

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of not guilty.

The United States attorney filed an information against Bell & Co. alleging shipment by said company from the State of New York into the State of Maryland of a quantity of an article labeled in part, "Bell-ans", which was misbranded.

It was alleged that the article was misbranded for the reason that certain statements appearing on the labels of the bottle and carton and certain statements included in the circular or pamphlet accompanying the article falsely and fraudulently represented it as effective in the treatment of and for relieving vomiting in pregnancy, cholera morbus, alcoholism, and seasickness; in the treatment of indigestion, vertigo, peritonitis, and dyspepsia; for digesting every variety of food, removing every symptom of indigestion and restoring the entire digestive tract to normal condition; as a treatment for biliousness, sick headache, colic, and cramps; and as a remedy for every derangement of the digestive organs, when, in truth and in fact, it was not.

CUSHMAN, *District Judge* (charge to jury). Gentlemen of the jury: As indicated by the arguments of the attorneys, the issue has been fairly stated by both counsel. This indictment, or rather information, charges the defendant with having on a certain day in 1914 shipped in interstate commerce from New York to Baltimore certain articles, described in the information, in a package containing labels and circulars, which contained statements regarding the effect as a medicine of the contents of the package.

The information charges that these statements on the labels and in the circulars were false and fraudulent; that they were known by the company that put them out and made this shipment to be false and fraudulent; that they were made in such reckless disregard of the truth that it could not be said that they honestly believed them to be true. Hence they were fraudulent.

To this information the defendant has entered a plea of not guilty, which places the burden upon the Government of establishing every material allegation of the information by evidence sufficient to convince you beyond a reasonable doubt of the guilt of the defendant before you can return a verdict of guilty.

In that connection, I instruct you that it is not necessary that the Government, in order to warrant you in returning a verdict of guilty, should have proven that every one of the representations on these labels and in these circulars were false and fraudulent regarding the curative or therapeutic effect of these medicines—of this article of medicine—but before you could return a verdict of guilty it would be necessary that the Government should have established by evidence sufficient to satisfy you beyond a reasonable doubt that at least one of the statements regarding the curative or therapeutic

effect of this medicine—I cannot remember the name of it—was false and fraudulent.

This law, in substance, forbids anyone to send in interstate commerce misbranded articles of medicine. Then it defines an article as misbranded if the label or circular contains any statement regarding the curative or therapeutic effect of such article which is false and fraudulent. And then it prohibits anybody doing the like of that, and if they do do it they are to be punished.

Now, the issue has been narrowed very materially and counsel in their argument have conceded it. It comes to this: Is any one of the statements on this label or in this circular concerning the curative or therapeutic effect of this medicine false and fraudulent? The first thing when you retire to consider on your verdict would be to take up logically whether any one of these statements was false. If you conclude that there was not evidence sufficient to convince you beyond a reasonable doubt that any one of these statements was false, your verdict would be not guilty; but if you should find that some of these statements were false and untrue then the next step that you would have to undertake would be to determine whether the defendant in putting out these circulars and labels with those statements on them did so fraudulently. That is, whether it knew them to be false. If you find that it honestly believed from reports of doctors and patients that had taken this medicine and had good reason to believe that all these representations were reasonably accurate and true, then it would not be fraudulent, because you could not say that defendant knew them to be false.

I consider it necessary to give you a general idea of what the word "fraudulent" means in that connection. A fraudulent representation must contain the following elements: First, it must be false; second, the person who makes it must know it to be false; third, he must make it to some one with an idea that that some one will believe it and act in the belief that it is true; and, lastly, it must be made under such circumstances as might lead an ordinary person to believe it was true.

And if he did believe it was true, and acting in that belief, he parted with his money, he would be cheated out of it, because it was not so.

All those things enter into a fraudulent representation.

Take this representation set out in the indictment, or information, just take a single one to illustrate, but the same rule applies to all these statements regarding the curative or therapeutic effect of this article of medicine—that is, it is stated in there that it relieves vomiting in pregnancy. Now, taking that statement alone, before you could find the defendants guilty concerning that statement you would have to find that that statement was false; you would have to find that the defendant did not believe it to be true; that the defendant either knew it was false or made it with such reckless and wanton disregard, regarding its truth, as to amount to the same thing. And you would have to find that it was made by the defendant with the idea that people would buy the medicine in the belief that it would relieving vomiting in pregnancy; and that it was made under such conditions as to induce ordinary persons to buy it in that belief.

Many of the things charged here are admitted. That is, the defense admits that it shipped the parcel. They admit that these labels were used, and they admit, of course, that the labels were put on there to induce the buying public to buy the medicine in the belief that it would do the work as it is described as doing in the labels and circulars. So you come back to the sole question in the case for you to determine, which is, whether those statements are true or whether they are false, and if false, whether the defendant made them, knowing they were false, or with such reckless disregard of the truth as to amount to the same thing.

I will read you certain instructions that I think I have covered already in substance in what I have already told you, but to be sure that the ground is covered, these have been prepared by counsel for the defense, and I will read them that I may see that his client is protected in its rights.

As the offense charged here is a misdemeanor, the Government must satisfy you of the defendant's guilt beyond a reasonable doubt and if it fails in that respect, you must acquit the defendant.

The first question of fact for the jury to determine on the evidence of this case is whether the statements made by the defendant in its circular and label as to the therapeutic or curative effects of its tablet are false. If you are not convinced that such statements are false, you must acquit.

If you find these statements are false, then the other and remaining question is whether such statements were made fraudulently, for the crime is not established by merely showing that the statements are untrue. They must have been made fraudulently as well as untruthfully.

The question as to whether these statements were fraudulently made involves a state of mind, the defendant's state of mind when it, through its agents, issued these statements. In other words, were these statements made with the knowledge that they were untrue and with the intention to deceive? What is actually in the mind of the defendant is a question of fact for your determination from all the evidence in the case.

The officers of the defendant corporation, as the owner of this alleged remedy, had a perfect right to state their views regarding the merits and effectiveness of the tablets, and if these statements brought into issue here were made honestly in the belief that they were true they are not fraudulent within the meaning of the act.

In determining as to whether the defendant's use of the words contained in the challenged statements was false and fraudulent, the jury have the right to consider the ideas conveyed by such words in their common usage to the average person as distinguished from the ideas conveyed to the average physician or scientist.

The court's denial of the motion made by the defendant's counsel for a direction of a verdict in its behalf in no way indicates any opinion of the court upon the subject of the defendant's guilt and the views of the court as to the merits of the case. The significance of the denial is that there were questions of fact in the case which should be submitted to the jury.

There is no presumption arises against the defendant by reason of the fact that it has been indicted and brought to trial before you, but every presumption of law is in favor of the defendant's innocence. This presumption continues throughout the trial with the defendant; and until the Government has produced evidence sufficient to overcome this presumption and satisfy you beyond a reasonable doubt, and prove every material allegation of the indictment, or, in this case, the information, by evidence which satisfies you beyond a reasonable doubt of the guilt of the defendant.

If you have a reasonable doubt concerning any material allegation in the indictment, it will be your duty to acquit.

Reasonable doubt as used in these instructions is just what the two words joined together mean. That is, a doubt based on reason;

a doubt for which you can give a reason. It does not mean every possible doubt. Nothing in this world, scarcely, can be established beyond all questions of mistake, but it does require, before you can return a verdict of guilty, that the guilt of the defendant must be shown by more than a mere preponderance of the evidence. That requirement of the law is that it should be established by evidence sufficient to satisfy you beyond a reasonable doubt. Reasonable doubt has been defined to be such a doubt as a man of ordinary firmness would allow to cause him to hesitate in the more important transactions concerning his own affairs.

You are in this case, as in every case where questions of fact are submitted to the jury, the sole and exclusive judge of every question of fact in the case, and of the weight of the evidence and the credibility of the witness.

In weighing the evidence and making up your minds as to the amount of credit which should be given to the various witnesses, you should take into account their appearance upon the stand, whether they appeared to you to be credible, whether they have inspired your confidence by their appearance. You should take into consideration their manner and demeanor in giving this testimony, whether it was such as to inspire your confidence or to repel it; whether it appeared to you that the witness was trying to tell you all that he knew about the case, neither holding back nor volunteering anything, or whether it appeared to you that he was reluctant and evasive and holding back what he knew or claimed to know until it was dragged out of him. On the other hand, whether he impressed you as being too willing and anxious to volunteer matters which no one inquired about. Also, you will take into account the testimony of each witness, whether it appeared to be reasonable and probable; whether it appeared to be complete in detail as you would expect it to be under the circumstances, or whether it had holes in it; whether it is corroborated by other evidence in the case where you would expect it to be corroborated if it were true; whether it is contradicted by other evidence in the case. You will also take into account the interest each witness has in the issues presented in the case, either by his manner or his relation to the case.

ABBOTT BROS. CO. v. UNITED STATES

(Circuit Court of Appeals, Seventh Circuit, Apr. 10, 1917)

242 Fed. 751; N.J. No. 5588

In error to the District Court for the Northern District of Illinois. Judgment affirmed.[99]

Before KOHLSAAT, ALSCHULER, and EVANS, Circuit Judges.

Per Curiam. The contention of the plaintiff in error that the information charging it with having violated the Pure Food and Drugs Act, bearing the signature of the district attorney for the Northern District of Illinois, and attached to which information

[99] Affirming *United States* v. *Abbott Bros. Co.*, p. 722, *ante*.

and made a part of it were four affidavits sworn to before notaries public, is insufficient to support a judgment because of the insufficiency of the acknowledgment, must be rejected. *Weeks* v. *United States*, 216 Fed. 292; *United States* v. *Adams Express Co.*, 230 Fed. 531.

No warrant for arrest having been sought, the information signed by the United States district attorney was sufficient without any verification and without any supporting affidavits. It was unnecessary for the district attorney, who signed the information in his official character, to assert in the body of that document that he informed the court upon his oath as a Government official of the facts therein set forth. It will be presumed he acted on his oath as an officer of the Government.

Nor do we think the plaintiff in error is in a position to raise this question for the first time in this court.

Defects such as are here complained of are in any event waived, if not raised by suitable objection before trial. *People* v. *Murphy*, 56 Mich. 546; *Bryan* v. *State*, 41 Fla. 643; *State* v. *Osborne*, 54 Kan. 473; *State* v. *Brown*, 181 Mo. 192; *Johnson* v. *State*, 53 Neb. 103; *State* v. *Pancoast*, 5 No. Dak. 516; *Hammond* v. *State*, 3 Wash. 171. See also on waiver of informalities *Garland* v. *State* of *Washington*, 232 U.S. 642.

Judgment affirmed.

SIMPSON v. UNITED STATES

(Circuit Court of Appeals, Sixth Circuit, May 8, 1917)

241 Fed. 841; N.J. No. 5526

Error to the District Court for the Northern District of Ohio. Judgment affirmed.[1]

Before KNAPPEN and DENISON, Circuit Judges, and SATER, District Judge.

KNAPPEN, *Circuit Judge.* Plaintiff in error was convicted, upon trial by jury, under an information charging the interstate shipment of certain drugs in violation of the Food and Drugs Act, June 30, 1906, ch. 3915, 34 Stat. 768, as amended by act of August 23, 1912, ch. 352, 37 Stat. 416, alleged to be misbranded in that the label of the carton or package containing the drug (as well as a circular therein) contained false and fraudulent statements regarding the curative or therapeutic effect of the drugs. But two grounds for reversal are presented.

1. The first ground is that the information was insufficient in law. It was accompanied by affidavits of four persons relating in part to the actual shipment of the offending articles and the presence in the enclosed packages of the label and circular referred to, and in part to the chemical analysis of the drugs and the alleged falsity of the claims made as to their therapeutic effect.

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[1] Affirming *United States* v. *Simpson*, p. 700, *ante*.

The information was not sworn to, but states that the court was "given to understand and be informed upon the oaths of * * * whose affidavits are hereto attached and made a part hereof, as follows, to wit." Two of the affidavits were sworn to before notaries public. It is urged that the information was insufficient because not upon the oath of the prosecuting officer but solely upon oaths of the witnesses by affidavit, and that oaths taken before notaries public were invalid.

We need not consider whether the objection would have been good had it been made in the court below. Defendant in fact pleaded not guilty to the information, without demurring or moving to quash, and the record does not indicate that the attention of the district court was ever directed to the alleged insufficiency of the information. Unless it was void, the question presented cannot for the first time be raised in the appellate court, unless a refusal to so consider it would shock the judicial conscience. *Keliher* v. *United States* (C.C.A. 1), 193 Fed. 8, 10. Had there been no affidavit of witnesses, the information would not have been void for lack of the oath of the prosecuting counsel (*Weeks* v. *United States* [C.C.A. 2], 216 Fed. 292); and we do not regard the information as showing that it was filed without investigation by the district attorney. See *Frank* v. *United States* (C.C.A. 6), 192 Fed. 864, 867. The objection is purely technical and without merit, and was waived by pleading to the information without raising objection. *People* v. *Harris*, 103 Mich. 473; *People* v. *Turner*, 116 Michigan 390; *Bartlett* v. *State*, 28 Ohio St. 669.

It is also urged that the information does not charge defendant with knowledge of the alleged false and fraudulent character of the representations made. We assume, for the purposes of this opinion, that such allegation is necessary. The gist of these representations, so far as need now be stated, is that the article was "a valuable remedy for lost nervous strength and treatment of all diseases which are really the result of diseases of the brain, spinal cord, medulla oblongata and the nerves given off from each of them." The information alleged that these representations were (omitting the words we have bracketed) "false and fraudulent in this, that the same were applied [by defendant] to said article knowingly, and in reckless and wanton disregard [on defendant's part] of their truth or falsity, so as to represent falsely and fraudulently to the purchaser thereof, and create in the minds of purchasers thereof an impression and belief that it was", etc.

The criticism we are now considering would be fully met had the information actually contained (as it did not) the words above brackets. But the defect was not substantial; it was only formal. The information charged that the shipment was made by defendant "trading as Dr. C. M. Simpson's Medical Institute", and that the name of the article given on the label of the carton was "Dr. C. M. Simpson's Cerebro-Spinal Nerve Compound." The natural construction would be that it was defendant whose knowledge and reckless and wanton disregard of the truth was intended to be charged. The Federal statute (Rev. Stat. 1025) expressly provides that an

indictment shall not be affected "by reason of any defect or imperfection in matter or form only which shall not tend to the prejudice of the defendant." *Rosen* v. *United States*, 161 U.S. 29; *Price* v. *United States*, 165 U.S. 311; *Tyomies Pub. Co.* v. *United States* (C.C.A. 6), 211 Fed. 385, 389. The rule applicable to an information is no less liberal. Its averment of facts constituting the offense need be only so certain and specific as fairly to inform defendant of the crime intended to be alleged, and as to make the judgment of conviction or acquittal thereon a complete defense to a second prosecution of the defendant for the same offense. *United States* v. *Hess*, 124 U.S. 483, 486, 487; *Stokes* v. *United States*, 157 U.S. 187; *Bennett* v. *United States* (C.C.A. 6), 194 Fed. 630, 632; *Hocking Valley R.R. Co.* v. *United States*, 210 Fed. 735. It is clear the information fulfilled these requirements.

That the criticism urged is purely technical and without merit, in that defendant understood that his own intent was in issue, is affirmatively shown by the fact that, at the opening of the trial, defendant admitted that he made the shipment in question; that it contained the cartons, bottles, and wrappers exhibited in court, and that he was the proprietor and sole owner of the "Dr. C. M. Simpson Institute"; and by the fact that as a witness in his own behalf, and under examination by his own counsel, he testified directly to the absence of intentional false branding and fraudulent intent.

It is finally urged that the information does not show that the alleged misrepresentations were in the "ultimate container," that is to say, in the package as it reaches the consumer *McDermott* v. *Wisconsin*, 228 U.S. 115, 130. This objection, as well as the preceding ones, must be considered in the light of the fact that the question was not raised below. We think the information should fairly be interpreted to mean that the misrepresentations were intended to accompany the bottles into the hands of the consumers. It is alleged that the shipment consisted of "certain packages", and that the packages contained the circular or pamphlet later described therein; that one of the alleged misrepresentations appeared "on the label of the carton aforesaid", and that the other was "included in the circular or pamphlet aforesaid." It is a matter of common knowledge that proprietary medicines in bottles are usually sold to the consumer in cartons, and that the latter usually contain circulars or other advertising matter. We are not impressed with the suggestion that the circular was charged to have been inside "the article of drugs."

2. The remaining complaint is addressed to the denial of the defendant's motion to direct verdict in his favor. We think the motion was properly denied. It seems unnecessary to set out in full the exact language of the representations alleged to be contained in the packages. It seems enough to say that defendant's compound was not only represented generally to be a valuable remedy for the treatment of all diseases "resulting from diseases of the brain, spinal cord, and medulla oblongata, and the nerves given off from each", "a remarkable discovery for the treatment of all nervous diseases", but also a "remarkable discovery for heart troubles", as well as a "most valuable remedy for nervous prostration, mania,

melancholia, and neurasthenia." There was substantial testimony from competent medical witnesses that there was no remedy applicable to all the diseases mentioned; that medical science and medical experience furnish no support for the broad claims made for defendant's remedy; that "there is no one medicine that will prove a valuable remedy for all" the diseases enumerated. There was further substantial testimony from competent witnesses that bromides, which constitute a prominent ingredient in defendant's remedy, are sedative in their nature and in ordinary doses, not stimulating; that while thus helpful in quieting an exalted or excited state of the nerves, as in many cases, including some cases of mania, they are not only not helpful, but are positively injurious in depressed conditions, as in melancholia; that there is no one remedy for all spinal diseases, nor for all cases of neurasthenia, or heart trouble, nor for all cases of melancholia or of mania; that some diseases of the heart require sedatives, others stimulants; that the same is the case with neurasthenia and certain other nervous diseases mentioned; and that in some cases of nervous prostration and other nervous affections the administering of sedatives or depressants is harmful; that bromides are not suitable to the treatment of the mentally and physically depressed. There was further testimony to the same effect as to others of the diseases included, either specifically or by general description, in the claims made for the remedy; also that defendant's compound was dangerous to instrust to the hands of a layman. Aside from defendant's own testimony, there was no competent medical testimony in opposition to that presented by the Government, to the effect that the claims made for the medicine were contrary to all medical science. The defendant's proposition that the presence of ammonium carbonate neutralized the effect of the bromides as depressants was denied by medical witnesses for the Government. True, it appeared beyond dispute that bromides are beneficial, at least as a palliative in quieting the nerves and inducing sleep, in ordinary cases of nervous excitability; and there was testimony on the part of the defense that several persons had received benefit—indeed, many of them claimed to have been cured—by the use of defendant's remedy. But such testimony, at the most, bore only upon the question of fact whether the alleged representations were, as made, false and fraudulent. There was still room for a conclusion that substantial mischief resided in the claim of a universally efficacious remedy for the numerous and widely prevalent maladies; for the term "remedy" must at least imply a curative tendency, although not of course guaranteeing a cure. The defendant was a graduate physician and the jury were justified, under all the evidence in the case, in presuming that he knew the falsity of the broad claim made for his compound.

The brief of defendant's counsel criticizes the admission of certain testimony, although we do not understand that such admission is relied on for reversal. We may say, however, that we have examined all the criticisms which are made the subject of either exception or assignment, and find no error.

The judgment of the district court is accordingly affirmed.

UNITED STATES v. NATURA COMPANY

(District Court N.D. California, May 9, 1917)

N.J. No. 5552

Information alleging violation of section 2 of the Food and Drugs Act. Trial before the court. Judgment of not guilty.

Dooling, *District Judge.* The defendant is charged with a violation of the Food and Drugs Act in misbranding a certain article of medicine sold by it and known as Akoz. To fall within the statute the package or label must bear or contain some statement, design, or device regarding the curative or therapeutic effect of the article, or some ingredient or substance contained therein, which is false and fraudulent. No purpose would be served here in reviewing the testimony. It may be said in a general way that the testimony of the Government was chiefly " expert " testimony; that is to say, testimony of skilled persons as to the possible effect of the use of Akoz. None of them had ever experimented with it, or tried it either on themselves or others, nor had any of them ever had the opportunity to observe any results from its use. The testimony for the defendant was given by witnesses, physicians, and others who had used the medicine themselves, or had observed its effect on others, and all testified to its beneficial effects.

The misbranding claimed in the indictment is the statement that Akoz is a natural remedy for certain specified diseases, and that it had proved effective in the treatment of such diseases and others named.

The Government insists that the word " remedy " is synonymous with " cure " and cites a definition from Webster's International Dictionary as follows:

" Remedy: that which cures a disease ", but the real definition found in that dictionary is the following: " Remedy: that which relieves or cures a disease." The Standard Dictionary gives the following definition: " Remedy: that which is used in any way for the cure or relief of bodily disease; a medicine; also remedial treatment."

It cannot therefore in this criminal action be concluded that when the defendant used the word " remedy " it used it as synonymous with " cure ", nor can it be concluded that the word would be understood by the public to mean " cure."

There is testimony that Akoz has relieved all the diseases specified and that the proprietors were informed of that fact.

The court is not endorsing Akoz as a curative or remedial agent. But this is a criminal case where the guilt of the defendant must be established beyond a reasonable doubt, and the Government must show beyond such doubt that the statements made were both false and fraudulent. It has not done so, and a judgment will be entered finding the defendant not guilty.

UNITED STATES v. WATSON-DURAND-KASPER GROCERY CO.

(District Court, D. Kansas, May 17, 1917)

251 Fed. 310; N.J. No. 5543

Information alleging violation of section 2 of the Food and Drugs Act. Hearing by the court on demurrer and stipulation of facts. Judgment of conviction.

POLLOCK, *District Judge.* The Government filed an information in this case against defendant, charging it in seven counts with as many violations of what is commonly known as the Food and Drugs Act of June 30, 1906 (34 Stat. 768), in the shipment from the city of Salina, this State, to the city of Denver, in the State of Colorado, of 250 pails of "confectionery," commonly called candy, consigned to one A. Lang, all as evidenced by two freight bills of the Union Pacific Railway Company, copies of which are attached to the complaint. To this complaint, and each and every count thereof, defendant interposes a general demurrer. The defendant further pleading not guilty, a trial by jury was waived, and the entire controversy submitted on stipulated facts. The case thus comes on for decision.

Two questions are presented for determination, viz: (1) Conceding the facts pleaded in the several counts of the information sufficient to charge defendant with the commission of one or more public offenses under the terms of the act, and the stipulated facts sufficient to clearly show the guilt of defendant, does the evidence found in the stipulated facts show defendant guilty of more than one offending against the law or amenable to more than a single punishment? (2) It being admitted by the evidence the product offered for interstate shipment, and so shipped by defendant, was "confectionery," commonly called candy, and the charge made, as the information pleaded, being such product was adulterated, in that it contained in whole or in part a "filthy, decomposed, and putrid vegetable substance," does the information, or either count thereof, sufficiently charge defendant with adulteration of "confectionery," in violation of the act? As the case stands submitted on both the demurrer to the information and each count thereof, and on the stipulated facts, and as resort must be had to the facts of the case to get at the true nature of the transaction, I deem it the better practice to treat the demurrer as having been waived by the submission of the case on its merits, or at least to overrule the demurrer and consider the questions presented by a consideration of the case on its merits.

It appears, as was admitted at the trial, defendant company is a wholesale grocery company doing business in the city of Salina, this State. In the conduct of its said business it handles "confectionery", commonly called candy, in wholesale quantities. On or about the 1st day of February, 1915, in the conduct of its said wholesale candy business, there had accumulated in the possession of defendant a very considerable quantity of old, stale, unsalable rem-

nants of candy. The consignee named in the bills of lading, A. Lang, applied to and purchased this candy from defendant, giving instructions to ship the same to him at the city of Denver, Colo. What purpose the buyer had in making the purchase or what use was intended by the purchaser to be made of the candy the evidence does not show. In pursuance of said shipping instructions, defendant delivered the candy in pails to the Union Pacific Railway Company, and did cause the same to be shipped to the purchaser at the city of Denver, Colo. That the purchase and sale thus made in bulk, or at wholesale, by defendant constituted but one transaction is apparent. While the railway company issued two freight bills covering the entire shipment, yet it is equally clear but a single shipment of the candy was made. In such case may the Government carve out of the single transaction of sale, purchase, and shipment more than one offense under the terms of the act?

Looking, now, to the provisions of the act, it is seen to be its purpose, by section 1, to prohibit within territory under the jurisdiction of the United States the manufacture or misbranding of foods and drugs; by section 2 of the act to prohibit the shipment or offer for shipment in interstate commerce of adulterated or misbranded food or drug products. Conceding, therefore, the candy complained of in this case was adulterated in violation of the act, yet, as there was but a single sale, purchase, and shipment of the adulterated product, as the entire matter charged grew out of a single transaction and a single shipment, it must follow the plaintiff can carve out of this single transaction but a single offense. Although there were 250 pails of the candy shipped, yet here, as under the provisions of the Twenty-eight Hour Law (act June 29, 1906, ch. 3594, 34 Stat. 607), the shipment made or offered by defendant must be taken as the unit, although it may consist of many parcels. No greater reason appears for dividing the shipment in question under the Food and Drug Act, all being comprehended under the general term "confectionery", into different lots or parcels than would appear for making the many different head or cars of stock a separate violation of the Twenty-Eight Hour Law. *B. & O. Southwestern R.R.* v. *United States*, 220 U.S. 94, 31 Sup. Ct. 368, 55 L.Ed. 384.

Coming, now, to the remaining question, defendant contends, although the adulterated product charged to have been shipped in interstate commerce is pleaded to have been a food product, as the evidence discloses it to have been "confectionery," commonly called candy, and as the act by its terms defines in what the adulteration of "confectionery" consists, namely, "if it contains terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color, or flavor," and as the adulteration here charged is not by the use of a mineral but of a vegetable substance, therefore, applying the rule of ejusdem generis, the act does not, by the addition of the phrase "or other ingredient deleterious or detrimental to health," cover a case in which the substance, deleterious or detrimental to health ingredient, is of a vegetable and not a mineral substance.

From a careful reading of the act I cannot give my assent to this construction for this reason: Conceding candy to fall under the general classification of "confectionery"; further conceding Congress has by the terms of the act specified what constitutes an adulteration

of "confectionery", all as by defendant contended, yet I am of the opinion the phrase, "or other ingredient deleterious or detrimental to health", is not limited by or restricted to the preceding phrase, "or other mineral substance or poisonous color or flavor." On the contrary, I am of the opinion it was the intent of the lawmaking power to provide that "confectionery" may be adulterated in violation of the terms of the act in three distinct and separate manners or ways: (1) By causing it to contain "terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor"; (2) by permitting it to contain or include any "other ingredient deleterious or detrimental to health"; or (3) by the use of "any vinous, malt, or spirituous liquor or compound or narcotic drug."

To my mind, this is the clear, unambiguous intent of the lawmaking power as gathered from the language employed in the act specifying the manners in which "confectionery" may be said to have been adulterated. It follows from what has been said judgment must go for plaintiff for a single penalty for the violation of the act.

UNITED STATES v. TAYLOR

(District Court, S.D. Illinois, June 7, 1917)

N.J. No. 5623

Informations charging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty in one count; verdict of not guilty in other count.

The United States attorney filed two informations against George C. Taylor, Smithboro, Ill., alleging shipment by said defendant on or about July 10, July 13, and July 14, 1914, and September 8, 1915, from the State of Illinois into the State of Missouri, of quantities of milk which was adulterated.

Adulteration of the article in the shipments of July 10, July 13, and 14, 1914, was alleged in the information for the reason that a certain substance, to wit, water, had been mixed and packed therewith so as to reduce, lower, and injuriously affect its quality and strength. Adulteration of the article in one of two shipments of September 8, 1915, was alleged for the reason that a certain substance, to wit, water, had been mixed and packed therewith so as to reduce, lower, and injuriously affect its quality and strength, and had been substituted in part for milk which the article purported to be; and for the further reason that the article consisted in part of a filthy, putrid, and decomposed animal substance. Adulteration of the article in the other shipment of September 8, 1915, was alleged for the reason that it consisted in part of a filthy, putrid, and decomposed animal substance.

HUMPHREY, *Judge* (charge to jury). Gentlemen of the jury: The United States attorney waives any argument.

The court charges you the matter you are considering is an information in two counts brought against this defendant by the

United States attorney, charging him with a violation of section 2 of the Food and Drugs Act passed by Congress on the 30th of June, 1906. The purpose of that act is to save the people from adulterated food. Congress only has jurisdiction of those matters which go into interstate commerce; therefore, it only becomes a Government case when it passes from one State or Territory to another.

The two counts in this information charge: One, adulteration by the addition of water, and the other by the presence of foreign matter—filthy matter as well.

If you believe from the evidence beyond a reasonable doubt that the defendant at the time and place in question did ship in interstate commerce milk—adulterated, misbranded, as charged in the information—then you will find him guilty in either count of the information.

On the other hand, if you do not believe from the evidence beyond a reasonable doubt that the milk in question did contain foreign matter and the water so testified to by the Government officers, then you will find him not guilty.

The fact of the shipments is not disputed. The sole question is as to the presence of the foreign matter—the water and the filth. The intention of the defendant in the premises is not material. The law does not leave that to be settled by good intentions. I don't know what more I can say to you about it.

You have heard the evidence, the tests made by the officers, and the result of those tests. There is no testimony on the other side.

You have a right to take the information and the exhibits, all of them. There are two cases. They are numbered, respectively 15674 and 15613. Two forms of verdict have been prepared in each case—one finding the defendant guilty, the other finding him not guilty—so you will return two verdicts. Go with the officer and consider of your verdict.

The jury thereupon retired, and after due deliberation returned a verdict of not guilty in one of the cases and a verdict of guilty in the other case, which was based on the shipments made September 8, 1915, and the court imposed a fine of $25 and costs.

UNITED STATES v. HEIMANN

(District Court, E.D. Illinois, Nov. 13, 1917)

N.J. No. 6120

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of not guilty.

The United States attorney filed an information against Herman Heimann, Albers, Ill., alleging shipment by said defendant from the State of Illinois into the State of Missouri of a quantity of milk which was adulterated.

Adulteration of the article was alleged in the information for the reason that a valuable constituent thereof, to wit, butter fat, had been in part abstracted.

The following charge was delivered to the jury by the court:

HUMPHREYS, *District Judge.* This is an information drawn in a single count, charging the defendant with adulterating milk in interstate shipment—the adulteration in point consisting of shipping milk that was illegally low in butter fat. The act is highly meritorious—it seeks to give to the people the natural product of food to which they are entitled.

The evidence shows that not all cows are uniform in the amount of butter fat which their milk contains—whatever it does contain, that the shipper should ship the whole milk without any abstraction of any part of it.

The question you are considering—the only question you have to consider—is if this defendant in question did abstract any essential element of this milk before shipping. You have heard the evidence, the Government officers on one side; the defendant, members of his family, the consignee, Winkler, on the other; and it is for you to say—make up your judgment, giving to the evidence such weight as you may find it to have—as to whether the case has been proven, because it is the burden of the Government to sustain this case, to prove, to convince your mind beyond a reasonable doubt, that this defendant is guilty. The presumptions are in favor of the defendant.

You have nothing to do with the punishment—that is with the court, and, therefore, all your work is to find the defendant guilty or not guilty.

Take the indictment in this case, and this record as part of the evidence, and go with the officer and consider of your verdict.

UNITED STATES v. BETHESDA MINERAL SPRING CO.

(District Court, E.D. Wisconsin, Nov. 26, 1917)

N.J. No. 5906

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

The United States attorney filed an information against the Bethesda Mineral Spring Co. alleging shipment from the State of Wisconsin into the State of Michigan, of a quantity of an article labeled in part, "Bethesda Natural Mineral Spring Water", which was misbranded.

It was alleged that the article was misbranded for the reason that certain statements appearing on its label falsely and fraudulently represented it as a remedy for all kidney diseases, Bright's disease, diabetes, torpid liver, dyspepsia, insomnia, calculi, and nervous prostration, when, in truth and in fact, it was not.

At the conclusion of the introduction of testimony the following colloquy upon the relevancy of the evidence respecting the radioactivity of the product took place between the court and counsel:

The COURT. The case, in my judgment, is in a narrow compass. I will say to you, freely, the evidence on this radioactivity business is not, in my judgment, relevant to the issues.

Mr. SAWYER. That is my position in the matter.

The COURT. Let us assume that the medical profession has experimented on this phase, the Government is not denying that this water has radioactivity. Let us assume the Government cannot, and does not profess to deny the presence of radioactivity in all waters, and, as the learned gentlemen tell us, it is present almost everywhere.

Mr. JACOBSON. In varying amount.

The COURT. Yes, in varying amount. Now, there is definite testimony respecting the maximum figures of radioactivity in waters. As against that the testimony respecting this particular water shows it to be infinitesimal. Assuming it is more than infinitesimal, when we are speaking of matters measured in very small quantities, it may be larger than that possessed by other waters. There is no testimony here respecting the possession by waters that are radioactive of therapeutic qualities justifying the putting out of the labels.

Mr. JACOBSON. We have not put that on the labels.

The COURT. No; I know you have not. The label here must be justified. When I stated this morning that assuming that the medical profession, by working on this, had some idea there was such a thing as radioactivity, the mere conjectural possibility that that may enter into therapeutic qualities is not sufficient to assert that because of the presence of radioactivity it has those therapeutic qualities justifying the assertion that for that same reason it is curative.

Mr. JACOBSON. I do not contend that.

The COURT. Then it has no place in it.

Mr. JACOBSON. I am not so sure of that.

The COURT. I am quite sure of it. By that I mean the jury here is not at liberty to reach a conclusion that this label squares with the therapeutic fact. That is what this jury must find: That this label squares with a therapeutic fact, and the jury cannot find that merely because of possible conjectures that may be indulged in because of this substance, radioactivity, or this quality, radioactivity.

Mr. JACOBSON. Not that standing alone.

The COURT. That does stand alone.

Mr. JACOBSON. There are other facts in this case.

The COURT. No; there is no suggestion until today of this matter of radioactivity, this phase of radioactivity. There is no suggestion that radioactivity is a quality or a drug or a thing that acts in combination with ordinary known salts producing rather mysterious therapeutic results.

Mr. JACOBSON. There is nothing mysterious, Your Honor, in the fact that the testimony proves conclusively that curves have resulted from the use of this water—nothing conjectural.

The COURT. Nothing mysterious. There may be something about it that would arouse skepticism. The defendant's testimony is entirely reconcilable with the Government's testimony. The defendant's testimony with respect to alleged cures that have been made is not responsible to the Government's case, which is that this label is not a true label. The Government, as I stated informally in the

discussion today, might well concede of this water the medical result that it might concede of a bottle of pure orange juice.

Thereafter, the case having been argued by counsel, the following charge was delivered to the jury by the court.

GEIGER, *District Judge.* Gentlemen of the jury: This case comes before the court upon an information filed by the Government against the defendant corporation, and rests upon what is commonly known as the Pure Food and Drugs Act. That act was passed some years ago and aims to reach the cases of transportation in interstate commerce of adulterated or misbranded foods and drugs. The Government of the United States, in its sovereign field, ordinarily has nothing to do with cases of fraud arising between citizens but, under the Constitution, Congress has the power to pass laws regulating interstate commerce, and this law, speaking generally and broadly, grows out of the exercise of that power on the part of Congress. The law, both as to food and drugs, aims to prohibit the transportation in interstate commerce as to foods, adulterated or misbranded, and as to drugs, those which are misbranded. That is not the whole scope of the law, but it is all we need consider here.

Now, at the outset, gentlemen, it will be well for you to get into your minds the real purpose of this law, and it is, in substance, this: That Congress aims by its provisions to prevent the shipment in interstate commerce of foods or drugs that have been misbranded or adulterated, with the idea that those things, when done, are deceptive and misleading. That is a wholesome policy of this statute, and it is a high purpose which Congress aims to attain through its enactment; and the bounden duty rests upon courts and juries and every administrator of this law to see to it that this high purpose and the integrity of this purpose and the spirit of this purpose is in no essential impeached or impugned.

That you may take, gentlemen, as the background, upon which this evidence that has been introduced here in court may be used for the purpose on your part to paint the real picture of this case, or, putting it in another figurative way, it is the screen upon which the evidence which has been introduced here shall be thrown, with the idea that you can determine what sort of a picture it makes.

It is charged in the case, and that is an admitted fact, that the defendant corporation in July 1916 made a shipment of Bethesda water from Waukesha to Detroit; and it is charged, in substance, that that shipment was a shipment of a drug, or so intended, and that it was misbranded within the meaning of this provision of the Food and Drugs Act relating to what shall mean misbranding as to drugs: "If the package or label or bottle shall contain any statement, design, or device regarding the curative or therapeutic effect of any such articles or any ingredients or substances contained therein which is false and fraudulent."

It is further a conceded fact in the case that the shipment containing many bottles of water was, as to each bottle, accompanied upon the bottle by a label which has been introduced in evidence and frequently referred to, which I will again read to you:

Bethesda: For all kidney diseases, Bright's disease, diabetes, torpid liver, dyspepsia, insomnia, calculi and nervous prostration.

Directions: Drink freely first ten days not less than six glasses per day.

There are certain other matters upon the label that are not for the present, if at all, essential. So the case comes before us as one charging, in substance and briefness, that this operated as a misbranding of the article which was then shipped as was conceded.

At the outset, gentlemen, the question is submitted to you, and it is for your consideration, as has been correctly said, largely in the light of good sense, as to what this label means; and you are to test that out by taking the language of it and imparting to that language the meaning of the words, singly and together, that would be conveyed to you as ordinary men; not as men who are skilled in medical, chemical, or pharmaceutical science, capable of making nice distinctions or nice discriminations, but rather the meaning that comes to you as ordinary men unskilled but seeking, we will assume, some sort of remedy or remedial help for the afflictions that flesh is heir to. Now, in that connection you should examine this language in the light of the purpose of this law, which is to protect humankind against the consequences of human weakness, or human frailty, or human credulity or the disposition to believe, or of human gullibility. You should examine it in the light of the disposition of the ordinary humankind to wish to believe in the potency of remedial agents to relieve them from ills from which they are actually or conceivably suffering.

Now, taking those general guides, ask yourself the question, as men of ordinary sense, well disposed, but disposed in the interests of getting curative agents: What does this label mean? Is it intended to induce and inculcate on the part of one so circumstanced and so disposed the idea that the article to which this is attached is the article which he desires for the purpose for which he desires it? In other words, is this, to the ordinary man, a representation that this, as a drug, will cure these diseases, that it is a drug which he is invited and urged to take for that purpose, and inculcate in him the reasonable belief and the expectation that if taken it will be productive of such results? That is a question addressed to you peculiarly as men of ordinary sense, ordinary affairs of life, men capable of understanding human conduct and the motives which prompt men to believe or to act. In that connection you have the right to take into consideration certain evidence in the case respecting the changes that have been made upon labels used by the defendant in this case. If you find it to be the fact, as I believe you can, that a former label used the word "cure", you have a right to consider why the change was made, and why no other change was made than merely from the word "cure" to the word "for." In other words: Whether that is not merely a colorable change designed for the purpose of leaving the statements at best equivocal, possible of one or two constructions, and upon that determine whether in any event the statement upon the label, the label itself, is not a misleading label. It is my judgment, gentlemen—a judgment which is not binding upon you, but the fact is for you to find—that this label does mean, and is intended to mean, that this article is curative.

The next question which arises in the case is: If you find that to be the meaning of the label, is it false? Putting it in another way: You must answer, upon the testimony in this case, whether or not the label is true in the sense that this article, Bethesda water, is a

cure, one to be accepted by the ordinary man who has the opportunity to purchase it, acting upon his own desire to help himself, whether when he does that he, in fact, is getting a remedy, something that will cure him, upon the basis of probabilities, of the ailment whereof he suffers or conceives himself to suffer.

Now, gentlemen, this branch of the case involves these possibilities, upon the evidence here; I think there is a general concurrence among the witnesses that there are no known drugs which are or can be accepted as cures for these various diseases; and if you agree with that testimony, it is my judgment that you should reach the conclusion, upon this branch of the case, that this is a false label; and that conclusion should not be deterred merely by the possibility upon the evidence that this water, or any water, may be a helpful adjunct in the treating of disease. You, as men of sense, required no testimony from witnesses, expert or otherwise, to reach the conclusion that in the treatment of all diseases, speaking generally, good water is helpful; that it is necessary. But that is a long ways from importing truth into this label as a representation of the virtues of a drug. It has been said here during argument that the mere fact that a professional man, or nonprofessional man, comes here upon the stand and asserts that he used this water and that it cured him does not make a true label out of this. The law exacts, in the carrying on of its high purposes, that the label should square—should cover not only the package but the ascertainable truth respecting its contents; and, as I shall indicate to you later, this law is not to be frustrated or to be made uncertain of application, it is not to be regarded as being without standards, merely because as to any ingredients, food, drugs, liquids, or solids, an individual may be able, truthfully, to say that it was helpful to him. I say to you that if that were so it would be possible at all times to bring into the realm of drugs the commonest foods or liquids, and permit advertising as such. Upon this branch of the case, gentlemen, you are not obliged to take professional opinion upon either side of it. If, for example, the testimony satisfies you that this water, so far as its qualities are ascertainable by scientists, by men who, so far as you and I are concerned, are the only ones that can tell us what is in it, is an article open to everybody, ascertainable, as was said here, by going down to Lake Michigan—you are not required to believe that it is possible to label that as a drug and not offend against the Pure Food and Drugs Act.

There must be to you, as men of sense, if this law is to have any potency, some method of ascertaining, in the light of good sense, as to what the truth is respecting any article which is subject of review under this law; and it is not to be regarded as open to doubt just because there are mere possibilities connected with its use, just because, as a general proposition, the real qualities of the thing are ascertained through use rather than through antecedent analysis. I say that to you in connection with the testimony given on behalf of the defendant to the effect that the curative properties of this water cannot be known except through use. Now, gentlemen, broadly speaking, that is true of any article. There is no way of conjecturing, even 5 minutes ahead, as to what the effect of any article or any movement is going to be in this world. But it does not apply to you, as jurors, as men of good sense, to say, in a case where an article is

shown to have certain definite proportions of a drug, of a chemical, or of a mineral, that you can form no practical idea in advance as to whether it has any curative effect. The illustrations that were given here on the argument are in mind, and they are such as were given by the court during the taking of the testimony, either in your presence or in your absence, as to the proper method of applying the testimony and analyzing it in this case.

The case is one of the misbranding of a drug. The Government is not concerned here with litigating or attempting to litigate the quality of this water as a water. The Government is not concerned in this case with denying, absolutely, that this water may not have some curative effect. That is not in the case at all. It is a case, pure and simple, of determining whether, upon the known facts of this water, respecting it, there is any justification for the breadth of label which appears upon that bottle.

If upon all the consideration you can give to the evidence you reach the conclusion, gentlemen, that this is a true label, that ends this case, and your verdict is for the defendant. But if you find, as in my judgment you should find, upon the evidence here, that it is not a true label, you will advance to the consideration of the question which is in the case as to whether it is a fraudulent label.

It is not easy, gentlemen, to give you a ready definition of what is meant by "fraudulent"; but there are some things that I can say to you by way of guiding you a little bit.

To say that this is a fraudulent label does not mean that the one who put it out, or the defendant corporation, as between itself and the individual who bought a bottle of this water, had a personal malicious scheme or design to get money out of it. It does not mean that at all. It means, in connection with the fact of untruth, one or all of these various things: Did the defendant know that this label was false? Second, if it did know that it was false, did it know that it was not true? And third, in any event was the defendant reckless about this; was the defendant in a position where it said, "I don't know whether it is true or false, but I am going to put it out anyway"? Now, it may cover any one of those situations. It is the idea of practicing a deception through a statement, through a practice, through an act which, in the light of attending circumstances, shows that the one who made the statement or committed the act, ought to have known better, producing damage by deceiving somebody; and therefore a mere open or reckless disregard of the truth may constitute fraud just as much as a personal malicious design to do an act hurts another.

Those, gentlemen, are the three branches of the case. The case is criminal in form, and there is attendant upon the defendant what in other cases I have indicated to you: The presumption of innocence which remains with the defendant until the proof satisfies you beyond a reasonable doubt of the guilt of the accused.

In connection with the matter of a reasonable doubt I deem it my duty upon the evidence here to state to you a little more fully matters that I have referred to in other cases: That that is not a whimsical doubt; it does not mean a doubt which you work yourselves up to believe or to entertain; it does not mean that you recognize, as for example, in this case, the mere possibility that somebody had been

cured, as he believed, by this water. That does not introduce into the case a doubt such as you are bound to entertain. Those are possibilities which would arise under this law if plain water were advertised as having therapeutic qualities; men might believe that plain water, that orange juice, had cured them of diseases, doctors might testify that was true, but that sort of testimony is not binding upon jurors who are called upon to exercise their good sense, who are called upon to recognize, as I think you must, that there is a distinction between things which are drugs and things which are not drugs. Therefore, in the consideration of this case the mere fact that professional men indulge in hypotheses, in conjecture, does not inject a doubt into this case respecting the status of the article which is here for examination solely with a view of ascertaining the one fact, whether the label that is attached to it is a true label.

Now, gentlemen, the case is an important one to the Government in the light of the purposes of this law, because this law, in situations of this kind, must be administered, and the applicability of that law to a set of facts must depend upon the view that 12 men will take of it. It does not in any event prohibit or aim to prohibit the use by any person in interstate commerce of a true label. Upon this question, I will add, respecting the fraudulent character of this label, I think a good way for you to test it out would be this: If you reach the conclusion that the label is false, what opportunity was open [to] the defendant to find out whether he was justified in using this sort of a label? What are the probabilities, had the defendant taken the trouble to do so, to make inquiry generally at those sources where inquiry would be made and probably could be answered, as to whether this sort of a label is justified? On behalf of the defendant, of course, the case is important, and he should not be adjudged guilty of this offense unless the evidence so satisfies you. The case involves nothing respecting the attitude of the Government toward this water, dealing with the water according to its true merit.

Your verdict in the case will be "Guilty" or "Not guilty", as you find the fact to be.

UNITED STATES v. JOHNSON ET AL.

(District Court, E.D. Tennessee, Dec. 10, 1917)

N.J. No. 5982

Information in two counts alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict directed for defendants on one count. Verdict of guilty on one count.

SANFORD, *District Judge.* Gentlemen of the jury: You are, in trying this criminal information, to give the defendant the benefit of the presumption of innocence, just as in trying an indictment. You are to carefully weigh and consider all evidence in the case. If it satisfies you of the guilt of the defendants, or either of them, beyond a reasonable doubt, it would be your duty to bring in a verdict accordingly; if it does not satisfy you of their guilt, or leaves in

your mind a reasonable doubt of their guilt, from the evidence, you should bring in a verdict of not guilty.

As I say, I direct a verdict of not guilty under the first count. I submit to you the question as to whether there is guilt under the second count. Each side, as you have heard, has asked for peremptory instructions in its favor. I have overruled both motions, both of the Government and of the defendants, and submit the matter to be decided by the jury.

This information is based under the Food and Drugs Act; an act passed by Congress for the prevention of the shipment in interstate commerce of adulterated and misbranded foods, drugs, and the like. One provision of this act is that the food shall not be misbranded; that is, it shall not be labeled or branded so as to deceive or mislead the purchaser. Now, it is under this clause of the Food and Drugs Act that the question of the guilt or innocence of these defendants must be determined. A good many of the matters here are admitted and are not in dispute. It is admitted that the defendants were partners and that they shipped the cans of sirup charged in the information, in interstate commerce, from Knoxville, Tennessee, to the State of Georgia. It is conceded that these cans were labeled in the words and figures set forth in the information; and one of the original cans, with the original label, has been exhibited to you in evidence. It is also, as I understand, not disputed that the two defendants had knowledge of the fact that this sirup did not contain any maple and was not maple sirup; and it was stated by their counsel in argument that the only question in the case for the jury's determination is whether or not this sirup was labeled so as to mislead or deceive the purchaser. In other words, the only question is this question of fact as to the label. Now, you have heard the evidence as to this matter. You are to carefully weigh and consider the same. You are to look at the label yourself, which has been introduced in evidence. The label, as you have seen, has the name "Maple" in large letters; the word "Etta" in smaller letters underneath it and to the right, without any hyphen; and the word "Syrup" in a little larger letters than the letters in the word "Maple." Below that are words "Produced by the delicate blending of refined sugar syrup, cane and maple etta syrups." These are in much smaller letters. The word "maple etta" as written in that small type seems to me to be really two words, that is there seems to be a larger space between the two "e's" than between the other letters; I am not sure about that, however. There is no hyphen certainly between the word "maple" and the word "etta." Still further down on the label and in still smaller letters and figures are the words "Over 99% pure." There are other things on the label not necessary to be called to your attention.

Now, the Government insists that, taking that label as a whole, especially considering the way in which the words "Maple" and "Syrup" are printed, with the type and size of the letters, and the way in which the word "Etta" is written underneath the word "Maple", with the design of maple leaves, or something in the nature of maple leaves, around it, deceives and misleads purchasers into the belief that it is maple sirup. That is the issue that is submitted to you. Does that label that you have before you deceive and

mislead; is it so labeled as to so deceive and mislead the purchaser into the belief that he is getting maple sirup? As a matter of fact it is conceded that he is not getting maple sirup. It is not a question as to whether any purchaser has been actually deceived or not; the Government does not have to show that. It is not a question of the actual intention of the defendants to deceive. It is a question simply of whether the label, taken as a whole, as it is upon the can and as offered to the purchaser for sale, is reasonably calculated to deceive and mislead the average purchaser into the belief that he is getting maple sirup. Is that its natural effect? If the natural effect of that label, when you take it as a whole and look at it as the average ordinary purchaser would look at it, is to deceive such an ordinary average purchaser into the belief that he is getting maple sirup, when he is not, then this shipment in interstate commerce was a violation of the act.

Now you have to consider all circumstances in this case, and put yourself, insofar as you can, in the position of an ordinary average purchaser who goes to a store to buy sirup. Now it is not a question of what a very careful man would do about it or would think about it; it is not a question of what a very careless man would think about it; it is a question what the ordinary average purchaser would believe when he saw this label, what he would reasonably be expected to think when he looks at it. You are to determine whether he would read the whole label, read it all, or only the large letters. What would the average ordinary purchaser do; would the average ordinary purchaser be deceived? You are to take into consideration all the circumstances bearing on that question, the label itself, the placing of the letters, and the size of the letters, and determine what would be the natural effect of that label on the ordinary average person.

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Now then take that label and determine for yourself just how much the ordinary average purchaser would read and how much he would notice about it, and whether that ordinary average purchaser would be led into the belief that he was getting maple sirup, as indicated by the large letters, or would read it all and see other things, and be led into the belief that he was not getting maple sirup? What effect, if read further, would that "Over 99% pure" have on it? Would that lead him still further to believe that he was getting maple sirup? What effect would those other words about how it is produced, blended, etc., have on the ordinary purchaser; would he notice them, would he pay any attention to them, would he read them, and what effect would they have upon him? You have got to put yourself, as I say, in the position of an ordinary average purchaser.

If the label taken as a whole, the words and everything, is reasonably calculated to deceive such an average ordinary purchaser then this shipment in interstate commerce by persons knowing its contents and knowing what sort of label it had would be a violation of the act. If you are satisfied of that, beyond a reasonable doubt, as to either or both of these defendants, it would be your duty to bring in a verdict of guilty. If you are not satisfied, or have a reasonable doubt about it, it would be your duty to acquit.

Take the case, gentlemen.

Thereupon the jury retired, and, after due deliberation returned a verdict of guilty on December 11, 1917, upon the second count of the information. By direction of the court a verdict of not guilty was returned upon the first count of the information charging adulteration of the article.

UNITED STATES v. DR. J. H. McLEAN MEDICINE CO.

(District Court, E.D. Missouri, Dec. 14, 1917)

N.J. No. 6149

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.[2]

The United States attorney filed an information against The Dr. J. H. McLean Medicine Co. alleging shipment from the State of Missouri into the State of Texas, of a quantity of an article labeled in part, "Dr. J. H. McLean's Liver and Kidney Balm", which was misbranded.

It was alleged in substance in the information that the article was misbranded for the reason that certain statements appearing on the label on the bottles and cartons falsely and fraudulently represented it as a remedy for the treatment of diseases and disorders of the liver, kidney, and urinary organs, dropsy, inflammation of the kidneys and bladder, incontinence of urine, bedwetting of children, rheumatism, leucorrhea or whites, irregular menses, weakness in urinary organs, and pains in the back, when, in truth and in fact, it was not. It was alleged in substance that the article was misbranded for the further reason that certain statements included in the circular accompanying the article falsely and fraudulently represented it as a remedy for the treatment of gallstones, diabetes, and Bright's disease, as a remedy for difficulty in passing urine and suppression and retention of urine, as a remedy for the treatment of rheumatism and as a cure for rheumatism, as a remedy for the cure of gout, sciatica, lumbago, and neuralgia, and as a remedy for gravel, and female diseases and disorders, when, in truth and in fact, it was not.

TRIEBER, *District Judge* (charge to jury). Gentlemen of the jury: For the purpose of protecting the health of the people, Congress in its wisdom has seen it proper to enact the law making it an offense for anyone to ship from one State or Territory to another State or Territory within the United States any impure foods or drugs. The act of Congress describes what act shall be deemed a violation of this law, and among others it provides that for the purposes of this act an article shall be deemed to be misbranded if its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effects of such article or any of the ingredients or substances contained therein which is false and fraudulent. The defendant is charged by the information filed in this case with having violated that provision of the act by having sent on July 20, 1916

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[2] Reversed, *Dr. J. H. McLean Medicine Co.* v. *United States*, p. 907, post.

[July 30, 1915], from the city of St. Louis, in the State of Missouri, to a certain firm which is mentioned in the information, at Dallas, in the State of Texas, twelve bottles of its medicinal preparation which, it is alleged, contained on its label on the cartons in which the bottles were placed, and circulars accompanying them, the statement or claim that the use of this medicine in the manner prescribed therein, the doses, would arrest or retard a large number of diseases which are mentioned therein.

Before going into this particular case I would call your attention to certain general principles of law which apply to every criminal case tried in the court of the United States. The law is merciful, it wants no person or corporation convicted of an offense unless, it says, every material allegation in the indictment or information is established by evidence which satisfies the jury trying the case beyond a reasonable doubt of the truth of these allegations. But I want to say in this connection in order that you may not be misled, that what the law means by a reasonable doubt is a rational doubt arising in the minds of reasonable men from the evidence of the case and which no other evidence removes, or from an insufficiency of the evidence a mere possible doubt which has upset the minds of some men on all occasions, a doubt which may be suggested by the ingenuity of counsel, or a doubt which may suggest itself in the minds of some jurists by reason of sympathy, but which is not warranted by the evidence in the case, is not a reasonable doubt and must not influence your verdict. The law goes further in its mercy. It says not only must these allegations and the guilt of the defendant be proven by the jury beyond a reasonable doubt, but, in order to justify a verdict of guilty, it is necessary for the Government to prove the allegations in the indictment in the manner in which they are charged. Although the evidence may show that a man is guilty of some offense, but if it is not the offense which is charged, or if it was not committed in the manner in which it was charged in the indictment or information, then the law says that the defendant is entitled to a verdict of not guilty. These are the general principles of law which are to govern the juries in the trial of every criminal case of the court of the United States.

Now, the first important question for you to ascertain is: What are the material allegations in this information which must be proven beyond a reasonable doubt by the Government before you can render a verdict of guilty? These material allegations are that the defendant is a corporation existing under the laws of the State of Missouri. At the time charged, in July 1916, it did ship twelve bottles or any number of bottles, the number would be immaterial, from the city of St. Louis, in the State of Missouri, to the person mentioned in the information at Dallas, in the State of Texas, therefore a State other than that where the shipment was made, of this preparation, and that the bottles contained had attached to them a label which contained the claims set out in the information. That they were in cartons which contained the language charged and set out in the information, and also accompanied by circulars containing the language set out in the information. In order to enable you to determine this fact without going into it now, in charging you, the

court will permit you to take with you the information, the labels on the bottles, the cartons in which they were, and also the circulars accompanying them. The Government must further prove that the claims made in these circulars, labels, and cartons were false, and in addition thereto that they were made fraudulently. Now, those are the material allegations in the information, every one of which must be established by the Government beyond a reasonable doubt before a verdict of guilty can be returned by you. Counsel have stipulated as to the truth of some of these allegations so that it was unnecessary to introduce evidence as to them, and you may consider them as having been established beyond a reasonable doubt. Counsel for the defendant agreed that this defendant was at the time a corporation existing under the laws of the State of Missouri. That it did make at the time alleged this shipment of the twelve bottles to the firm mentioned in the information, in the city of Dallas, State of Texas. That these bottles had the labels on them and were put in cartons or boxes and were accompanied by circulars which contained the language set out in the information. Therefore, gentlemen of the jury, the only questions which are submitted to you and which must be determined by you for the purpose of deciding what your verdict shall be are: First, does the language used on the labels, cartons, or circulars accompanying the preparation, giving it such meaning as an ordinary intelligent person reading it would give it, show that the defendant claimed that the use of the preparation in the manner and the doses directed therein would arrest or retard the progress of the diseases which are mentioned therein; second, if it does, then the next question to be determined by you is whether they were false. If you find that they were false, you are next to determine whether they were fraudulent. To justify conviction or a verdict of guilty, you must find all of these three issues for the Government. Otherwise your verdict should be not guilty. For the purpose of determining whether the labels on the bottles and the cartons and the circulars accompanying them contain statements that the use of the medicine in the doses mentioned would arrest or retard all the diseases mentioned therein, you should take into consideration all the language used therein, interpreting it as an ordinary intelligent man would, and from it determine whether it was the intention of the defendant to lead such persons who would read them to believe that the medical preparation, if taken in the manner prescribed in these circulars or labels, would arrest or retard the progress of the numerous diseases mentioned therein, although the language does not in direct terms say so. If you further find that they were false, as I will explain to you later on what is meant by false, insofar as this preparation would not arrest or retard the diseases mentioned therein or any of them as claimed by the defendant, and that these false representations were made by the defendant for the fraudulent purpose of inducing people suffering from any of these diseases to purchase the preparation for the purpose of obtaining relief or a cure, then the defendant would be guilty of this charge. The meaning of the word false in this statute is that a person states that to be true which he knows to be false or which he has no reason or reasonable cause to believe to be true. When a person makes claims of cures or beneficial effects from the use of a certain medicinal prep-

aration, he may be held to good faith in his statements, and if made with actual intent to deceive, an intent which may be derived from the facts and circumstances in the evidence, they are fraudulent. Fraudulent intent, as any other intent, is frequently a matter which cannot be proven by direct or positive testimony. Of course, it is a matter of the mind, a state of mind is itself a fact, and false and fraudulent representations may be made about it, and persons who make substances or compositions alleged to be curative or beneficial are in a position to have superior knowledge, and may be held to good faith in their statements. There is another fact which the parties have agreed on so that it requires no proof. The defendant or his counsel have read to you the ingredients which make up this medicine. There are a large number of ingredients possessing medicinal qualities. The Government has admitted that the preparation is compounded of the materials and in the quantities as stated by Judge Crum when he opened the case. So there is no dispute as to what it contains. Now, the first question, as I stated to you, is what the language is and how it should be interpreted. It is unnecessary, gentlemen of the jury, for me to go into this matter, because I believe you are just as well qualified, perhaps better than I am, to determine what you think the language used in these circulars and labels means. So that will be a matter which the court leaves entirely to you without giving any expression. If you find that a reasonably intelligent person reading them would believe that by the use of these medicines a person suffering from any one of these diseases, and the diseases are quite numerous, which are mentioned therein, for which this medicine might be taken with beneficial effect; diseases of the liver, kidneys, and urinary organs, dropsy, inflammation of the kidneys or bladder, incontinence of urine, bedwetting of children, rheumatism, leucorrhea or whites, irregular menses, weakness in urinary organs, pains in the back, gallstones, diabetes, difficulty in passing urine, suppressing or retention of urine, gout, lumbago, sciatica, neuralgia, gravel, female diseases and disorders. Were these statements false, that is, did the defendant know that it would not cure all of these diseases? And in this connection it is proper for me to say that it is not necessary for the Government to prove, before you can find a verdict, that they are false as to all of these diseases. It is sufficient if you find from the evidence that they are false as to any one or more of these diseases, although they may not be false as to all of them. Now, were they false? As I stated to you before, they may be found to be false if the defendant knew that they would not have the effects claimed for every one of these diseases, or if the statements were made not knowing that they would have that effect. A person who makes a statement which he doesn't know to be true. makes a false statement just as much as a man who makes a statement which he knows to be false.

The Government for the purpose of establishing its case has introduced four physicians. They belong to three different schools of medicine. One of them belongs to the school known as the eclectic school of medicine, one of them belongs to the school known as the homeopathic school of medicine, and two of them to the regular school of medicine, usually spoken of as the allopathic. All of these four found—something unusual, but the doctors seem to

agree in this case—every one of them testified that while the ingredients possess curative properties, yet when compounded, all of them put together, they would not cure, arrest, or retard the progress of a single one of the diseases mentioned therein. That a great many diseases can't be cured at all by any kind of medicine. They testified that almost each one of these diseases may be caused by different causes and from different causes, and until it is ascertained what caused that particular disease, it is impossible to prescribe and tell what medicine should be taken, or what medicine can be of benefit at all. They say that liver diseases, some of them may be tubercular, some of them may be caused from one cause and some from another cause; in fact, they went through every one of these various diseases and showed how different they were. They say as to removing gallstones, if the gallstones happen to be very small, they may be removed, that is, they may by the use of medicine be caused to pass through some of the organs of the body, but at the most severe pain, but if the gallstone is quite a large stone, as is frequently the case, then it is utterly impossible for it to be passed off by the use of medicine, because there is no organ which is large enough to permit it to pass, and that they can only be removed by an operation, or as one of them expressed it, by the use of the knife. I am not going to review all the testimony of these physicians. You have heard it and know just as much about it as I do. There has been no testimony introduced by any other physicians or persons who are qualified to testify as experts to dispute the testimony of these witnesses. But I want to say this to you, gentlemen, that the testimony of experts, even if not contradicted, is not conclusive on the jury. You are the final arbiters to determine the facts, but for the purpose of aiding you, that testimony has been introduced because owing to the fact that these men have received a medical education at well-established medical schools, and have practiced the science of medicine for years, some of them for over 30 years, is a matter to be considered by you for the purpose of determining what weight you shall give to their opinions. Therefore, you should consider what weight you should give it, their knowledge and experience, their manner of testifying, whether they were prejudiced or not. Now, the question was asked some of these expert physicians whether they were not prejudiced against the use of all proprietary medicines. They said, no, but they think that if given indiscriminately without examination of the causes of the disease and especially if they are to be given for a large number of diseases, different entirely from each other, then it is unwise to use them, and, for that reason, they would not advise anyone to use them; or, they say they are prejudiced simply against such medicine as is harmful instead of being beneficial. Now, those matters, gentlemen, are to be considered by you for the purpose of determining what weight you shall give to the testimony.

Now, then, the next question is, Did the defendant know that they were false, or did he not know that they were true. The only evidence that has been introduced on the part of the defendant as to that was the recipe for this medicine was prepared by one Dr. McLean, whose picture was hanging in the office or laboratory of this defendant. Dr. McLean is dead, and the diploma

exhibited here shows that he had been a graduate of a medical school, graduated in the 60's. There is no evidence whether Dr. McLean ever practiced medicine, whether he had any other medical experience or not, and that this medicine is the same that has been made ever since. I want to say to you, gentlemen, that until August 23, 1912, it was not an offense for anyone to send medicine from one State to another, containing labels which were false or fraudulent. It is only since 1912 that the law was passed under which this charge has been brought. Now, the president of this defendant has testified that, but he hasn't said that he knows anything about the medicinal qualities of this preparation. A gentleman who is a chemist has testified that he examines it after it is made, not for the purpose of ascertaining what its medicinal virtues are, what it will cure, but for the purpose of determining the quantity of alcohol which is in it, which under the law must appear on the label. Then another gentleman testified that he has been in the defendant's employ for 32 years, that he mixes this medicine, but he didn't testify that he knew anything about the virtues of the medicine. Now, gentlemen, it is for you to determine whether upon this evidence you believe that they were false within the meaning of the law. If you find these two issues in favor of the Government, then the next issue to be determined is whether it is fraudulent. If a person makes false statements for the purpose of inducing another to purchase such preparations from him in the belief that they will cure or arrest, retard, or relieve him to some extent from the ailment which he suffers, any one of these ailments mentioned, which he didn't know to be true, and therefore were found to be false, then you are justified in finding that it was for the fraudulent purpose of inducing people to buy the medicine from him.

As I stated to you before, gentlemen of the jury, before you find a verdict of guilty, you must find every one of these three issues in favor of the Government. If you don't find them in favor of the Government, if you don't believe that the evidence justified it, or if, as reasonable men, you have a rational doubt in your minds whether any one of these three issues should be found in favor of the defendant, then, gentlemen of the jury, the defendant is entitled to the benefit of that reasonable doubt, and your verdict should be not guilty. If, on the other hand, you have no such doubt and are satisfied beyond a reasonable doubt that the defendant did commit these acts, as charged, and find these three issues, every one of them in favor of the Government, then, gentlemen of the jury, under your oath it is equally your duty to return a verdict of guilty. You may retire, gentlemen, to consider. Take the circulars and cartons with you, gentlemen.

The jury thereupon retired and, after due deliberation, returned into court on May 18, 1917, with a report that they were unable to agree to a verdict, and were thereupon discharged from further consideration of the case.

On December 14, 1917, the case was again brought on for trial before the court and a jury, and after the submission of evidence and arguments by counsel the following charge was delivered to the jury by the court (Dyer, *District Judge*):

Gentlemen of the jury: There are some allegations in this complaint that have been admitted and about which there is no controversy. It is admitted that the defendant is a corporation organized under the laws of the State of Missouri and has its principal business office in the city of St. Louis. It is also admitted that the shipment charged in this information as being shipped to Dallas, Tex., was a shipment in interstate commerce, and was made at the time alleged in the information. It is practically admitted that the compound shipped contained the specific drugs that are mentioned in the complaint. There is no question about that.

On June 30, 1906, Congress passed what is known as the Pure Food and Drugs Act. This act of Congress, like all other acts of Congress, is important, and it is the duty of the court, the duty of the jury, and the duty of everyone to uphold that act. Speaking for myself, I do not believe that Congress ever enacted a more salutary statute than the one under consideration. When it was passed in 1906 that statute contained a provision as follows:

SEC. 8. That the term "misbranded," as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

You will see from section 8 of the original act, which I have read, that it treated only of the misbranding of these articles by stating falsely what had entered into the composition of the food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it was manufactured or produced. If section 8 of the statute, to which I called your attention, were the only provision of the law, then as a matter of course this particular prosecution could not be maintained. However, with a view of meeting cases similar to this, Congress amended that act on August 23, 1912, which amendment, so far as it applies to this case, is as follows:

Third. If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent.

That was the amendment to the act made in 1912, and it is under the provision of the act as it now stands that the information in this case was lodged. I am not relying alone upon my own judgment or construction of the act as to the effect of this amendment and the character of the amendment, but I rely upon and agree with the declaration of the Supreme Court of the United States as to the scope and extent of this amendment.

As you will remember, the amendment contains these words, "which is false and fraudulent." The allegation must be shown to have been false. It must be shown to have been fraudulent. Of this phrase, "false and fraudulent," the court says as follows:

This phrase must be taken with its accepted legal meaning, and thus it must be found that the statement contained in the package was put there to accompany the goods with actual intent to deceive, an intent which may be

derived from the facts and circumstances, but which must be established. That false and fraudulent representations may be made with respect to the curative effect of substances is obvious. It is said that the owner has a right to give his views regarding the use of his drugs, but state of mind is itself a fact and may be a material fact, and false and fraudulent representations may be made about it, and persons who make or deal in substances or compositions alleged to be curative are in a position to have superior knowledge, and may be held to good faith in their statements.

This information charges, after setting out all that accompanied these bottles, and about which there is no controversy, it being admitted that all that is charged in the information as to certain things that went with the bottle are true, among other things,

> That when shipped and delivered for shipment as aforesaid, said article of drugs was then and there misbranded within the meaning of said act of Congress, as amended, in that the following statements regarding the therapeutic or curative effects thereof appearing on the label, to wit, on carton, "Dr. J. H. McLean's Liver and Kidney Balm * * * For the treatment of diseases and disorders of the liver, kidney and urinary organs." * * *
>
> On bottle "Dr. J. H. McLean's Liver and Kidney Balm * * * For the treatment of dropsy * * * Inflammation of kidneys or bladder, incontinence of urine, * * * bed-wetting of children, rheumatism, leucorrhea or whites, irregular menses, weakness in urinary organs, and pains in the back," were false and fraudulent in this, that the same were applied to said article knowingly and in reckless and wanton disregard of their truth or falsity, so as to represent falsely and fraudulently to the purchasers thereof, and create in the minds of purchasers thereof the impression and belief that the article was, in whole or in part, composed of, or contained, ingredients or medicinal agents effective, among other things, as a remedy for the treatment of diseases and disorders of the liver, kidney, and urinary organs, and effective as a remedy for the treatment of dropsy, inflammation of the kidneys and bladder, incontinence of urine, bed-wetting of children, rheumatism, leucorrhea or whites, irregular menses, weakness in urinary organs, and pains in the back, when in truth and in fact, said article was not, in whole or in part, composed of, and did not contain, ingredients or medicinal agents effective, among other things, as a remedy for the treatment of diseases or disorders of the liver, kidney or urinary organs, or effective as a remedy for the treatment of dropsy, inflammation of the kidneys or bladder, incontinence of urine, bed-wetting of children, rheumatism, leucorrhea or whites, irregular menses, weakness in urinary organs, or pains in the back.
>
> That when shipped and delivered for shipment as aforesaid, said article was further misbranded in that the following statements regarding the therapeutic or curative effects thereof, included in the circular aforesaid, to wit:
>
> Gallstones * * * Dr. J. H. McLean's Liver and Kidney Balm will aid in dissolving gallstones so that they may pass away.

That is one of the several things contained in this information. The second is,

> Rheumatism * * * For the treatment of rheumatism take Dr. J. H. McLean's Liver and Kidney Balm. * * * This medicine helps in restoring the kidneys to a healthy condition so that the urine will not contain too much uric acid, and in that way rheumatism is cured.
>
> Gout, sciatica, lumbago and neuralgia * * * The treatment for them should be the same as for rheumatism,

and so on.

You will see what is charged in this complaint. The testimony of the physicians introduced here by the Government. I may say tends to prove in a measure, I do not say it does prove, but the testimony was offered to show that this particular compound containing these particular ingredients would not do what is represented it would do. That was for the purpose of ascertaining, in the first place,

whether the statements made in the circular were false or were true, and that is the matter for you to decide. If you decide they were false, then you have taken one step in disposing of this case. If the statements were true, and the compound will do what the statements claim for it, then that is the end of the case, and your verdict will be for the defendant.

If you find from the testimony that is before you that those statements were false, the next step is to see whether they were fraudulent or not, taking the two, false and fraudulent. If you find that the statements were false and fraudulent, then as a matter of course your verdict will be for the Government. If you find the statements were false but not fraudulent, under that state of fact you would find for the defendant, because you must find the two: In the first place it must be false, and in the next place it must be fradulent. In determining the question as to whether or not the statements were fraudulent you may take into consideration all the facts and circumstances that have been introduced in evidence. You are the judges of the testimony.

There is another well-settled principle involved in this case and in every case, and that is that one who makes a false statement, not knowing whether it is false or true, is as guilty of wrong as the man who makes a false statement knowing it is false. No one may be permitted to make statements recklessly not knowing whether they are true or false, put these statements out, and then say he did not know whether or not it was false.

It is not necessary that the Government should prove that all the statements on the label or in the circular were false and fraudulent. If you believe beyond a reasonable doubt that any one or more statements as to the curative or remedial properties of this medicine was false and fraudulent, and that the defendant knew it was false, you may find the defendant guilty. If you find, as a matter of fact, that the statements were false, and by the defendants known to be false, then your verdict will be for the Government. If you find as a fact that the statements were not false, or, being false, there was no intent, whether actual or implied, upon the part of the defendant to defraud, then your verdict will be for the defendant.

If you believe from the evidence that any one of the claims as to the therapeutic effect of this medicine upon gallstones, diabetes, Bright's disease, gravel, rheumatism, and the other diseases mentioned in the information, was false, and was made by the defendant with a reckless and wanton disregard as to whether it was true or false, you may from that fact, and from other facts connected with the case, find the defendant guilty.

In determining the intent of the defendant take into consideration all the facts and circumstances of the case and determine whether or not it was the intention that this language, interpreting it as ordinary intelligent men would, should convey the impression that the medicine was to cure, or act as a remedy for the diseases or ailments mentioned, even where the language does not directly say so. If it was the intention, so framed or stated, that it convey those impressions, and those statements were false, and known by the defendant to be false, or, if from all the circumstances in the case you

find there was an intention to defraud, then it would be your duty to return a verdict of guilty. If you do not find that intention, of course, you will return a verdict of not guilty.

After the admissions were made in this case as to sending this medicine in interstate commerce to the State of Texas, and after the admission of the other facts that I have mentioned, the Government relied upon the evidence of three physicians. The evidence of those men as experts is to be taken by you as the testimony of expert witnesses, by which you are not necessarily bound. The testimony of experts is not conclusive, even if not contradicted. The evidence was permitted in order to aid the jury in determining the therapeutic value of the compound. These witnesses had nothing to say except to answer questions that were put to them on the subject of the curative properties of this compound, administered as these directions said it should be administered. They are the witnesses who were examined with reference to that. You are to be the judges of all that testimony. The court is not going to interfere with you in that regard.

Counsel alluded to matters that are not in evidence. I interrupted at the time and excluded that matter. Whether it contains anything or not is not for your consideration, because it has been excluded by the court.

Evidence has been introduced here as to the character for honesty and fair dealing of the defendant corporation. That is an element and a fact that may be taken into consideration by you as you would any other proper and legitimate testimony.

This is a criminal prosecution under a statute that makes it a misdemeanor to violate it, and the defendant is entitled to the benefit of any reasonable doubt that may arise out of the testimony in his favor. The presumption of innocence accompanies the defendant company as it would accompany an individual, and that presumption continues until it is shown by the testimony in the case to have been overcome. If you find that the facts and circumstances developed before you are as consistent with the theory of innocence as they are with the theory of guilt, the jury should acquit the defendant.

You will see that you are to decide, first, whether the statements in reference to the curative properties of this medicine were false. If they were false, did the defendant know them to be so, and, if the defendant knew them to be so, were the statements made in such a reckless manner as a reasonable man would not have indulged in. From all the facts and circumstances in the case, you are to say whether the defendant is guilty or not guilty under this charge.

As far as the punishment is concerned, as stated by counsel, that is a matter within the discretion of the court with which you have nothing to do. It is lodged with the court to impose the fine, and not with the jury.

I do not know that I have anything else to say. The form of verdict has been prepared. If you find the defendant guilty sign the verdict as prepared. If you find the defendant not guilty insert the word "not" before the word "guilty" and return your verdict into court.

UNITED STATES v. A. SKARZYNSKI & CO.

(District Court, W.D. New York, Dec. 19, 1917)

N.J. No. 6125

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Mistrial. Defendant later entered plea of guilty.

The United States attorney filed an information against A. Skarzynski & Co., a corporation, Buffalo, N.Y., alleging shipment by said company, from the State of New York into the State of New Jersey, of a quantity of an article labeled in part "Wine of Chenstohow", which was misbranded, in violation of the Food and Drugs Act as amended. It was alleged in substance in the information that the article was misbranded for the reason that certain statements appearing on its label falsely and fraudulently represented it as a remedy for stomach affections, and as a cure for general debility, loss of strength, indigestion, piles, and pains, when, in truth and in fact, it was not. The case having come on for trial before the court and a jury, after the submission of evidence and arguments by counsel, the following charge was delivered to the jury by the court:

HAZEL, *District Judge.* Gentlemen of the jury: An information has been filed in this court by the United States attorney—as he had the right to do—accusing the corporation known as A. Skarzynski & Co., with violating the Sherley Act, so-called, which is an act passed by Congress for the purpose of prohibiting the sale of impure foods and drugs, and forbidding the misbranding of the same. The evidence on both sides is about to be submitted to you for your consideration and decision, and, in many respects, it is not in harmony, and, therefore, I have to remind you that it is your duty to harmonize whatever conflicting testimony there may be, in order to ascertain where the truth rests.

The responsibility of finding the defendant company guilty as charged in the information, or finding it innocent, of course, rests entirely upon you, and my duty is discharged when I have instructed you as to the law applicable to the controversy, leaving you to apply the facts to the law.

As the United States attorney has very properly said, the case does not lack in importance. Although the statute makes such offense as charged in the information a misdemeanor, it is, nevertheless, an important case, in that violators of this statute cannot be permitted to defraud the public by placing upon the market spurious foods or drugs or beverages, or placing upon the market foods or beverages and mislabeling them, to the end that the buying public may be lead to believe that the contents of the package—if the drug or beverage is contained in packages—contains something different from what they intended to purchase.

But the case is also important to the defendant company, for, if you reach the conclusion that there was a misbranding of this commodity, and that the defendant company placed the commodity upon the market with the intention of cheating and defrauding and deceiving the public, then, obviously, the defendant may be somewhat curtailed in its business pursuit, so that you should not lose sight of the fact that the case is not without its importance, and

requires, on account thereof, your most serious and earnest consideration.

There are several questions of fact that arise from this testimony, which you are required to consider, and one of them is as to the meaning of the words contained on the label upon the bottle in which this commodity was enclosed; are the words on the label or wrapper to be taken in a broad or restricted sense? If they are to be taken in the broad sense, the product in question is misbranded, on account of their evident falsity; if the meaning is restricted, as the defendant claims, to conditions of the stomach as distinguished from organic troubles, and such condition is benefited or cured by the product, then the defendant company is not guilty.

There is another question which you are obliged to consider and determine, if you conclude the product was misbranded and that the label and wrapper were false and intended to mislead, before there may be a conviction in this case, and that is whether the defendant company was aware of the falsity of the wording, or knew it was untrue, and used the wording on the label carelessly and recklessly without sufficiently apprising itself of the true facts, and marketing the product with the view of getting money fraudulently from the public for an article which could not give or render a specified result.

Now, gentlemen, the law does not prohibit a true label or wrapper for this commodity; it does not object to the sale of this product, or to the inclusion of the ingredients specified; the law simply requires that the commodity—this wine in question—shall be properly labeled and branded so as not to deceive.

This is a criminal case, and all the essential elements of the offense, as set forth in the information, are required to be established by the Government beyond a reasonable doubt; and, moreover, the defendant is entitled to the presumption of innocence until you gentlemen have determined what the facts are, and until you have reached the conclusion that the defendant is guilty as charged in the information.

There is no question but that the particular shipment to which the Government objected was a shipment in interstate commerce, and, therefore, this court has jurisdiction of the offense.

Before considering any of these matters to which I have preliminarily alluded, I think it is quite necessary that you should understand with some fullness what the object of Congress was in enacting this law.

In the first place, the object was to prevent the sale of commodities in interstate commerce that are harmful to the health of the people, and to prevent them from being defrauded by adulterated foods, drugs, and liquids, also to prevent the misbranding or false labeling of such articles, so that the buyer should know that the article bought by him was what it purported to be.

The information is not that the product was harmful or injurious to health, or that the label contained a false claim in reference to the place of manufacture; there is no objection on the part of the Government, as I understand its claims, to distinguishing or labeling this wine as the Wine of Chenstohow, inasmuch as the label also contains the explanation that it was manufactured in Buffalo; but, I repeat, the Government insists that the bottles, labels, and wrap-

pers contain reckless expressions or wording which tend to mislead the buyer into believing that he is buying a wine, drug, or beverage that is a remedy or cure for the stomach, or certain conditions of the stomach, appearing on the label.

Now, what was the inscription on the label and wrapper? It has several times been drawn to your attention, but it will not be altogether amiss to have me repeat it, so that you will have it clearly in mind. On the label or wrapper with which the bottle was enclosed were the printed words, "Celebrated Curative Wine of Chenstohow" (to which designation the Government does not object). "Medicinal Compound. The Best Remedy for the Stomach," and on the bottle are the words, "Those who suffer from loss of strength, indigestion, piles, pains, etc., should use the Curative Wine of Chenstohow." There are other words appearing on the label, but they are not essential, and therefore we need not direct your attention to them.

As I have already stated, under this statute under which the information is filed, the word "misbranding" applies to foods, drugs, and liquids, and under the Sherley Act a package or label containing words or design or figure regarding the article or ingredients contained therein, which is false or misleading in any particular, is a misbranding thereof, and is a false labeling.

In considering this wording on the label and wrapper, it seems to me, the first question for you to consider and determine is the meaning of those words and what the defendant intended the public should understand thereby. Did it mean to have the public believe that the product would remedy and cure those troubles of the stomach, general debility, piles and pains, due to a diseased condition of the stomach, or did it simply mean that the printed words on the label or wrapper, by themselves, or taken together, should be understood as relieving conditions of the stomach, pains, indigestion, general debility, etc., such as do not arise from a diseased condition, or an organic condition of the stomach?

It is for you to determine what the defendant meant by referring to its product as "Curative Wine," "Medicinal Wine," and "Best Remedy for the Stomach," for the conditions and symptoms specified in the label.

In your efforts to reach a proper conclusion, you must have in mind the purpose of this suit is to safeguard the unwary public from being deceived, and from buying such commodity which would not of itself give the benefit promised by the seller, and as indicated by the labels and wrappers.

You should also have in mind the meaning of the words "remedy" and "cure." Those words are to be taken in their ordinary sense, as people in the ordinary walks of life understand them. It, no doubt, was the intention of the defendant to make representations that the public would understand, and, therefore, it did not address doctors, druggists, and chemists, but ordinary folk. The word "remedy" is known to signify something that cures a disease, something taken internally to alleviate disease and benefit the health. I repeat, did the defendant company mean by the wording of the label that the public should understand that the product would remedy or cure all stomach troubles, in the broad sense, which would include organic troubles of the stomach, or did it simply mean to be under-

stood, and want the public to understand by the label and wrapper that the reference was to temporary or symptomatic conditions of the stomach? That is one of the salient questions submitted to you for your decision.

Gentlemen, if you decide that the wording was misleading, and a person would understand thereby that some stomach troubles generally were meant, then the defendant misbranded this commodity, and if the misbranding was to deceive, then the defendant is guilty as charged; if the defendant did it honestly, believing the product would accomplish those ends specified on the label, then it is not guilty.

The Government is required to prove, not only that the commodity was misbranded, as claimed by it, not only that it was too broad and not limited or restricted in its wording, but that it was the intention of the defendant to deceive the public, and that it knew when the branding was appended to the bottle, that it was false. If it was a true label—and you should reach that conclusion from the evidence—and the defendant in good faith marketed the article believing it would remedy the conditions specified in the label and wrapper, then the company obviously is not guilty, and your verdict must be one of "Not guilty."

Now, gentlemen, considerable dispute arose between the experts—men of medical training—as to the wording on the label and wrapper; the witnesses for the Government, Dr. Stockton, Dr. Otto, and Dr. Leonard, testified substantially that there was nothing in the product that would be useful or beneficial for organic stomach troubles, except perhaps for a laxative, as it contained laxative ingredients; that the product had no curative agency whatever except perhaps as to the symptoms of indigestion, which the alcohol might help, or the wine itself might help; that it would not, in their opinions, help or cure any known stomach disease such as comes from cancer, ulcer, dilitation, or reflexation due to other diseases of the body; while, on the contrary, the testimony of the medical witnesses for the defendant is substantially to the effect that the formula which the defendant's president claimed the defendant used, when the product was administered in specified doses, would afford benefit to the user, and might often remedy the condition of the stomach in their view. I am referring to the testimony of Dr. Marcy and Dr. Heath, that the label does not specify any diseases of the stomach, but merely conditions without the implyment of any organic difficulties, and they testified that this product, which admittedly included some medicinal elements, had a curative or remedial effect on the stomach, although they admitted it would not cure the stomach if the troubles arose from diabetes, ulcers, and cancers, but they seemed to think—at least Dr. Heath seemed to think—the product might in such cases often afford some relief. You will remember the testimony, not only that given on behalf of the defendant, but also the testimony for the Government on that point, and it is your duty to harmonize it, and while it is merely opinion evidence, yet, at the same time, it is the opinion of skilled and trained men—trained physicians—who presumably are aware of the effects of medicines on the stomach, and after an examination of the testimony on both sides, give credence to that testimony which appeals to you most.

Now, treating more especially with the defense in this case, you will bear in mind that the witness Skarzynski, who was the president of the defendant company, desires that you should believe that this commodity was put on the market in absolute good faith, and that he did not intend to deceive the public; indeed, he claims broadly that the commodity is not misbranded, and some testimony in substantiation thereof has been given by the doctors as already stated.

He testified that the Wine of Chenstohow is quite celebrated in Poland; that it was originally manufactured by the Paulist fathers; that he obtained his formula for the wine, tonic, or drug which he subsequently manufactured in Buffalo, from a cousin of his, a doctor of some ability, living in Lemburg, Poland, and that he was told, at the time the formula was delivered to him, that it was a remedy for ailments and indispositions and conditions such as are stated on the label. He testified that he has been manufacturing this product in this community about 14 years; that he never intended that the label should be understood as meaning it to be a remedy for organic troubles such as the Government has specified, and that it was always his idea that the language upon the label should be used in the restricted sense. Of course, it does not matter what his original idea or intention was in that respect; it is for you to determine, from the language itself, what the public would understand by the wording and phrasing contained on the package.

Now, gentlemen, there was some testimony given in reference to a decree that was entered in the United States Court at Chicago, condemning some of the product manufactured by the defendant company, under the Pure Food Law, and a decree was also alluded to in this court, showing or tending to show that the defendant company pleaded guilty here.

The decree of the Illinois court required the defendant to eliminate certain statements from the label, which indicated that the product was a foreign importation, and that it was manufactured by the Paulist fathers. That decree was not a bar to this proceeding; the Government now goes farther than it did before, as it has the right, and says that the labeling was wrong, that it was false, and therefore was a misbranding under the meaning and intendment of the Sherley Act.

There was testimony given by Dr. Hill on behalf of the defendant that the analysis was improper; that it failed to show the various active medicinal agencies contained in the commodity, and Dr. Hill testified that, in his opinion, there was no way of determining what acids there were present in the solution, and that the chemist did not fully determine the total amount of solids that were contained in the preparation.

Gentlemen, these are vital matters that are submitted to you, but, in connection with the testimony of Dr. Hill you, of course, must take into consideration the testimony of Mr. Patton, the chemist, who stated, on rebuttal that the failure to state these various solids made no difference so far the analysis was concerned.

Your attention is also called to the testimony of Dr. Marcy and Dr. Heath—indeed, I have already alluded to it, but it should be considered in connection with the testimony of Dr. Stockton, Dr.

Leonard, and Dr. Otto, all with the view of ascertaining what the truth is as to whether this commodity was misbranded—as to whether the words contained upon the label broadly referred to curing all stomach troubles that the human frame is heir to, or whether they were to be taken in the restricted sense—those matters are to be determined by you from the language itself; you must ascertain what the ordinary significance is of those words.

If you reach the conclusion that there was a misbranding, as I have stated, you must go a step farther, and you must examine the testimony with the view of ascertaining whether there was an intention to deceive the public, and if so, then the defendant is guilty as charged in the information.

On the other hand, if you reach the conclusion that there was a misbranding, but there was no intention to foist upon the public this commodity with the view of gain, then the defendant is entitled to an acquittal on the ground that there was no intention to violate the statute, and without the intention being present there can be no conviction.

Any requests?

Mr. BAIN. No, sir.

Mr. O'DAY. I would like to have the court charge the jury on the question of intent, that wanton and reckless disregard for the truth is equivalent to an intent to do a thing.

The COURT. Yes.

Mr. O'DAY. I ask the court to charge the jury that the state of mind—on the question of the intent of the defendant—the state of mind is itself a fact, and may be a material fact, and false and fraudulent representations may be made about it, bearing on what he thought or knew of the ingredients, and persons who make or deal in substances or compositions alleged to be curative are in a position to have superior knowledge, and may be held to good faith in their statements?

The COURT. Yes; that is a correct statement of the law.

Mr. O'DAY. I ask the court to charge the jury, furthermore, that the article alone is not necessarily the inducement and compensation for its purchase, that it is the use to which it may be put, and the purpose it may serve, and there is a disposition to defraud when the article is not of the character or kind represented, and hence does not serve the purpose.

The COURT. Yes.

Mr. O'DAY. I ask the court to charge the jury that in connection with the word "remedy"—I believe that the court has already charged that the words should be taken in their usual meaning—that the usual meaning of the word "remedy", as a matter of law, is that which cures disease, any medicine, the application of which puts an end to disease and restores health.

The COURT. That is what I said before.

Mr. O'DAY. I ask the court to charge, as a matter of law, that the word "curative" is to be taken in the usual sense, on this bottle and that the usual sense of the word "curative" is that which cures, a remedy.

The COURT. Yes.

Mr. BAIN. In connection with that, I ask Your Honor to charge the jury that another recognized definition of "remedy" is "curative tendency only, and not a guarantee."

The COURT. Yes.

Mr. BAIN. I ask Your Honor to charge the jury that, if upon any reasonable hypothesis they can reconcile the evidence with the defendant's innocence, they should acquit.

The COURT. So charged.

UNITED STATES v. DIRECT SALES CO.

(District Court, W.D. New York, Feb. 5, 1918)

252 Fed. 882; N.J. No. 6193

Information in 14 counts alleging violation of section 2 of the Food and Drugs Act. Fine imposed on each count.

HAZEL, *District Judge.* The information in 14 counts charges the misbranding and adulteration, in violation of the Food and Drugs Act, of each of seven different medicines (acetanilid, calomel, quinine sulphate, salol, sodium salicylate, elixir iron pyro-phosphate, quinine, and strychnine, and hydriodic acid) contained in a single shipment from Buffalo, N. Y., to East Falls Church, Va. Defendant company pleaded guilty, as charged in the indictment, and the question presented is as to the penalty to be imposed, defendant's counsel contending that but one offense is charged and that there should therefore be imposed only a single penalty.

Section 2 of the act in question makes it an offense to transport in interstate commerce any article of food or drugs which is adulterated, stating that:

> Any person who shall ship * * * any such article so adulterated or misbranded * * * shall be guilty of a misdemeanor and for such offense be fined not exceeding $200 for the first offense, and upon conviction for each subsequent offense not exceeding $300 or be imprisoned not exceeding 1 year, or both, at the discretion of the court.

According to this, the article is clearly specified as the unit of the offense, as distinguished from the shipment, and as there were 7 different articles in the shipment and each was both adulterated and misbranded, it would seem that there were 14 separate and distinct violations of the act, for which separate penalties may be imposed. This is the view, I think, quite generally adopted in other Federal districts. The brief of the United States attorney directs attention to a number of cases in other districts in which separate penalties were imposed on different counts of information charging a single shipment of misbranded and adulterated articles. Here the various offenses charged are such that not only is a deception as to money value practiced upon the purchaser, but also as to medicinal value, which may be injurious to the health of the user. The intent undoubtedly was to consider each misbranding and adulteration of an article a violation of the statute, regardless of the number of articles contained in any one shipment.

In opposing the imposition of a penalty in excess of $200, counsel cites Byrne on Criminal Procedure, section 357, to show that separate offenses committed at one and the same time are inspired by one criminal intent and that therefore but one punishment may be imposed; but I think that rule does not strictly apply, as the statute specifically designates the articles as the item, the transportation of which is prohibited. The imposition of a penalty in excess of $200 would not be the imposition of a penalty for a subsequent offense. Each bottle comprised in the shipment contained a different article and the misbranding and adulteration constituted concurrent offenses. The provision for different punishment for subsequent offenses was made in contemplation of violation of the statute subsequent to conviction for similar violations.

A fine of $50 is imposed on each count, amounting in the aggregate to $700.

WEEKS v. UNITED STATES

(Supreme Court of the United States, Feb. 9, 1918)

245 U.S. 618; N.J. No. 6308

Certiorari to the Circuit Court of Appeals for the Second Circuit. Judgment affirmed.[3]

Mr. Justice VAN DEVANTER delivered the opinion of the court.

This was a prosecution under the act of June 30, 1906, ch. 3915, 34 Stat. 768, upon a charge of shipping an article of food in interstate commerce in circumstances making the shipment a violation of the act. The information contained two counts, both charging that the article was misbranded—one because it bore a false and misleading label, and the other because it was offered for sale as lemon oil when in truth it was an imitation thereof containing alcohol and citral derived from lemon grass. In the district court there was a conviction upon both counts, and the Circuit Court of Appeals reversed the conviction as to the first count and affirmed it as to the second (224 Fed. 64). The judgment upon the latter is all that is brought here for review.

The defendant was engaged in making and selling various articles of food used by bakers, confectioners, and ice-cream makers, including the article with which this prosecution is concerned. On the occasion in question he shipped from one State to another a quantity of this article labeled "Special Lemon, Lemon Terpene, and Citral." The printed record, although not purporting to contain all the evidence, shows that there was testimony tending to prove the following facts among others: The shipment was made to fill an order solicited and taken by a traveling salesman in the defendant's employ. The salesman had been supplied by the defendant with a sample bottle of the article which was labeled simply "Special Lemon." In offering the article for sale and soliciting the order the salesman exhibited the sample and represented that the article

[3] Affirming *Weeks* v. *United States*, p. 646, *ante*. For the case in the District Court *Weeks* v. *United States*, *see* p. 519, *ante*.

was pure lemon oil obtained by a second pressing and that this pressing produced a good, if not the best, oil. In truth the article was not lemon oil, but an imitation thereof containing alcohol and citral made from lemon grass. Some of the elements of lemon oil were present in other than the usual proportions and others were entirely wanting.

The testimony respecting the salesman's representations was admitted over the defendant's objection; and later the court denied a request on the part of the defendant that the jury be instructed that this testimony could not be considered, but only the statement appearing on the label when the article was shipped. In that connection the court told the jury that the defendant could not be held responsible criminally by reason of any representations made by the salesman unless it appeared beyond a reasonable doubt that the same were made by the defendant's authority.

The defendant, who is the petitioner here, complains of the admission and consideration of this testimony and insists that under the statute the question whether an article is misbranded turns entirely upon how it is labeled when it is shipped, regardless of any representations made by a salesman, or even the vendor, in offering it for sale.

The statute, in its second section, makes it unlawful to ship or deliver for shipment from one State to another "any article of food or drugs which is adulterated or misbranded within the meaning of this act."

In its eighth section it declares:

> That the term "misbranded," as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.
>
> That for the purposes of this act an article shall also be deemed to be misbranded:
>
> In the case of drugs:
>
> * * * * * * *
>
> In the case of food:
>
> First. If it be an imitation of or offered for sale under the distinctive name of another article.

This section contains other provisions relating to misbranding, but they are not material here and need not be set forth or specially noticed.

It is apparent that the statute specifies and defines at least two kinds of misbranding—one where the article bears false or misleading label, and the other where it is offered for sale under the distinctive name of another article. The two are quite distinct, a deceptive label being an essential element of one, but not of the other. No doubt both involve a measure of deception, but they differ in respect of the mode in which it is practiced. Evidently each is intended to cover a field of its own, for otherwise there would be no occasion for specifying and defining both. That one article of food may be offered for sale in the distinctive name of another, and the offer accomplish

its purpose, without the aid of a false or misleading label hardly needs statement.

The statute does not attempt to make either kind of misbranding unlawful in itself, but does, as before indicated, make it unlawful to ship or deliver for shipment from one State to another an article of food which is misbranded in either way. That this is a legitimate exertion of the power of Congress to regulate interstate commerce is settled by our decisions. *Hipolite Egg Co.* v. *United States*, 220 U.S. 45; *McDermott* v. *Wisconsin*, 228 U.S. 115, 128; *Seven Cases of Eckman's Alterative* v. *United States*, 239 U.S. 510, 514. It also is settled by our decisions that "the negotiation of sales of goods which are in another State for the purpose of introducing them into the State in which the negotiation is made is interstate commerce." *Robbins* v. *Shelby Taxing District*, 120 U.S. 489, 497; *Crenshaw* v. *Arkansas*, 227 U.S. 389, 396.

It follows that the testimony respecting the representations of the defendant's traveling salesman was rightly admitted in evidence and submitted to the jury. It tended to prove that the order, to fill which the shipment was made, was obtained by offering the article for sale in the distinctive name of another article, and therefore that the article was misbranded within the meaning of the statute. To have confined the jury's attention to the label borne by the article when it was shipped, as was requested by the defendant, would have been to disregard the nature of the charge in the second count and the distinction between the two kinds of misbranding.

In the Circuit Court of Appeals the view was expressed that intent was not an element of the offense charged in the second count, and therefore that it was immaterial whether the representations of the salesman had the sanction of the defendant. Complaint is now made of this. But the question is not in the case, the view expressed by the Circuit Court of Appeals not being essential to an affirmance of the judgment. The district court had expressly instructed the jury that to hold the defendant responsible criminally by reason of such representations it must appear, and appear beyond a reasonable doubt, that they were made by his authority. The record before us does not show that the defendant objected to the submission of this question to the jury in this way, neither does it purport to contain all the evidence. The verdict therefore must be taken as conclusively determining that the representations were made with the defendant's sanction.

UNION DAIRY CO. v. UNITED STATES

(Circuit Court of Appeals, Seventh Circuit, Feb. 20, 1918)

250 Fed. 231; N.J. No. 6142

Error to the District Court of the United States for the Southern District of Illinois. The Union Dairy Company, a corporation, was convicted of violating the Food and Drug Act, and it brings error. Affirmed.

Plaintiff in error is charged with having shipped 75 cans of milk from Troy, Ill., to itself at St. Louis, Mo., which milk was adulterated through the addition of water, and it was further charged that "filth, putrid and decomposed animal substance," was found therein.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVANS, *Circuit Judge.* Plaintiff in error contends that it was shipping the milk from a receiving station in Illinois to itself in Missouri, there to be treated, impurities removed, and the milk standardized; that while in transit it was not an article of food such as was defined by the Food and Drug Act, and did not become such an article of food until after treatment. Were we to adopt this conclusion, it would do violence to the plain language of section 2 of the act under which prosecution is brought. The first sentence of section 2 reads:

> The introduction into any State or Territory or the District of Columbia, from any other State or Territory of the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this act, is hereby prohibited.

Section 6 of the act provides:

> The term "food" as used herein, shall include all articles used for food, drink, confectionery, or condiment by man or other animals whether simple, mixed, or compound.

Our conclusion is strengthened by another section of the act. Section 9 provides:

> No dealer shall be prosecuted under the provisions of this act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this act, designating it.

In *Hipolite Egg Co.* v. *United States*, 220 U.S. 45, 31 Sup. Ct. 364, 55 L.Ed. 364, the court said:

> Transportation in interstate commerce is forbidden to them [decayed eggs] and in a sense they are made culpable as well as their shipper. It is clearly the purpose of the statute that they shall not be stealthily put into interstate commerce and be stealthily taken out again * * * at their destination and be given asylum in the mass of property in the State.

In passing this act, Congress was endeavoring to protect the public by keeping out of commerce certain illicit articles, debased by adulteration, and it would be an unjustifiable construction of the act to make liability turn upon a difference in identity of consignor and consignee, or the secret intent with which a shipper made the shipment.

Plaintiff in error further contends that the evidence fails to show any adulteration at all, or such an adulteration as injured the milk as food. We have carefully examined the record, and, giving the stipulation of the parties the fair meaning which we believe was intended, the adulteration was clearly established. It was unnecessary for the court to receive evidence to establish the fact that the addition of water to milk injuriously affected the quality or strength of milk. See section 7 of the act.

UNITED STATES v. 1,038 CASES OF TABASCO FLAVOR CATSUP

(District Court, E.D. Missouri, Feb. 22, 1918)

N.J. No. 6918

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict in favor of the claimant.

The United States attorney filed a libel for the seizure and condemnation of 1,038 cases of tabasco flavor catsup, alleging that the article had been shipped and transported from the State of Illinois into the State of Missouri and remained unsold in the original unbroken packages, and that it was adulterated in violation of the Food and Drugs Act.

Adulteration of the article was alleged in substance in the libel for the reason that it consisted in whole or in part of a filthy and decomposed vegetable substance.

POLLOCK, *District Judge* (charge to jury). I want to commend you gentlemen for the attention you have paid to this case—I might say with the patience and interest you have listened to this trial. Let me say to you again, I cannot impress too strongly the matter on your minds that the Department of Justice, where matters are tried as this matter is tried, the responsibility for the proper administration of justice is equally divided between your body and the court. Courts are mere instruments created by the law for the purpose of doing justice. Under the law we are appointed—by its responsibility. The nature of the service that is to be performed, under the law, by your body and this court is not the same. You know you can follow the law as prepared for you. It is presumed that the court is more familiar—as he should be from long experience with the law—than the jury, who have made some other pursuit in life their life's thought, and for the reason that if any mistake is made in any matter of law, that is a mistake of the court for which the jury is in nowise to blame. On the other hand, the jury—and the jury alone—is the exclusive judge of the weight of the evidence, the credibility of the witnesses, and the facts, just as the jury must come into court to correctly and honestly bear the brunt; just so, the court must instruct the jury to honestly and firmly find the facts in the trial of the case and to enlighten them in the law with the facts just found. Now, to proceed to this present trial, in view of that idea, can we administer justice in any other proper form and with a determination to determine this matter precisely as it should be? Among other duties it is the duty of the court to define the issues in the case; that is, to state so clearly and precisely that the mind of no juror can possibly be mistaken as to the precise thing that is to be determined, and just as the court always desires a jury, where there are controversed questions of fact to be determined in any given case, just so this jury want to indulge and rely upon the court to tell them exactly what it is to determine, and the jury feel the need of that in this case, as you should in every case, and I am going to tell you.

The Government, in this case, comes into court, and through a representative, files a replevin in this case, in libel; that is to say, to have this court determine that this 1,038 cases of tomato catsup made by the Brooks Tomato Products Company of Collinsville, Ill., shipped in interstate commerce into this city—because it is only interstate commerce shipments that the United States has anything to say about—made in violation of the National Food and Drugs Act, and in violation of the sixth paragraph of section seven of that act, because adulterated within the meaning of that act; hence the Government seized this 1,038 cases of tomato catsup, manufactured by this Brooks Tomato Products Company and their property until it became sold to another, in order to prevent it going to the trade, where it would be used. Now, the precise charge made in the complaint for libel in this: That for the purpose of this act, or article in the law—it says to be adulterated, in the case of food; then, paragraph 6—

> If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is a part of a diseased animal, or one that has died otherwise than by slaughter.

Now, the defendant in the case denies adulteration in the matter charged in this food product, tomato catsup, and thus the matter is fought. At the trial here the real contention and complaint of the Government is, not that there was, in the catsup that was said to be condemned, any putrid matter, because the word putrid, used in this section of the act, has application to animal matter, but it is that the tomatoes that were used by this company in the manufacture of this tomato catsup were decomposed, or rotten, in whole or in part, to such an extent as is violative of this section of the statute. There is no contention made here in this evidence that the plant, or, speaking plainer, this Tomato Products Company, was not kept in a reasonably cleanly condition, or that the vat or pipes through which this food product was passing while it was being manufactured were allowed to become filthy and dirty so as to injure the product in that way, but it is, as I understand the evidence adduced, solely and alone on the facts that there was used in the manufacture of this catsup rotten tomatoes to such an extent as to violate this provision of the act.

Now, gentlemen, that brings us, of necessity, to a determination of what the founders intended by the enaction of this provision. In certain other provisions there is used the term—for instance, in paragraph one of this section: "If any substance has been mixed and packed so as to reduce, lower, or injuriously affect its quality or strength." That is to say the law-making power laid down the test. In another provision, down here, the law-making power placed another test on the matter, that is, "If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health." So, if this were a proceeding under the fifth paragraph and the inquiry was as to whether there was an adulteration of something else, and in such a manner as to make it deleterious to health—you will notice that the paragraph which we are following lays down no test whatever. Now, let me read it again: "If it consists in whole

or in part of a filthy, decomposed, or putrid animal or vegetable substance." Now, the Congress, in section 6, based a reasonable application of this section to the practical business affairs of life. In such a case the Congress intended that it should apply to the absolute term. For instance, supposing you were manufacturing pepper, and you would add to that pepper something that would not adhere to the pepper grain itself, this would be prohibitive; that is, Congress would make it prohibitive to add ground peas. And Congress assumes here that putrid animal flesh was not healthful and not good, so they prohibited it—the sale of putrid animal matter—and they also prohibited the use of decomposed vegetable matter in the manufacture of food products. Now, of course, if this catsup was manufactured altogether out of rotton tomatoes it would not be regarded as fit for human beings to consumer. If it was some substance that was not inherent to the tomato itself it could be easily prohibited in that case, and the prohibition there be easy. But the word, packages, here, with which we are principally interested in this trial is in its everyday use, and not in the scientific sense. In the scientific sense wine or beer would be absolutely prohibited in this case; as you gentlemen all know the grain with which beer is made and the grapes with which wine is made are fermented.

Again, there are lots of food products—made out of partially decomposed vegetable matter, in some instances at least—that the Congress didn't intend to prohibit. Many of us like a dish called youget that has gone through a process of decomposition. Again, take an article like sauerkraut; there is a certain stage of decomposition reached in there that the Congress did not mean. Again, you take cheese. In the ripening process decomposition has taken place, and the Congress did not mean to prohibit the manufacture of it, or sauerkraut. On the other hand, Congress did not intend to prohibit the manufacture of cider. While it says "in whole or in part decomposed", no man could engage in the manufacture of cider because you might possibly make a bottle of cider or a gallon of cider that no part of it has been decomposed, but you could not engage in the manufacture of cider, because to find perfect apples that are not in part decomposed would be absolutely prohibitive of the making of cider. So, if we had to make tomato catsup out of tomatoes which were not in part decomposed we could never make any tomato catsup, because it would be a matter of impossibility for anyone to engage in the manufacture of catsup, and there would be some decomposed tomato matter going into the product. The care with which you would have to conduct a business of that kind would absolutely prohibit the business. So, what the Congress meant—it meant this: That in the manufacture of tomato catsup, which is the subject of this, that the rule of reason should enter; that is to say, a factory that exercised a reasonable, prudent caution in collecting the tomatoes and assorting those that went into the cylinder so as to cut out any, unreasonably so, of decomposed tomatoes—the manner of a reasonably prudent, careful, and intelligent man, engaging in his affairs, would do—that he be protected under the law, unless he became careless in his business and allowed rotten tomatoes to go in

there in a manner that a reasonable, prudent man, making a product for consumption of his own, would not do.

The burden of proof is on the plaintiff in this case, gentlemen. It is admitted by the intervener that they did make and manufacture the product at their plant. The plaintiff in this case attempts to show that in the selection of the tomato from which this catsup was prepared, in this case, that the reasonable care and caution was not used, to keep out rotten tomatoes, that a man of ordinary care and prudence would use. If the Government has established that, you will then find that it is adulterated, and find for the plaintiff. If the Government has failed to establish that, you will find that it is not adulterated, and find for the claimant.

I have tried to bring the attention of the jury down to what I deem, under this law, a crucial test case, insofar as a substance that might result in adulteration of a food product from the very adherent food product itself. This is the first case that I have known to be tried under the law, and as the law body has not laid down a test, then of necessity the court must make a test, and it is one of the primary rules with all laws, that they must be free, so that is what I am giving you to determine the facts in this case. You, gentlemen, as I say, are the exclusive judges of the weight of the evidence, the credibility of the witnesses, and the facts proven at the trial of this case. There have been certain requests in this case, to instruct to discharge. Insofar as I have not given them, they will be treated as refused. It is a matter of considerable concern to the parties, and you will take it as such and determine from the evidence in the case and the manner I have indicated, whether or not this food product is, or was, decomposed and filthy to an unreasonable extent, or to the extent that a reasonably prudent, cautious, and diligent business man in the manufacture of a product to be consumed by his family would not permit.

We have no general verdicts in a case of this kind. If you find for the plaintiff in this case you will sign the verdict as it is here prepared. In the event that you fail to find, by the greater weight of the evidence in the case that the Government has made out, you will add the word "not" and then sign your verdict.

Mr. Wheeler. I would like to have the jury instructed on account of the law of evidence, that this product described was moving in interstate commerce.

Mr. Lace. The court has already instructed as to that.

Mr. Wheeler. I wish to except to that part which deals with the rule of reason.

The Court. That is, you contend that if there was in this tomato catsup any particle of decomposed matter it must be condemned?

Mr. Cronin. We contend that if there is decomposed matter in the product it be condemned.

The Court. Well, I will tell you, gentlemen of the jury, that it is impossible on this earth to manufacture any product from the tomato without some decomposition. If you arrive at your verdict before 5 o'clock I will receive it, but if you do not arrive at your verdict before 5 o'clock you will seal it and I will receive it in the morning, although it is a holiday.

UNITED STATES v. SCHIDER

(Supreme Court of the United States, Apr. 15, 1918)

246 U.S. 519; N.J. No. 6151

Error to the District Court for the Southern District of New York. Judgment reversed.

Mr. Justice McReynolds delivered the opinion of the Court.

An indictment containing six counts charged defendant, Schider, with violating the Food and Drugs Act of June 30, 1906 (34 Stat. 768), by delivering for shipment in interstate commerce food contained in a bottle plainly labeled as follows: "Compound Ess Grape Jos. L. Schider & Co. 93–95 Maiden Lane, New York."

Each count alleged the article was an imitation of grape essence artificially prepared from alcohol, water, and synthetically produced imitation oils, and contained no product of the grape nor any added poisonous or deleterious ingredient; and that the word, "imitation", nowhere appeared.

The first count further alleged that it was "unlawfully adulterated in that an imitation grape essence artificially prepared from alcohol, water, and synthetically produced imitation essential oils had been wholly substituted for a true grape product, which the article purported to be"; and the second that it was "unlawfully adulterated in that an imitation grape essence artificially prepared from alcohol, water, and synthetically produced imitation essential oils, had been mixed with the said article so as to reduce and lower and injuriously affect the quality and strength of the said article."

The third, fourth, fifth, and sixth counts, in varying ways, further alleged misbranding so as to deceive and mislead in that the label indicated a true grape product, whereas the article was not such but an imitation artificially prepared, one which contained nothing from grapes.

The trial court sustained a demurrer to each count upon the view that, properly construed, the Food and Drugs Act did not apply to facts stated.

Pertinent portions of the act follow:

Sec. 7. That for the purposes of this act an article shall be deemed to be adulterated. * * *

First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

Second. If any substance has been substituted wholly or in part for the article.

Sec. 8. That the term "misbranded", as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

That for the purposes of this act an article shall also be deemed to be misbranded: * * *

First. If it be an imitation of or offered for sale under the distinctive name of another article.

Second. If it be labeled or branded so as to deceive or mislead the purchaser, * * *

Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases * * * Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word "compound", "imitation", or "blend", as the case may be, is plainly stated on the package in which it is offered for sale: * * * (34 Stat., ch. 3915, pp. 768, 770–771.)

The obvious and undisputed purpose and effect of the label was to declare the bottled article a compound essence of grape. In fact, it contained nothing from grapes and was a mere imitation.

Within the statute's general terms the article must be deemed adulterated since some other substance had been substituted wholly for the one indicated by the label; and, also, it was misbranded, for the label carried a false and misleading statement.

Defendant relies on the proviso in section 8 which declares articles of food shall not be deemed adulterated or misbranded if they are "labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word 'compound', 'imitation', or 'blend', as the case may be, is plainly stated on the package in which it is offered for sale." But we are unable to conclude that by simply using "compound" upon his label a dishonest manufacturer exempts his wares from all inhibitions of the statute and obtains full license to befool the public. Such a construction would defeat the highly beneficent end which Congress had in view.

We have heretofore said: "The purpose of the act is to secure the purity of food and drugs and to inform purchasers of what they are buying. Its provisions are directed, to that purpose and must be construed to effect it." *United States* v. *Antikamnia Co.*, 231 U.S. 654, 655. "The legislation, as against misbranding, intended to make it possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was and not upon misrepresentations as to character and quality." *United States* v. *Lexington Mill Co.*, 232 U.S. 399, 409. And see *United States* v. *Coca Cola Co.*, 241 U. S. 265, 277.

The stuff put into commerce by defendant was an "imitation", and if so labeled purchasers would have had some notice. To call it "compound essence of grape" certainly did not suggest a mere imitation, but on the contrary falsely indicated that it contained something derived from grapes. See *Frank* v. *United States*, 192 Fed. 864. The statute enjoins truth; this label exhales deceit.

The trial court erred in sustaining the demurrer. Its judgment is reversed and the cause remanded for further proceedings in accordance with this opinion.

UNITED STATES v. 720 CASES OF TOMATO CATSUP

(District Court, E.D. New York, Apr. 27, 1918)

N.J. No. 6192

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict for claimant.

GARVIN, *District Judge* (charge to jury). Mr. Foreman and gentlemen of the jury: It now devolves upon the court to charge you generally with reference to the law applicable to the case on trial, and before proceeding to discuss the law which is peculiarly applicable to this case, it is my duty to charge you generally with respect to the duties that devolve upon juries irrespective of the character of the case on trial.

In the first place, just as the court is the sole judge of the law which is applicable to the case on trial, so you gentlemen of the jury are the sole judges of the facts, and that means that you are to decide this case upon the evidence, and you are to disregard entirely statements of counsel made during the trial, because that is not evidence. You are further to disregard any opinion that you think the court may entertain as to the merits of either side in this controversy, because the function of the court has nothing to do with determining the facts. That, gentlemen, is a duty which the law imposes upon you, and it is a duty which you are obliged, by your oath, to face fearlessly. That is to say, that you are to put aside all passion, prejudice, and sympathy and to decide the case according to the evidence in order that justice may be done, and that means that you are to disregard the fact that the United States of America is a party to this proceeding. That should not sway you one way or the other. You are to disregard any consequences that you may think may be directed against the claimant in the event that you decide against the claimant, because that consequence is something with which a jury has nothing to do, and which a jury has no business to consider in reaching its verdict.

As you are to decide this case upon the evidence, I will charge you that you are to take into consideration all the evidence presented, and you are to give it such weight as in your judgment it deserves. In determining whether or not you will accept or reject evidence given by a witness you will take into account the bearing of that witness on the stand, the probability of the story told, and the likelihood of it being true. I charge you that if you find that a witness has willfully misstated a material fact you are at liberty to disregard the entire testimony given by that witness. You are not required to do so, but that is your right. You may disregard it if you so desire.

And now, gentlemen, with respect to the law applicable to the case on trial. The United States of America comes into court and files a process known as a libel, and under that process seizes a quantity of tomato catsup, and then the shipper of that catsup, known here as the claimant, appears in the proceeding and states that the

Government had no right to make the seizure, and the Government had no right to make the seizure unless that seizure was justified by law, and the Government claims that the justification for its action was that an act of Congress known as the Pure Food Law Act had been violated and that law reads in part as follows:

> That for the purpose of this act an article shall be deemed to be adulterated * * * If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is a product of a diseased animal, or one that has died otherwise than by slaughter.

And so, the part peculiarly applied here is that the Government claims that the goods in question consisted in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance. I charge you in reaching your conclusion as to whether or not the law was violated that you are to accept in the common ordinary everyday sense these words "filthy", "decomposed", and "putrid." There has been considerable expert testimony here, but I charge you it is the law that you are to give to these words the meaning which they are ordinarily given in everyday life. That is to say, filthy is usually considered to be nasty or dirty, and decomposed is usually considered to be rotten, and putrid has a somewhat similar meaning in everyday life—rotten or emitting a vile odor. Just the meaning that you gentlemen would give to those words in your daily life.

Although the United States of America is a party to this proceeding, and although you gentlemen who have sat in criminal prosecutions have found in this court that the United States of America is the plaintiff there, yet this proceeding is not a criminal prosecution, and the reason of that becomes of extreme importance to you because of the fact, as perhaps you know, a different rule of law applies in guiding you in reaching your verdict. If it were a criminal prosecution, the court would charge you that you must be satisfied that the Government made out its case against the defendant beyond a reasonable doubt. Now, this is not a criminal prosecution and if you gentlemen determine that the Government has proved the claims that it makes by a fair preponderance of evidence, then it is your duty to find in favor of the Government. If you are satisfied that a fair preponderance of evidence has been presented by the Government, that makes out the Government's case. If you find that the evidence is evenly balanced between the claimant and the Government, and you are unable to make up your mind in whose favor your verdict would be, in that event you must render your verdict in favor of the claimant.

The Government has charged, and the trial disclosed, that 512 cases of catsup were seized, and the Government claims that by reason of an analysis made of a part of this seizure, and by reason of conditions existing in the factory of the claimant with respect to the manner of sorting tomatoes that this entire lot is so substantially affected with mold as to render it filthy, decomposed, or putrid within the meaning of the Pure Food Law. And if, gentlemen, after considering the evidence you come to the conclusion that the Government has sustained by a preponderance of evidence its contention that a whole or part of this seizure of 512 cases are so affected by mold as to render them filthy, decomposed, or putrid, then your verdict will be in favor of the Government.

The evidence has been so carefully analyzed for the benefit of you gentlemen, by counsel for the claimant and the Government, that the court does not deem it necessary to go over it at length. You have been paying careful attention to its presentation, and the court is of the opinion that you can, without further comment by the court, review the details of the evidence, and give it such weight as in your judgment it requires.

I have been asked by the claimant to make certain specific charges. I will read them to you:

(1) In determining as to whether the catsup seized consists in whole or in part of a filthy, decomposed, or putrid vegetable substance, the jury should consider that the words "filthy", "decomposed", or "putrid" are not used in a purely technical and scientific sense, but in the common, ordinary, everyday sense.

I have endeavored to so charge, and I so charge.

(2) The question for the jury to determine is whether upon all the facts appearing in this case there is such a substantial presence of mold, yeasts and spores, and bacteria as to warrant the finding that the product is filthy, decomposed, and putrid in a natural, practical sense. If the jury find there was not a substantial presence of these molds, yeasts and spores, and bacteria, the verdict must be for the defendant.

I so charge, except I charge you, you are not required to find all four of these products in the material. If you find any one or more of them present in such a substantial degree as to render the product decomposed and putrid in the natural sense, your verdict must be for the Government.

(3) The testimony of the Government's experts as to the percentage of molds, yeasts and spores, and bacteria are only statements of fact as to the counts obtained by them, and the inferences they draw from these facts are opinions which the jury may accept or reject.

I so charge, and let me make it a little plainer to you, gentlemen. The Government experts have testified that they made certain tests, and they found certain percentages of molds as a result of those tests in specimens which they selected from the quantity seized. Now, those statements by the Government experts under oath are positive statements of fact. Then the Government experts went on to say that as a result of the tests made, in their opinion, the balance of the goods seized were in the same condition and had the same relative percentages of mold. Those are mere expressions of opinion, the sort of opinion upon which expert testimony is very largely based, and which the jury may accept or reject according to whether or not they believe that the expert is a man who knows sufficiently about what he is talking to justify giving his opinion some substantial credence.

(4) In determining as to whether the catsup is filthy, decomposed, or putrid, the jury should also consider the testimony as to the quality of fruit used and the process employed by the Garret Bergen Co. in the manufacture thereof.

I so charge. I have endeavored to cover that in my charge to you when I charged you to pay attention to all the evidence presented, and to consider all the evidence. I am requested to charge as to

part of the evidence, and I charge as to that. I charge also that you are to consider all the evidence.

(5) This case involving a forfeiture of property, the Government must establish its case by the preponderance of evidence and if you are in doubt on the whole case as to whether the Government has made a case or not, you must find for the defendant.

I so charge.

(6) The court's denial of the motion made by the defendant's counsel for a dismissal of the libel, in no way indicates any opinion of the court upon the merits of the case. The significance of the denial is that there were questions of fact in the case to be decided by the jury.

I so charge. I endeavored to cover that proposition when I told you if you think the court has any opinion in this matter you must dismiss it from your minds entirely. What the court thinks of the facts is of no significance to you whatever. You are to determine the facts in this case.

(7) No charge is made that the product is filthy or decomposed in a way that makes it injurious to health in the sense of a poison.

I so charge. I charge you further. It is not necessary that the contents, if it consists in whole or in part of a filthy or decomposed vegetable substance, is unfit for food, but if it comes within this prohibition as defined in the statute and explained by the court in its charge, then the claimant has violated the law and your verdict will be accordingly. And so I charge you if, after considering the evidence with the instructions given by the court, you conclude that these 512 cases of catsup, or any part of them, are in such a condition as to have violated this law, then your verdict will be for the Government, indicating the number of 512 cases you believe were in an unfit condition. If you believe that the cases were all in a proper condition and the law was not violated, then your verdict would be for the claimant. Are there any further requests to charge?

Mr. GILPATRIC. None from the claimant.

The COURT. Any from the Government?

Mr. SMITH. I ask the court to charge that if the jury find that the bottles examined by the Government employees as to which the testimony was given by those employees respecting the mold counts are deemed by them to be a fair sample after such examination, they may find that the condition of the entire shipment was the same as that indicated by the examination of those 22 bottles.

The COURT. Do you wish to be heard upon that request?

Mr. GILPATRIC. I should except to that, if Your Honor please.

The COURT. I so charge.

Mr. GILPATRIC. Exception.

Mr. SMITH. I ask Your Honor to charge that it is not necessary for the Government to establish that this product is decomposed and putrid and filthy. It is not necessary for the Government to establish all of these. If it establishes any one of these, it establishes its case.

The COURT. I so charge.

Mr. SMITH. I ask Your Honor to charge the jury, if the jury find that this catsup so seized contained as much as 8 percent of decomposed matter, such as rotted tomatoes, they may find that the statute is violated.

The COURT. I so charge, gentlemen, only, however, if you reach the conclusions that by 8 percent present, there is present a substantial amount of the mold, which in your judgment brings it within the prohibition of law.

Mr. GILPATRIC. I take an exception to that, if Your Honor please. If Your Honor please, I desire to except to so much of your charge in charging the claimant's second request to charge as referred to the presence of yeast and spores, and my exception is on the ground that that is not relevant to the case here, as the whole point of the Government's contention is the presence of rot as indicated by mold.

The COURT. I am very willing to have that taken out. Very well; by consent that will be eliminated and the only question for you to have in mind is the presence or absence of mold.

Mr. SMITH. Of course, what Your Honor charged as to the manner in which the Government experts testified is to be treated as well to the claimant's expert.

The COURT. It does, gentlemen.

UNITED STATES v. JOSLIN-SCHMIDT CO.

(District Court, S.D. Ohio, May 17, 1918)

N.J. No. 6355

Two informations alleging violations of section 2 of the Food and Drugs Act. Jury trial. Verdict of acquittal.

The United States attorney filed informations against the Joslin-Schmidt Co., alleging shipment in violation of the Food and Drugs Act from the State of Ohio into the State of Indiana, of quantities of an article labeled in part "The Joslin-Schmidt Company, of Cincinnati, Ohio, Guarantees this 'Abattoir Brand' Digester Tankage to contain not less than * * * 60.0 per cent of crude protein," which was alleged to have been misbranded.

Misbranding of the article in each shipment was alleged in the information for the reason that the label was false and misleading in that it indicated to purchasers thereof that the article contained not less than 60.0 percent of crude protein.

HOLLISTER, *District Judge* (charge to jury). The United States of America charges the Joslin-Schmidt Company, a concern you have heard described, with two offenses against the Food Act, which was passed by the Congress of the United States some time ago. These charges are contained in informations, as they are called, which differ from indictments in that indictments are found by the grand jury and informations are filed by the district attorney. It is immaterial to you whether this is an indictment or information, except that informations usually are filed upon misdemeanors, charging misdemeanors rather than crimes.

There is a difference between a misdemeanor and a crime in this way, if one is guilty, the greater disgrace of the one over the other, the crime having in it the meaning of infamous punishment, that is to say, punishment in the penitentiary. But the charges are criminal charges notwithstanding, and the same degree of proof is required

in order to prove what is alleged in an information as is required to prove what is alleged in an indictment.

The defendant starts out with presumptions in its favor, presumption of innocence, presumption of reputation and of good character. Now, those presumptions are in the nature of evidence. They attend the defendant from the beginning to the end of the case, until the jury shall think, if they should, them to be overcome by testimony and evidence beyond a reasonable doubt.

Now, a reasonable doubt has nothing especially doubtful or subtle in the meaning of it. It is a doubt for which a reason may be given, a reason satisfactory to the jury, and another way to put it is, that if the jury have an abiding conviction amounting to a moral certainty that the charge as made is true, then there is no room for reasonable doubt; and if they have not an abiding conviction amounting to a moral certainty that the charges as made are true, then they have room for reasonable doubt, and having room for a reasonable doubt, the only thing to do under those circumstances is to acquit. But if there is no reasonable doubt, then it is the duty of the jury to find them guilty.

At first the Government started out with one information containing two counts, one covering the case of the shipment to Pearson at Upland, Indiana, and the other to Krum at Milan, Indiana. In the second count, relative to Krum, reference was made to the descriptive parts of the first count and saying that they were incorporated in the second count. The district attorney, having found some mistake had crept into some part of the first count, asked the court to dismiss that count under what is called a *nolle prosequi*, a signification on the part of the Government of unwillingness to prosecute on that first count, and that was granted by the court. That left the second count in as the sole count, the sole charge in that information. While the first count was nolled, dismissed, withdrawn, nevertheless that left the reference in the second count to the descriptive part of the first count standing as a part of the second count; so that the second count of the first information, that having to do with the sale to Pearson, the shipment to Pearson, remains as the sole charge in the first information. Then the district attorney afterwards filed a second information, which contained in substance the same as the first count in the first information but with the mistake corrected. So you have two informations here, each containing one count—I think I have made it clear—one count having to do with the shipment to Pearson and the other count having to do with the shipment to Krum. The shipment in the one case was 500 bags and the other was 100 bags.

Now, what the Government says was an offense against the Food Act in each of these shipments was or is that in the first shipment, that to Pearson, of 500 bags, there was a guaranty on the part of the defendant—and the same guaranty also as to the second shipment, that to Krum—that there was in this shipment 60 percent of protein, a 60 percent content of protein, whereas in fact and in truth, as the information says, or words to that effect, that in the shipment to Pearson the content was only 58.1 percent protein, and in the shipment to Krum 57.3 percent protein content, in the one case a shortage of 1.9 percent and in the other a shortage of 2.7 percent.

The law under which these informations were filed, so far as we are interested in it now, says:

> That it shall be unlawful for any person to manufacture within any Territory or the District of Columbia any article of food or drug which is misbranded, within the meaning of this Act: * * *
>
> That the term "misbranded," as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design or device regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular, and to any food product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

Then further along it says it shall be regarded as misbranded "if it be labeled or branded so as to deceive or mislead the purchaser * * * ."

Now, while this language says "misbranded in any particular," yet the charge is that it was misbranded because approximately the amount of protein in each of these packages was in the figures the Government charges. So we must regard this charge in the language in which it was made in the information, together with the meaning and purposes of this act.

Now, if the strict language of the act is followed, if it is misbranded in any particular, it wouldn't do to say it was misbranded approximately, because "approximately" has a different meaning, a different shade of meaning from what an exact figure would be if included within a charge of this kind. The fact of the matter is that the Government, in such a case as this, if we are to follow the testimony, could not make an exact charge, but approximately. So they are bound to say "approximately", if they are to make any charge at all.

Now, these acts are for the protection of the consumer, the public, both in food products and drugs, for humans and animals, and are to be so regarded. But in the interpretation of acts of Congress of this kind the purposes to be accomplished are to be borne in mind, the benefits which the Congress had in mind, and the evils which they sought to remedy. And in determining in this case just what must be established to maintain the offense, those things that I have just said must be borne in mind. Especially is that true when the subject matter of the charges is of such character that it is impossible for the Government or anybody else, according to the testimony, to say exactly what the protein content of food, hog food of this kind, is.

Now, it is conceded by the Government that there is a variation in the results of the tests that are made, even when made with the greatest care, and that those variations may run from four tenths to six tenths of a percent. Now, that being so, it is only fair to say that if the defendant's product had in it—either of these cases or both, giving the defendant the benefit of every doubt—59.40 percent, that it would still come within what the Government would claim as a 60 percent protein content. Then, the Government says that this is short of that, that each of these shipments is short of that, in that in the one there would be, after taking away sixty-one one-hundredths from 1 percent and ninety one-hundredths—you could figure that out—and in the other case more than that—that there was a claimed difference, approximately, of 2.70 percent. The Government must admit that you can still take sixty one-hundredths off of that,

off of the difference in each case, and the Government now says that even with that there is this difference which that subtraction would still leave between a 60 percent protein content less sixty one-hundredths, the 58.1 percent as happened in one case and 57.3 percent in the other, and therefore the defendant has been guilty of making these two shipments with at least that much difference, or substantially that much difference, and therefore the defendant has broken this law.

Now, in that connection, inasmuch as the purposes of all these acts is to protect the public in the purchase of articles of this kind and to prevent deceit, it doesn't make any difference what the intention or purpose of the person charged with the offense is. The manufacturer may be as innocent as an angel, and as little harmful as a lamb—I don't know how I could put it any better than that—that is not the question. It is different from what it is in most criminal cases, in which the intent has to be proven. It does not make any difference in such a case as this what the intention is; the manufacturer may be entirely, absolutely, innocent of any intention to defraud or deceive anybody, and yet under the interpretation of this law which has been made, if the thing does not come up to the representation made, then the manufacturer must be regarded as guilty, whatever his intention or purpose was; even if he had intended to put in more than what he had guaranteed, it would be improper.

So that when you have boiled it all down, there is but one question for the jury to determine, and that is, whether or not, in each one of these shipments, there was a misbranding in that the representation made was of 60 percent and that the protein content actually present was in one case approximately only 58.1 percent and in the other 57.3 percent. Now, how are you going to find that out? You don't know yourselves, unless it be that some of you have had some experience in these matters. You have got to find it out from the testimony of those who have made a study of matters of this kind and have had practical experience in them. Those men are called experts, and a man is entitled to be called an expert when he is expert, and that would depend upon the amount of his knowledge, the care with which he studied, the kind of a man he is, the make-up of his mind as far as you can see it, and his experience, both theoretical and practical. And you will take all of these witnesses on both sides and measure them up and determine which of them is really, on the whole, entitled to be given the greatest credit. I won't say credit in the way of weighing their credibility—they are all presumed to tell the truth and there is no reason, so far as any one can say here, why they should not tell the truth, I will touch on that in a minute—but credit by reason of the fact that they have a knowledge which the ordinary man has not.

All of these men should be given the greatest credit in the testimony they have given to the jury by reason of all of these circumstances which have been before you. Who of these probably knows more about it? Who of these witnesses has probably the greater information than the other, if you find any difference between them at all?

Then, of course, what I said a little while ago when I was talking about credit I did not mean that to apply to credibility, yet that must be taken into consideration also, because when you are determining

what weight to give to the evidence of a witness, if you find any motives of self-interest or desire to see one side or the other victorious, or any motive which you may discover which will tend to color his testimony, either consciously or unconsciously, you must give that weight in determining what weight to give to his testimony.

It is the duty of the jury to reconcile the testimony whenever they can, if the testimony is conflicting. This scientific testing of food products of this kind is not exact; it is not claimed to be; the conditions are such that it is hardly within, if within, human skill and care to make them so that the results may be exact. Theoretically they may be, but practically there are considerations which develop which prevent absolute accuracy.

Now, there is evidence tending to show that there are a number of factors which must be borne in mind when one is considering the accuracy of tests of this kind—the skill of the operator, the assayist; the weather conditions, whether dry or damp; the length of exposure to the atmosphere of the article to be assayed; the purity or want of it of the acids used in the tests; and then—and I don't intend to give them all, you have heard them all and you may remember them better than I do, probably do—but there are reasons why these tests are not absolutely accurate and why they may differ from each other even when the same sample is used, growing out of different conditions, growing out of different skill, growing out of the use of different acids, which may not be equally pure or of equal strength.

There is evidence tending to show that even when the same sample has been subjected to a number of tests, and those by the same person, there is some variance, as you have heard from the testimony.

There is evidence tending to show that in this very sample of material shipped to Pearson there is a difference between the Government assay and the assay made by the chemical department of Indiana, the food department of the State chemist—I don't remember the title exactly—but it may have been 2 points or over; that is to say, 2 percent.

Now, you have got to take the case as you find it; you have got to take the testimony as it is and make up your mind whether these two shipments were short or not in protein content. If they were, the defendant is guilty; if they were not, the defendant is not guilty, and your verdict will be in accordance with the conclusion you reach on that main question.

Now, on the subject of tags, there was no Government requirement that any tags should be on these bags. There was a requirement by the State chemist's department of Indiana, whatever the name of it is, as you have heard, that if a manufacturer of this kind of a product did business in Indiana he must make a certificate to the department stating the amount of protein he proposes the product shall contain; that is to say, he represented that his product would contain in these 2 instances 60 percent of protein, and thereupon the department sends to him—by " him " I mean the manufacturer, the defendant in this case—tags or cards upon which that representation is printed; then when the defendant, or the manufacturer, ships the product into Indiana, for sale there, he is required to attach these cards to each bag of this kind of product. And thereupon there is the representation made, to whomsoever it comes, that each bag contains 60 percent protein content.

Now, you have heard a good deal about the way samples are made for the purposes of chemical analysis. I expect you are as well qualified, after hearing this testimony, to say what a fair sample is as anybody else. Take all the evidence on that subject and make up your mind how to get a fair sample of this kind of product, under all the circumstances. The Government shows that sometimes the way to get a sample is to use the apparatus which you saw and introduce it into the end of a bag, the bag lying down on its side, horizontally, and from the construction of the apparatus they could get a pretty fair representation of what the core is. Another of the Government's witnesses preferred to introduce the apparatus diagonally, as I understood him to say, down to the farther edge of the bag, so that he would get something from the outer part of it and something from the inside, whereas the other way they would get only the inside. Now, Mr. Schmidt has testified that the ingredients of the product are at least three, and that they are of different specific gravity, and that when shaken together the tendency of the particles which are of denser specific gravity is to be thrown off at the side when a pile is made. I gather from what he said that that part which was thus thrown off, and of the heavier or the greater specific gravity, contains a greater part of protein than the other. He says that when the different ingredients are thrown into the hopper the same tendency prevails; that when it is dropped into the bag the same tendency prevails; that the product is let out slowly from the hopper into the bag by some sort of a shut-off—I don't know what to call it, particularly, but you know just what I mean; that after the bag is filled the workman who is doing the work smooths off the top of the bag, and I suppose closes it up. He says the same tendency is found when the product is dropped into the bag, and that the particles of heavier specific gravity would tend to fall to the outside. That is the basis of the claim on the part of the defendant that these samples taken by the Government were not fair samples, in that they—especially in the case of those that were taken by running the apparatus through the middle of the bag, from end to end—would not come in contact to so great a degree with the particles which were of the heavier specific gravity and containing more protein, which would tend to be on the outside of the mass and more nearly within the immediate encircling canvas or burlap of the bag. And the inference is, and the argument is, that the way to get a fair sample is to run the apparatus along the inside edge, just beneath the cover—that is to say, the bag—by doing that you would be more apt to get a greater protein content there than you would in the middle of the bag, or greater than if you ran it diagonally.

All this is for you to consider and debate about, and reach a conclusion upon when you are determining the character of the samples that were obtained, and when you are considering also the way these samples were manipulated afterwards, and whether or not, under all the circumstances, if you shall find the content was short, whether or not, under all the circumstances, with that finding, the sample of two tenths of an ounce, made the way it was, would fairly represent the homogeneity of the contents of 500 bags, in the first instance, of 100 pounds each, and 100 bags in the second instance, of 100 pounds each.

And you are not to go at these matters in a narrow way. It is a large subject; it is a large subject both from the standpoint of the Government and from the standpoint of the manufacturer, and you are to determine from all that you have heard, as well as you can, whether this discrepancy which the Government claims has been proved beyond a reasonable doubt, in each case. If it has, the defendant is guilty; if it has not been so proved, the defendant is not guilty, and your verdict will be in accordance with the conclusion you will reach in each instance. But there are, you will remember, two charges, and your conclusion will be guilty or not guilty to each charge.

Now, gentlemen, I believe I have said all I can or care to, unless you have something to suggest.

Mr. BRUCE. According to the testimony of Mr. Schmidt as to the separation of the particles, will Your Honor also refer to Mr. Proulx's testimony as to their making tests showing differences between the bottom and the top of the sacks?

The COURT. I had overlooked that. Just as Mr. Bruce in substance said, the tests that they had made had shown that it made no difference, as I remember it, when you were considering the question of shipment. Am I right about that?

Mr. BRUCE. Yes, Your Honor; these tests were made after shipment.

The COURT. These tests were made after shipment, and Mr. Proulx did say, if I remember the substance of it—and if I am not [right] I want to be corrected—that the transportation would make no difference in the dispersion of the various particles in a bag, and would not cause—the inference is—would not cause or tend to cause the segregation of one particular kind of element to itself, particles of that kind to themselves. That, I think, is the substance.

Mr. BRUCE. Yes, Your Honor.

Mr. OLIVER. If Your Honor please, I should like to ask whether that testimony wasn't in reference to fertilizer?

Mr. BRUCE. It was as to both. Mr. Proulx testified that they made a test on some 500 shipments of fertilizer containing tankage and dried blood, to find out whether there was any difference in different parts of the sack. He also testified in a large number of cases where the manufacturers complained that their way of taking samples was not fair, that they had had a representative of the manufacturer there and they would take a new sample, using their instrument and withdrawing a core; then they would also dump the sack on the floor and take a sample that way. In those two cases he said they found no appreciable differences.

The COURT. Gentlemen, you have remembered all the testimony, I have no doubt—I hope so—and you will give such weight to it as you think it ought to have, in your judgment.

You may retire to the jury room, elect a foreman, and bring in a verdict in accordance with the law and the testimony, a verdict in each case.

Mr. OLIVER. If Your Honor please, I want to preserve our rights. I wish to except to that last charge as to the testimony of Mr. Proulx. I am informed that his testimony was as to fertilizer. Now, as to fertilizer——

The Court. Just a minute—let me interrupt you. Of course, if that is so, then it was wrong to say what I did to the jury. Now, we must get that right, and the only way to do is to get it right out of what the stenographer has here. Are you going to withdraw what you said about his testimony? Are you going to withdraw what you have just said about that testimony?

Mr. Bruce. I was going to withdraw the statement in this way, that as far as I know it makes no difference to us whether it was fertilizer or tankage. Mr. Smith said tankage and dried blood, Your Honor.

The Court. We want to know what he said.

Mr. Bruce. If Your Honor please, Mr. Smith has said it was a mixture of tankage and dried blood in the fertilizer.

The Court. Are you willing to accept that?

Mr. Oliver. No; that is fertilizer—well, taking what he says now, then the charge, I claim now, is erroneous because a fertilizer is an entirely different thing from a digester tankage. This fertilizer is more or less wet. You can't have the same segregation in it that you would have in a dry product.

The Court. Gentlemen, what I said about the testimony of Mr. Proulx had to do with what he said about fertilizer, and not digester tankage, and therefore the statement to you was incorrect and is withdrawn. I assumed that my young friend over there had it just right.

Mr. Bruce. I thought it was, Your Honor.

The Court. Now you may retire.

UNITED STATES v. 60 DOZEN BOTTLES OF "A TEXAS WONDER"

(District Court, N.D. Texas, July 2, 1918)

N.J. No. 6337

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict in favor of the United States.

The following charge was delivered to the jury:

Meek, *District Judge.* Gentlemen of the jury: The United States procured what is termed in law a libel against 60 dozen bottles, more or less, of Texas Wonder, and took such bottles of Texas Wonder into its possession, charging that the statement on the package containing that liquid, which is denominated Texas Wonder, is false and fraudulent. Thereafter a claimant appeared in court, that is, E. W. Hall, claiming this liquid, put up in cartons, and known as Texas Wonder, denying the allegations made by the United States in its libel proceeding to the effect that the allegations or statements on the cartons were false and fraudulent. The issue now on trial before you, and to be determined by the evidence adduced before you from the lips of the witnesses and from the written testimony, in the light of the law applicable to the case, and which is now given you; the issues to be decided by you, first, the evidence and the

facts and circumstances in evidence; and, second, the law applicable to that evidence, and to those facts and circumstances in evidence.

In the libel it is alleged as follows:

> It is further stated that the said property (having reference to the Texas Wonder) is branded and labeled "Texas Wonder, Hall's Great Discovery, contains 43 percent alcohol before diluted, 5 percent after dilution," and "Texas Wonder, Hall's Great Discovery for kidney and bladder troubles, diabetes, weak and lame back, rheumatism, dissolves gravel, regulates bladder trouble in children; one small bottle is two months' treatment, seldom fails to cure any case above mentioned. Dr. E. W. Hall, sole manufacturer, St. Louis, Missouri."

It is further alleged that on the circular it reads:

> For kidney and bladder trouble, rheumatism, kidney diseases; Texas Wonder, Hall's Great Discovery has been employed successfully in rheumatism, diabetes, kidney and bladder troubles, cases of gravel and other kidney diseases appears from the following sworn testimony and evidence.

The claimant of the 60 dozen bottles, more or less, of Texas Wonder alleges that the medicine will in fact do exactly what is represented that it will do, and that it is in no sense misbranded as in said libel charged, and as proof whereof he offers sworn testimony of parties who have taken the same and benefited thereby as to its claim in its brand of which the Government complains.

These, gentlemen, are the issues made by the pleadings in this case, and it is upon these issues which you have heard testimony from the witness stand, and it is from such testimony and evidence and facts and circumstances in evidence that you will reach your conclusion, as I have indicated, being guided and controlled as to the law of the case by the charge of the court.

Section 8 of the Pure Food and Drugs Act, as amended by the act of August 23, 1912, reads in part as follows:

> That the term "misbranded," as used herein, shall apply to all drugs or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular. * * *
>
> That for the purposes of this Act an article shall also be deemed to be misbranded:
>
> In the case of drugs:
>
> Third. If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent.

That is, the article shall be deemed misbranded under the terms of this law if its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances therein, which is false and fraudulent.

You have heard the evidence in this case, gentlemen; I need not review it before you. You have heard the argument pro and con upon this suit. I will be of what assistance I may in construing this statute and giving it application to the facts as they have been presented to you from the lips of the witnesses on the witness stand. You have heard the witnesses testify as to certain ailments, and to the fact that they have, among other remedies, secured and availed themselves of what is designated as Hall's Great Discovery, Texas Wonder. On the wrapper or carton containing the bottle, which is

the customary method of getting the medicine to the public, is the following:

The Texas Wonder, Hall's Great Discovery for kidney and bladder troubles, diabetes, weak and lame back, rheumatism, dissolves gravel, regulates bladder trouble in children; one small bottle is two months' treatment and seldom fails to cure any case above mentioned.

You have heard from the physicians who have testified before you under oath the various diseases that are met with and commonly affect the kidneys and the bladder; you have heard them testify in regard to weak and lame backs, and it is in the light of their testimony, as well as the testimony of the defendant and the various witnesses introduced by the defendant, that you will determine whether or not the statement which I have read to you from the label is in any particular false and fraudulent; whether or not any part of this label, in the light of the facts adduced from the lips of the witnesses, is in any particular either false or fraudulent.

It is not difficult to grasp the object of our lawmakers in placing this law or enactment upon the statute books. It is for the protection of our citizens, to prevent medicine, through false statements made for the purpose of gain on the part of the person making them, and by which the individual citizen will be mulcted and defrauded by the purchase of goods which are misrepresented to him or to her. At the same time, the law is placed there on the statute books for the benefit and the protection of those who have remedies which they wish to submit to the citizenship of the country through the various channels of trade, and at the same time receive the protection of the law for their candid, true, and straightforward statements with regard to the result to be expected from the use or taking or the application of the medicine, or whatever pursuit it may be.

The evidence before you—I say this, I think, having considered it carefully and deliberately—is not, on the part of either party to this action, of the most convincing nature. It is not of a nature which is calculated to carry conviction to one who is reaching a conclusion on such evidence and facts and circumstances in evidence, about the correctness of which there can be no question whatever. The question is whether or not it is true in each and every particular thereon, every statement thereof. Witnesses have taken the stand and testified that they had weak backs, or testified that they had trouble with their liver or with their kidneys, and that they were benefited thereby. I believe some said that they were cured thereby, but the question is whether or not this treatment, as stated in the advertisement, seldom fails to cure any case above mentioned, which includes a number of cases, and I have reviewed them to you two or more times. The owner is not upon trial for a violation of the law in a criminal sense, but we are here to determine whether or not the original owner, the one who shipped out these cartons, is entitled to their return from the United States; they having been libeled by the United States, because he has been wrong, and because no such misstatement as it is claimed by the United States occurs in this advertising—that is the question. Is there a false and fraudulent misstatement made in the advertisement which I have read to you, and which you have been considering for days, which justifies and warrants the United States in taking hold of and appropriating this 60

dozen bottles of Texas Wonder? Is there such false and fraudulent misrepresentation here as justifies the jury in saying these bottles should be appropriated and set aside, put aside, should not be returned to the owner thereof, who is here in court before you gentlemen claiming them? That is the function which you are to perform, sitting as judges of the facts.

Now, if you believe from the evidence, by a greater weight and preponderance thereof, that the advertisement contained in the paragraphs which I have read to you, is, and the statement contained in such advertisement regarding the curative and therapeutic effect of such article—that is, these bottles of Texas Wonder, or any of the ingredients or substances contained therein, are false and fraudulent—then in that event you will deny the application of the intervener to have these 60 dozen bottles, or thereabouts, returned to him. On the other hand, if you [do not] believe—if you do not find from the evidence and facts and circumstances in evidence, by a preponderance of the evidence—that the statement concerning the therapeutic and curative effect of this remedy was false or misbranded—false and misbranded—then and in that event your verdict will be in favor of the claimant.

There must be in the advertisement or statement concerning drugs contained in the carton a statement made which in its nature is false and which is fraudulently made. Now, then, did it seldom fail to cure any of the ailments stated in the face of the statement, concerning which—concerning the drug, did it or did it not? That is for you, gentlemen, to decide. If it did fail, was the statement falsely placed there?

You gentlemen are the exclusive judges of the witnesses and of the facts proved by the testimony given in evidence. If there is anything about the testimony of a witness that you hesitate about believing, you may take that into consideration. Does he testify fully and frankly, or does he exhibit a desire to see one side rather than be perfectly fair? You gentlemen, not the court, are the exclusive judges of the credibility of the witnesses and the weight to be given to their evidence, and of the facts proved by their evidence.

I believe I have covered in sort of a desultory and rambling way all the issues in this case. You gentlemen will take the case, and if you find against the claimant Hall you will simply say, "We, the jury, find for the United States." If you find for the claimant, your verdict will be, "We, the jury, find claimant entitled to the sixty dozen bottles", or whatever the portion is, "of the Texas Wonder."

Are there any suggestions?

Mr. ATWELL. No suggestions except the formal exception to the refusal of these special charges.

The COURT. I think I have given you this, although I will read it. You are instructed that inasmuch as the Government charged the medicine was falsely and fraudulently branded, it is necessary to prove this allegation, and if you do not find that proven by a preponderance of the testimony, you will find for the claimant.

Now, then, gentlemen, I feel that I should say that evidence pertaining to that is not only—is almost entirely circumstantial evidence, and circumstances which tend, either tend to or do not tend to prove—what were the ingredients of the medicine; what is the

testimony as to whether or not they would cure the different ailments set forth and described in the writing or printing on the carton. Are these true? If not true, why was it put there? Is it false? If you should say, "Yes", then was it fraudulently done? What inspired the fraud, if, perchance, there was fraud? I am simply making these suggestions in order that you may have the views and mind of the court to assist you upon your deliberations. You will retire to your room, gentlemen, select your own foreman, and try to let your verdict reflect the truth of the transaction.

UNITED STATES v. 1,500 CASES OF TOMATO PULP

(District Court, S.D. New York, July 10, 1918)

N.J. No. 6411

Libels under section 2 of the Food and Drugs Act. Motion to release samples of product to claimant granted. Jury trial. Verdict in favor of the United States.

The United States attorney filed two libels for the seizure and condemnation of 1,000 cases and 500 cases, each containing 4 dozen cans of tomato pulp, alleging that the article had been transported from the State of Maryland into the State of New York, and remained unsold in the original unbroken packages, and that it was adulterated in that it consisted in part of a filthy, decomposed, and putrid vegetable substance.

Thereafter the Booth Packing Co., claimant, by its attorney, filed its motion for an order directing the marshal to release to said claimant 20 samples of the product for the purpose of analysis. Said motion was granted upon certain conditions, as will more fully appear from the following opinion of the court (Manton, *District Judge*):

No authorities are cited by counsel, nor do I find any, which require the United States to submit samples of the tomato pulp in question to the claimant's counsel or their experts for analysis and investigation. It is a privilege accorded the claimant by the United States attorney, and the conditions upon which such an examination is allowed in this case are liberal. If a limited number of cans are taken from each and these be deemed representative of the entire shipment, it should be satisfactory to the claimant. The proof will not require examination of each particular can in order to work a forfeiture to the libellant.

The motion will be granted upon these conditions.

The consolidated case then came on for trial before the court and a jury, and the following charge was delivered to the jury:

GRUBB, *District Judge*. Gentlemen of the jury: It is necessary for me in the first place to call your attention to the fact that there are two cases being tried by arrangement, as one case under this testimony, under which separate verdicts are required to be rendered by you, although, of course, the result of the one verdict will be the same as the other; that is, the same evidence applying to each, we will have a verdict of the same kind with reference to both cases.

The first case is 377. In that case the Government of the United States seeks to condemn a shipment of 500 cases of tomato pulp which was seized, as has been described to you. In no. 378, the other case, the Government seeks to condemn 1,000 cases of tomato pulp seized as has been described to you. As I say, those two cases are before you for decision upon the same testimony, but in order to keep the record straight it is necessary for you to render a separate verdict in no. 377, and a separate verdict in no. 378, although the verdict will be of the same tenor and effect in each case, as the evidence is the same, and therefore should produce in your minds the same result in each case.

Now, these are both cases that arise in this way: The Government has seized and by these libels seeks to condemn these shipments of tomato pulp upon the idea that they were shipped in interstate commerce in violation of the Pure Food and Drug Act, passed by Congress. After the seizure of one of the shipments the Booth Packing Company intervened and claimed the shipments, and that makes that litigation, and the controversy between the Government on the one hand, and the claimant, the Booth Packing Company, on the other hand, and the only question involved is whether these shipments are subject to seizure under the Pure Food and Drug Act.

As a condition to any such seizure it is necessary that the seized shipment should travel in interstate commerce, because Congress has no jurisdiction over food products except as they enter into interstate commerce, therefore, the preliminary question would be, except for the concession that I will call your attention to, whether these shipments entered into interstate commerce before their seizure. But it is conceded on the record that the shipments had entered into interstate commerce and were in interstate commerce at the time of the seizure, so you need not trouble yourselves with that question, since it is conceded on both sides that that is the case.

It is further conceded that the samples that have been used; that is, the cans that were used for the purpose of investigation, were parts of the two shipments and were fairly representative of the other cans in the shipments. In other words, to avoid the impossibility of investigating each can, it comes before you that the cans that had been produced are fairly representative of the shipments, and that they were taken from the shipment. Their identity, as far as the shipments are concerned, is conceded, and that they were fairly representative of the shipments is conceded.

Now, the Pure Food and Drug Act affecting interstate shipments prohibits shipments of food products that are either putrid, filthy, or decomposed. In this case the Government lays no stress on the word "putrid." It does claim that this tomato pulp was filthy and decomposed; filthy, as I understand it, because it had sediment in the bottom of it, and decomposed because it was made from what the Government claims was decomposed stock when it was originally made.

Now, those are the questions that are presented for your decision, whether the shipments in question were either filthy or decomposed in the sense claimed. The burden is on the Government to reasonably satisfy you from the evidence, of one of those two propositions, either that they were filthy or that they were decomposed. If

it has reasonably satisfied you of either the one or the other, then the product is subject to condemnation. If it has failed to satisfy you that the product was either filthy or decomposed, in other words, if you do not believe it was filthy, and do not believe it was decomposed, then the claimant is entitled to your verdict.

Now, what "filthy" means outside of its being synonymous with decomposed, is what it means in ordinary use, that is, a product that is unclean, foul, and dirty. Whether you believe that this proof relating to the sediment which has been testified was seen, would bring the product within that description, is for you to say. It must be filthy in the sense I have defined, that is, dirty, unclean, and unfit for use by reason of its uncleanly condition.

Passing from that for a minute, the other thing that the Government lays stress on is that this product was decomposed within the meaning of this law, and decomposed within the meaning of the law means decayed or rotten, using these words in their ordinary acceptation, that is, what you or I would call decayed or rotten in ordinary conversation. That is the significance to be applied to the terms of the statute, and not the scientific meaning of decay or the scientific meaning of decomposition, which means a different thing from what is understood in ordinary conversation.

It is not essential, of course, in order that you should find that the product was decomposed within the meaning of the statute, that the Government should show that it was, by reason of that decomposition, injurious to health, because its shipment in interstate commerce is prohibited if it is decomposed, and that applies without reference to the effect of the decomposition on the health of the consumer. Congress may have intended to conserve the taste of the consumer in preventing shipments of decomposed food products in interstate commerce, that is, it may have been the intention of Congress to preserve the consumer against the use of decayed products from the points of taste rather than from the point of health. However that may be, there is no qualification in the statute which limits the denomination of this class of stuff to such products as injure health. If they are decomposed within the meaning given you, the common acceptation, even if they have no deleterious effect on health, the shipment then comes within the inhibition of the statute.

The Government claims that they were decomposed, because it claims that the product was made from rotten tomatoes, and therefore the result must be that the product itself is rotten. The Government has not, and of course could not, introduce eyewitnesses to testify to the character of stock that went into these particular shipments of tomatoes. It does not ask you to arrive at your conclusions from the testimony given by witnesses who have seen the original tomatoes that made up the product, but they ask you to arrive at your deduction in the reverse way—that is, by determining by analysis what is in the product, and by an inference, which it claims is a legitimate inference, arrive at a conclusion that the stock must have been rotten that went into the product because of the character of the product itself.

The evidence tends to show that there are three things which cause rot in vegetable matter of this kind—bacteria, yeast, and mold.

The Government has placed no reliance on any excess of bacteria or yeast as rot producers in these tomatoes. Dr. Howard testified that his examination developed that there was no excess of bacteria and no excess of yeast, and therefore he made no further examination, and the Government does not rely on either of those as causes of rot, which, it claims, existed in this product. Its reliance is placed on an excess of mold in the product, and it claims the evidence shows that this was produced by rotten tomatoes. As I said, it does not get that conclusion by showing by witnesses what the tomatoes looked like before they went into the product, because that naturally would be impossible, but it claims that you have a right to deduce from the fact that it has shown, as it claims, that there was an excessive mold in the product, and that mold produces rot, that therefore there must have been rot in the tomatoes. This method on arriving at that, as I understand, is designated as the Howard method.

That method is this: A microscopic analysis is made of the product or a sample of the product, and a count of the mold field is made, microscopically, from the specimen of the product. After having arrived at the number of fields shown in the specimen the Government has its first premise. Then, under this method, experiments are made on stock that it actually has seen of sound tomatoes, and partially rotten tomatoes, and wholly rotten tomatoes, and by these experiments the Government seeks to convince you that there is a relation between the mold count and the character of the original stock as to rot. In other words, it has caused experiments to be made in cases where it could see the condition of the stock, and has caused microscopic analyses to be made of the amount of mold in a product where it has seen the stock, and thereby arrive by experiment at what it deems the rule as to the relation between the number of fields showing mold count in the product and the character of the stock in the product. It claims that it shows that there is a relation between the mold count, the fields containing mold, and the character of the stock that entered into the product which was the subject matter of the experiment.

In applying that rule to this case, where it has not seen the stock, they claim that, if it shows a certain number of fields showing mold count in the experiment, they can, by this rule, show the relation between the number of fields showing mold count and the rot in the original stock.

As I understand the contention of the Government's witnesses, it is that a percentage of something like 66 percent of mold count would indicate a percentage of rot in the product of something like 6 percent; that thereafter the percentage of rot rapidly increases; when the mold count increases above 66 percent the percentage of rot in the original product increases rapidly, and for that reason they say that it is fit to use a stock containing less than approximately 6 percent, but have prohibited a stock that contains a greater proportion than 6 percent.

You have heard the testimony of Dr. Howard as to the mold count taken from these shipments, and you have heard the testimony of

the claimant on that subject matter. It is for you first to determine what you believe from the evidence to be the character of this product as to the quantity of mold indicated by this microscopic analysis. Then it is also your duty, having done that, if you can do it, to determine what the proportion of rot in the product would be under that rule, if the rule is the correct one, from the amount of mold you determine the product to contain according to this count by microscope. If, after having done that, you arrive at the conclusion that the product itself is rotten in the sense of the statute, that is, that it was made from rotten stock, and was therefore rotten itself and within the prohibition of the statute, then the Government would prevail. If you are unable to do that, or, if you believe that on the contrary it was not made from rotten stock, then the claimant would prevail.

Of course, your ability to do that and the Government's case depend upon the accuracy of the Howard method and its correct applicability to the specimens in question and to the tomato pulp in question. Each of these matters are questions of conflict in testimony—whether the Howard method is a correct one, and whether it was correctly applied to these specimens. That it is a correct method and was properly applied is asserted by the Government and disputed by the claimant.

In the first place, the claimant contends that the specimens analyzed are not fairly representative of the shipment, not in the sense that the cans from which the drops were taken are not fairly representative, because that is conceded; but the Booth Packing Co. claims that the drops taken from the cans were not properly taken or not properly prepared to make them representative samples of the shipment or the cans from which they came. That is a matter which the Government disputes. The Government contends that they were properly taken and were properly representative of the cans from which they were taken. You have heard the criticisms with reference to that. The claimant's witnesses, or some of them, criticised the kind of instruments used by Dr. Howard. Then, with reference to the shaking, you have heard the criticism of Dr. Brooks that a severe shaking was likely to give inaccurate results, whereas the Government's witnesses testified that that is the only way you can properly prepare a sample to get accurate results. Those are questions of fact in conflict that you are to determine.

Then the claimant contends that the sample itself, or the number of drops, whatever the evidence shows were analyzed under the microscope, were themselves too small a quantity of the original shipment to be fairly representative of the character of the shipment. The Government, on the other hand, claims that they were fairly representative. That is a question for you to determine under the evidence, with the understanding, of course, that you are to do it in the light of science, so far as it relates to the use of the microscope, and not be swayed by reason of any prejudice that you may have against it. You are to look at the matter in the light of science, as arrived at, at the present time. If you find that the method was properly applied, your next inquiry would be whether the method

itself is a correct one in the sense that it gives fairly accurate results, that is, from the mold count you can fairly arrive at the amount of rot in the stock, which, of course, would indicate rot in the product.

Now, the method itself is criticised, on the one hand, by the claimant, and is asserted to be correct by the Government. You have heard the evidence as to the experiment that has been made to support its accuracy, experiments made by the Department of Agriculture for the purpose of arriving at whether an accurate method could be discovered to show the relation between the mold in the product and the rot in the stock. You have heard the testimony of Dr. Howard with relation to the experiments he made, and these other witnesses for the Government, some of them in the Government Department, and some in private business, who testified to the experiments they had made, having seen the stock, and determining the percentage of rot in the stock, then having analyzed the product of tomato pulp after it was made, and having counted the mold field in the product, the percentage of mold fields in the product, and having done that often enough, they contend, to have shown that there was an approximate fixed relation between the number of mold fields in the product and the percentage of rot in the stock. The claimant contends that there is no such relation, and that experiments based on that would be unreliable for that reason; that there is no relation between them which can be determined with any accuracy, between the number of mold fields, as determined by the microscope, in the product, and the percentage of rot as determined by weight or by the eye, or any quantitative way of getting at it, in the stock from which the product was made. In addition to that you have heard discussion pro and con as to the reputation among scientists as to what is called the Howard method, and it is for you to take into consideration that testimony, and make up your minds as to which has the better reason, in your judgment. It is also proper for you to consider the evidence relating to the use of this method by practical canners, as to whether it is general or not, and the weight you will give to the method because of its having been in use by canners as a method of arriving at conditions of the stock from the count of mold fields in the product.

Then the claimant introduces evidence of a chemical analysis as distinguished from a microscopical analysis, and claims that the chemical analysis was in conflict with this Howard method or its application as applied in this case. As against that, the Government contends that the chemical analysis of Dr. Brooks, who was the witness that testified on that subject, was an unreliable one, and that not sufficient time was taken in the way provided by the Government in making that kind of experimental analysis; also the Government's contention is that no chemical analysis can with any reliability show the relation between the rot and the original stock, and the amount of mold as shown by the count of mold fields in the product, or that any chemical analysis of tomato pulp can indicate how much rotten stock was used.

On the one hand the claimant's position is that chemical analysis can do that, while the Government contends that owing to the nature

of the tomato, no chemical analysis of tomato pulp can show with any certainty whether there was rot in the tomatoes or not from which the pulp was made.

Those, as I recall, are the general contentions on the one side and the other, and the answers of each side to the other's contention. Of course those contentions must be supported by the evidence which has been introduced before the jury, and in arriving at which contention to adopt you must look to the evidence as introduced. You should try this case on the evidence and not by any prejudices you may have one way or the other about the matter. Your inquires are restricted to determining which contention is the correct one based on the evidence introduced since this trial began up to the time when both sides rested. That evidence includes the oral testimony of the witnesses, the scientists, the experts, and those who testified to the fact. Also the physical exhibits that have been introduced, the tomatoes themselves, the inspection which you made of them under the microscope, and all the exhibits which have been introduced before you for the purpose of enlightening you as to the correct result. Also the documentary evidence, which includes the scientific pamphlets which have been introduced, upon the idea that men of recognized ability, scientists—that what they write or say about a thing is some evidence, and the jury may look to it as persuasive that what is contained therein is true as a matter of fact.

Then you have a right to look at the evidence as to the conditions in the Booth Packing Company's factory. On the one hand, you have heard the testimony of Dr. Howard, as he says, on August 20, as to the absence of sorting, method of cleaning, etc. The claimant's contention is that on that day they did not make any tomato pulp, and that therefore it was not required to sort, because that was not the practice when tomatoes were canned as whole tomatoes and no pulp made.

You have also heard the description of the premises by the claimant's witnesses as to the character of the machinery, cleanliness, and sanitary methods adopted, and from that and all the other evidence I have mentioned, you are required to make your minds up on this issue, which is the ultimate issue in the case, whether you are reasonably satisfied from the evidence that these shipments were either filthy or decomposed. If you are reasonably satisfied from the evidence that they were either filthy or decomposed, one or the other, in the sense defined to you, and the sense intended by Congress when it enacted this Pure Food and Drug Law, then the Government, as the plaintiff in this case, is entitled to your verdict. If you are not reasonably satisfied from the evidence that they were either filthy or decomposed—that is, if you fail to find that they were filthy and fail to find that they were decomposed, then the claimant is entitled to your verdict. The Government must establish its case by a preponderance of the evidence to your reasonable satisfaction; not beyond a reasonable doubt, because this is a civil case. It simply relates to whether the property, the tomato pulp in question, shall be condemned, and the interest of the claimant divested by your judgment.

UNITED STATES v. 1,300 CASES OF VINEGAR

(District Court, D. Nebraska, July 20, 1918)

N.J. No. 6563

Libel under section 10 of the Food and Drug Act. Trial before the court. Libel dismissed.

The United States attorney filed a libel for the seizure and condemnation of 1,000 cases, and 300 cases, each containing 24 bottles of vinegar, alleging that the article had been shipped and transported from the State of Kentucky into the State of Nebraska, and charging adulteration and misbranding. The article was labeled in part, "Blue Grass Belle Brand * * * Pure Apple Cider Vinegar."

Adulteration of the article was alleged in substance in the libel for the reason that distilled vinegar or added dilute acetic acid and material high in reducing substances had been mixed and packed therewith so as to reduce, lower, and injuriously affect its quality and strength, and had been substituted in part for the article.

Misbranding of the article was alleged for the reason that the statement, to wit, "Pure Apple Cider Vinegar", was false and misleading, and deceived and misled the purchaser into believing that he would be purchasing pure apple cider vinegar, whereas, in truth and in fact, it was not pure apple cider vinegar; and for the further reason that it was an imitation of, and was offered for sale under the distinctive name of, another article.

WOODROUGH, *District Judge.* I am persuaded in this case that there were many suspicious circumstances that fully justified the libel being brought, but I am not persuaded that the evidence is sufficient to justify me in the condemnation of the product.

I find that the testimony of the experts is very persuasive; that their practical experience has shown them that good vinegar ought to have certain properties, that in a wide field of investigation have always shown up, that the particular vinegar in question does not have, but that the reasons why it does not have them are purely conjectural and speculative. So now I am left without any foundation to determine why this particular vinegar does not show the properties that these men, after years of experience, find exists in vinegar in general.

I find that the vinegar is manufactured under circumstances that practically put the seal of secrecy on it. Mr. Blakemore is able to testify only from information and belief. As to the elderly man who does supervise the manufacture of the vinegar, however, his testimony is positive. He says there was no adulteration, and sticks to it through a long cross-examination that there was no adulteration. He speaks of the physical difficulties which, in his mind, make it almost an impossibility that there should be, in any practical way, any adulteration.

I find many suspicious circumstances, however. It seems to me a suspicious circumstance that the chemist of this company should

concern himself so particularly, time after time, in analyzing the product to see whether or not it came up to the standard set forth in circular 19. What did he care about that fact, if it was made out of pure apple cider? He seems to have had some purpose in making these investigations. The circumstance looks suspicious to me; looks as though, if he knew it was made out of pure apple cider he wouldn't be concerned with the analysis, as far as that particular circular is concerned, giving as his only excuse that it was a good feeling to have to find that it happened to tally up with the definition in that circular. That is an analysis that had been made, which is admitted by all parties not to be a true analysis, a complete analysis, of cider vinegar, showing all its component parts, because all the parties here admit that there is another part found in this vinegar, and practically all vinegar, that is made by the fermentation process.

But I am unable to reach a conclusion with a sufficient degree of certainty or positiveness to overcome the positive testimony of the man who made the vinegar in question, and to order its condemnation.

I find plenty of opportunity. I find a good deal of incentive in the business conditions existing, where there was such a great discrepancy between the amount manufactured in this particular year, and the amount in other years, and the difficulty of getting apples this year. Seventy thousand gallons against 250,000 gallons would perhaps offer a great incentive. Ample opportunity in the fact that both kinds, the clear white vinegar and the other, were being made in the same place—undoubtedly ample opportunity—sufficient motive—very persuasive circumstances in the analyses that are made by these men who have devoted years to this study, but a lack of certainty sufficient to justify final condemnation.

Therefore there will be a dismissal of the libel.

UNITED STATES v. KAR-RU CHEMICAL CO.

(District Court, W.D. Washington, July 26, 1918)

N.J. No. 8021

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.[4]

The United States attorney filed an information against the Kar-Ru Chemical Co., alleging shipment from the State of Washington into the State of Oregon of quantities of articles labeled, respectively, "Kar-Ru" and "Gon-Nol", and from the State of Washington into the State of Oregon of quantities of articles labeled, respectively, "Kar-Nitum" and "Kar-Kol", all of which were misbranded.

Misbranding of the article labeled "Kar-Ru" was alleged for the reason that certain statements, appearing on the label of the article, falsely and fraudulently represented it to be effective as a remedy for rheumatism, for kidney, liver, bladder, stomach, and catarrhal troubles, for mental and physical debility, neuritis, eczema, blood

[4] Affirmed, *Kar-Ru Chemical Co.* v. *United States,* p. 970, post.

diseases, irregular menstruation, and the most acute and chronic rheumatic afflictions, when, in truth and in fact, it was not.

Misbranding of the article labeled "Gon-Nol" was alleged for the reason that certain statements, appearing on the label of the article, falsely and fraudulently represented it to be effective as a remedy for gonorrhea, to penetrate the nerve centers to the source of the trouble, to cause a reaction of vital forces, and to stir up latent primary disease due to suppression, and to eradicate from the system the life-destroying gonorrheal germs and their toxins in both the acute and chronic states, when, in truth and in fact, it was not.

Misbranding of the article labeled "Kar-Nitum" was alleged for the reason that certain statements, appearing on the label of the article, falsely and fraudulently represented it to be effective as a remedy for tuberculosis in cattle, for the prevention of tuberculosis in animals, as a relief for tuberculosis in the early stages, to penetrate the nerve centers, to fortify the system against disease germs and their toxins, and to eradicate tuberculosis from the system, when, in truth and in fact, it was not.

Misbranding of the article labeled "Kar-Kol" was alleged for the reason that certain statements, appearing on the label of the article, falsely and fraudulently represented it to be effective as a remedy for cholera in hogs, as a preventive of cholera in hogs, as a relief of cholera in hogs, to fortify the system against disease germs and their toxins, to reach the source of and to eradicate the cholera germ, as a preventive of cholera and other diseases, as a remedy for cholera and diarrhea in man, and as a relief for cholera and diarrhea in man, when, in truth and in fact, it was not.

CUSHMAN, *District Judge* (charge to jury). Gentlemen of the jury: You have had the issues in this case explained to you for several days. I do not deem that it is necessary to outline at any great length the indictment in the case. You will have it with you in the jury room, and it has also been explained to you. These four kinds of medicine here—each kind is made the subject of a different count in the indictment. There are four counts in the indictment, and the defendant company is charged with having moved in interstate commerce, between this State and Oregon, packages of these different remedies named in the different counts in the indictment. It is charged that the labels on these parcels contained representations regarding the curative and therapeutic effect of the substances contained in the packages which were false and fraudulent.

The defendant has entered a plea of not guilty to the information, which places the burden of establishing the truth of every material allegation of at least one count in the indictment upon the prosecution, the burden requiring that they should establish the truth of every material allegation by evidence sufficient to convince you beyond a reasonable doubt before you could return a verdict of guilty. If you have reasonable doubt, taking each count by itself, as though it were a separate indictment, if you have a reasonable doubt concerning any material allegation in each count of this indictment, it would be your duty to return a verdict of not guilty. If you have no reasonable doubt concerning any material allegation in any count of the indictment, it would be your duty to return a verdict of guilty as to that count.

You will understand that these labels that were described in the indictment and that appear upon the exhibits contain representations that the contents would cure a number of diseases, and, of course, it would not be necessary to prove that the entire label, that all of the representations on the label regarding the curative and therapeutic effect of the contents were false and fraudulent; it would be necessary before you could return a verdict of guilty upon any count to find beyond a reasonable doubt that at least there was one representation upon the label regarding the therapeutic and curative effect of the contents that was false and fraudulent.

The defendant, as I understand it, both at the time the admissions were made and from the argument of its counsel, admits a number of matters set out in the indictment; admits that these packages were sent in interstate commerce with the labels upon them as charged; but the gist of the defense, as I understand it, is that the defendant denies either that there was any statement regarding the therapeutic or curative effect of any of these medicines on these labels that was false, and denies that, if any such representations were false, they were fraudulently made; and it seems from the argument and the whole trend of the case that your attention will be narrowed to those two propositions.

It is not required of the court to charge you as to what is false. It is about as simple as the English language can make it; but it is charged not only that these representations were false but that they were fraudulent. Now, a fraudulent representation may be defined about as follows—that is, one man represents to another that something is true. To be a fraud, that representation must be false and the party who makes it must know that it is false; he must make it with the intention that the other party will act upon it, relying upon it as being true, and parts with his money; he must have been injured or defrauded of his money to that extent. That is what is meant by charging that the representations regarding these medicines were fraudulent. To apply it to one of the representations, as I understand it, mentioned in the information and contained in one of these labels, the statement that this Gon-Nol would eradicate the germ of gonorrhea from the human system; that statement, before you could convict upon that alone, would have to have been false—that is, that the medicine would not have had that effect. The defendant company must have made the statement knowing that it was false, or, at any rate, having no ground to believe that it was true, having made it so recklessly and wantonly, with no honest belief that it was true. The representation must have been made in such a way and with the intention that people would purchase the medicine believing it would eradicate from the human system the germ of gonorrhea, and that, acting upon that belief, if any person purchased it acting upon that belief, that person would be swindled out of his money. That would have to be all established so as to convince you beyond a reasonable doubt before you could find that that particular representation was fraudulent.

There is no presumption arises against the defendant by reason of the fact that it has been indicted or placed on trial before you. Every presumption of law favors the innocence of the defendant, and this presumption of innocence continues throughout the trial

until such time as the prosecution has produced evidence sufficient to break down the presumption and overcome it and convince you of the truth of every material allegation in at least one count in the indictment by evidence beyond a reasonable doubt.

Reasonable doubt, as used in the foregoing instruction and as used in the other instructions which I will read to you, means just what the words mean; that is, a doubt that is based upon reason, a doubt for which you can give a reason. It does not mean every possible doubt, because it is almost impossible to establish a particular truth, and especially the truth of the assertions that rest in opinion regarding men's ailments and what cures them to an exact certainty and beyond all possibility of a mistake, but it does mean more than mere probability or mere preponderance of evidence.

Reasonable doubt has sometimes been defined as such a doubt as a man of ordinary prudence, intelligence, and determination would allow to cause him to pause or hesitate in one of the more important transactions connected with his own affairs. If you have such a doubt on a material matter that was disputed in any count of the information, it would be your duty to give the defendant the benefit of that doubt and acquit him; if you have no such doubt, it would be equally your duty to convict.

I will read you certain instructions which I have been requested to give:

This case is a prosecution for violation of that part of the Pure Food and Drugs Act known as the Sherley Amendment. The information sets out four counts, each alleging a distinct and separate offense by appropriate allegations. You will take this information with you to your jury room and may refer to it for specific knowledge of the material allegations therein. The defendant, however, has not required the Government to produce proof of the formal allegations, but has admitted them to be true, but has pleaded not guilty to each and every of the four counts of the information, and this plea raises the issue as to every material allegation in these counts contained, except as the formal allegations are admitted. By these admissions the issues are narrowed substantially to two questions. The first is, Do the several preparations put upon the market in interstate commerce by the defendant in fact contain curative agents for the several ailments set forth upon the labels of these respective preparations? If you find from the evidence that each and every of these preparations do in fact contain such curative agents, your verdict will be not guilty under each and every count of the information. If you find as a fact that one or more of these preparations does not in fact contain such curative agents, then, as to such preparations, it will be necessary to consider the second question in the case, which is: Did the defendant in fact believe that the preparation in question would be effective in alleviating the ailments for which its label says it is intended to be used?

It is not proper in such a case as this to try to rival well-established schools of medicine, and, if you find that the defendant has only used in its several preparations homeopathic remedies for the alleviation of ailments, then your verdict should be not guilty, and you will not be called upon to consider any other question in the case.

If you find, however, as a fact that some or all of the preparations put upon the market by the defendant do not, in fact, contain remedial agents used in any school of medicine for the relief of the ailments for which it is put upon the market, then you will be called upon to consider the second question in the case and that is: Did the defendant honestly believe that such remedy would have a curative effect upon the ailments for which it is offered to the public? The law requires that the Government must prove beyond a reasonable doubt, not only that the statements upon the labels are false, but also that the statements are fraudulent. The statements may be false and not fraudulent. To be considered fraudulent within the meaning of the law requires that the defendant should either know that the remedy which he offers to the public is of no

curative value or that he represents it to be of curative value recklessly and without caring whether it would cure or whether it did not, for the purpose of defrauding his customers and getting their money for an article which he knew in fact, or ought to have known, was of no value. If you find from the evidence that the defendant honestly believed and had reasonable ground to believe that his remedy was of curative value, then your verdict must be not guilty, no matter if in fact the remedies were worthless from a medical point of view.

The other instructions are in a series of four, and the law is stated in a series of four, the first applying to the first count and the same principle of law and the second one applying also to the second count, so they will have a great deal of sameness, but there being four counts in the indictment, I am going to read the law applying to the principle in each count, in series:

Gentlemen of the jury: You will recall that the Government alleges that the following statement in count I as to Kar-Ru was false and fraudulent: "Kar-Ru, The Constitutional Remedy for Rheumatism—it is effective in Kidney, Liver, Bladder, Stomach, and Catarrhal Troubles, Mental and Physical Debility, Neuritis, Eczema, Blood Diseases, Irregular Menstruation, and the most Acute and Chronic Rheumatic Afflictions."

It is unnecessary for the Government to prove that all of these statements were false and fraudulent. If you believe beyond a reasonable doubt that any one statement as to the curative or remedial properties of this medicine was false in fact, and that the defendant knew that it was false, you may find the defendant guilty under count I. If the defendant honestly believed it would have the effect stated, it is not guilty.

The Government alleges that the statement in count II, that Gon-Nol is a remedy for gonorrhea, and that this remedy eradicates from the system the life-destroying gonorrheal germs and their toxins, in both the acute and chronic states, was false and fraudulent.

You are instructed that it is unnecessary for the Government to prove that both of these statements were false and fraudulent. If you believe beyond a reasonable doubt that any one statement as to the curative or remedial effects of this medicine was false in fact, and that the defendant knew that it was false, you may find the defendant guilty under count II. If defendant honestly believed it would have the effect stated, it is not guilty.

The Government alleges that the statements in count III on the label as to Kar-Nitum, in the following language, "Kar-Nitum, Tubercular Remedy for Cattle. Kar-Nitum is a scientifically prepared remedy for the prevention of Tuberculosis in animals and the relief of the disease in the early stages. It penetrates the nerve centers and fortifies the system against disease germs and their toxins—Give until the disease germ is eradicated from the system," were false and fraudulent.

You are instructed that it is unnecessary for the Government to prove that all of these statements are false and fraudulent. If you believe beyond a reasonable doubt that any one statement as to the curative or remedial effects of this medicine was false in fact, and that the defendant knew that it was false, you may find the defendant guilty under count III. If defendant honestly believed it would have the effect stated, it is not guilty.

The Government alleges that the statements in count IV on the label as to Kar-Kol, in the following language, "Kar-Kol, A Remedy for Hog Cholera, Kar-Kol is a scientifically prepared deep-acting remedy for the prevention of cholera in hogs, and the relief of the disease, in the early stages. It penetrates the nerve centers, and causes a reaction of the vital force, produces a proper digestion and assimilation of natural elements and food substances, fortifies the system against disease germs and their toxins. By its broad and deep action, it reaches the source of trouble and eradicates the cholera germ. It acts as a preventive of cholera and other diseases, * * * Good for Humans—For cholera, or diarrhœa in humans, take one half teaspoonful once a day, dry in mouth, and repeat daily until relieved", were false and fraudulent.

You are instructed that it is unnecessary for the Government to prove that all these statements were false and fraudulent. If you believe beyond a reasonable doubt that any one statement as to the curative or remedial effects of this medicine was false in fact, and that the defendant knew that it was false, you

may find the defendant guilty under count IV. If defendant honestly believed it would have the effect stated, it is not guilty.

Here is another series of four:

As to count I, if you believe beyond a reasonable doubt that Kar-Ru is not the constitutional remedy for rheumatism, and is not effective in kidney, liver, bladder, stomach, and catarrhal troubles, mental and physical debility, neuritis, eczema, blood diseases, irregular menstruation, and the most acute and chronic rheumatic afflictions, and that the defendant must have known this, you may find the defendant guilty under count I. If defendant honestly believed that it would have the effect stated, it is not guilty.

As to count II, if you believe beyond a reasonable doubt that Gon-Nol is not a remedy for gonorrhea, and does not eradicate from the system the life-destroying gonorrheal germs and their toxins in both their acute and chronic states, and that the defendant must have known this, you may find the defendant guilty under count II. If defendant honestly believed it would have the effect stated, it is not guilty.

As to count III, if you believe beyond a reasonable doubt that Kar-Nitum is not a scientifically prepared remedy for the prevention of tuberculosis in animals and the relief of the disease in the early stages, and does not penetrate the nerve centers, and fortify the system against disease germs and their toxins, and does not eradicate disease germs from the system, and that the defendant must have known this, you may find the defendant guilty under count III. If defendant honestly believed it would have the effect and was as stated, it is not guilty.

As to count IV, you are instructed that if you find that Kar-Kol is not a remedy for hog cholera, and if you further find that Kar-Kol is not a scientifically prepared, deep-acting remedy for the prevention of cholera in hogs, and the relief of the disease in the early stages, and if you find that it does not penetrate the nerve centers and cause a reaction of the vital force, and does not produce a proper digestion and assimilation of natural elements and food substances, and does not fortify the system against disease germs and their toxins, and by its broad and deep action it does not reach the source of the trouble, and does not eradicate cholera germs, and does not act as a preventive of cholera; and if you further find that Kar-Kol is not good for humans for cholera and diarrhea, and that the defendant must have known this, you may find the defendant guilty under count IV. If defendant honestly believed it would have the effect and was as stated, it is not guilty.

You are instructed that if you find beyond a reasonable doubt that Kar-Ru is worthless for any one of the things for which it is labeled, and that the defendant knew this, you may find the defendant guilty under count I. If it honestly believed it was in all things as stated, it is not guilty.

You are instructed that if you find beyond a reasonable doubt that Gon-Nol is worthless for any one of the things for which it is labeled, and that the defendant knew this, you may find the defendant guilty under count II. If it honestly believed it was in all things as stated, it is not guilty.

You are instructed that if you find beyond a reasonable doubt that Kar-Nitum is worthless for any one of the things for which it is labeled, and that the defendant knew this, you may find the defendant guilty under count III. If it honestly believed it was in all things as stated, it is not guilty.

You are instructed that if you find beyond a reasonable doubt that Kar-Kol is worthless for any one of the things for which it is labeled, and that the defendant knew this, you may find the defendant guilty under count IV. If it honestly believed it was in all things as stated, it is not guilty.

If you find beyond a reasonable doubt that the statement that Kar-Ru is the constitutional remedy for rheumatism, and that it is effective in kidney, liver, bladder, stomach, and catarrhal troubles, mental and physical debility, neuritis, eczema, blood diseases, irregular menstruation, and the most acute and chronic rheumatic afflictions, was absolutely false, and was made by the defendant with a reckless and wanton disregard as to whether it was true or false, you may find the defendant guilty under count I. If it honestly believed it was in all things as stated, it is not guilty.

If you believe beyond a reasonable doubt that the statement that Gon-Nol is a remedy for gonorrhea, and that it eradicates from the system the life-destroying gonorrheal germs and their toxins in both the acute and chronic states, was absolutely false, and was made by the defendant with a reckless and wanton

disregard as to whether it was false or true, you may find the defendant guilty under count II. If it honestly believed it was in all things as stated, it is not guilty.

If you believe beyond reasonable doubt that the statement that Kar-Nitum is a tubercular remedy for cattle and that Kar-Nitum is a scientifically prepared remedy for the prevention of tuberculosis in animals, and the relief of the disease in the early stages, and that it penetrates the nerve centers, and fortifies the system against disease germs and their toxins, was false, and was made by the defendant with a reckless and wanton disregard as to whether it was true or false, you may find the defendant guilty under count III. If it honestly believed it was in all things as stated, it is not guilty.

If you believe beyond a reasonable doubt that the statement that Kar-Kol is a remedy for hog cholera, and that by its broad and deep action it reaches the source of trouble and eradicates the cholera germs, and acts as a preventive of cholera and other diseases, and that it is good for humans for cholera and diarrhea, was false, and was made by the defendant with a reckless and wanton disregard as to whether it was true or false, you may find the defendant guilty under count IV. If it honestly believed it was in all things as stated, it is not guilty.

You will understand that the instructions that I have given you are to be taken as a whole. These written instructions omitted some of the requirements that I stated to you in my oral instructions which were necessary to constitute fraud. You will understand that the written instructions are amended by the oral instructions and that these requirements are necessary in addition to what I read to you.

You are in this case, as in every other case where questions of fact are submitted to you for determination, the sole and exclusive judges of every question of fact in the case, the weight of the evidence, and the credibility of the witnesses. In weighing the evidence and determining the amount of credit that should be given the different witnesses who have come before you and testified it is your duty to take into account their appearance, the appearance of each witness, and the manner, demeanor, and conduct of the witness in giving his or her testimony, whether the witness earnestly appeared to be telling you the exact truth, carefully avoiding saying anything that apparently the witness did not believe and avoiding exaggeration, or whether the witness may not have appeared to you as reluctant, evasive, hesitating, trying to keep from telling you what the witness claimed to know; whether a witness may not have struck you as being too willing, too free, running along and injecting information that the witness claimed to have into the case about which no one had asked; also you will take into consideration the testimony of each witness by itself, whether it appears to be likely, probable, reasonable under all the circumstances, whether it is corroborated by other evidence where you would expect it to be corroborated, if it were true, or whether it is contradicted by other evidence in the case. You will also take into account the situation in which each witness was placed in relation to the things about which he or she testified, as one witness might be much better situated to know the exact facts than another who was equally anxious to tell you the truth. You will also take into account the interest that any witness may be shown to have in the case, either as shown by the manner in which the witness gave his or her testimony or by the relation of the witness to the case. Mr. Hebb, having taken the stand in behalf of the defendant company, of which he is the sole stockholder, you should apply to his testimony the same tests as you do to the testimony of other witnesses, including his natural interest in the case.

DR. J. H. McLEAN MEDICINE CO. v. UNITED STATES

(Circuit Court of Appeals, Eighth Circuit, Oct. 28, 1918)

253 Fed. 694; N.J. No. 6362

In error of the District Court for the Eastern District of Missouri. Judgment reversed.[5]

HOOK and STONE, Circuit Judges, and MUNGER, District Judge.

MUNGER, *District Judge.* The plaintiff in error, hereafter called the defendant, was convicted of a violation of the Food and Drugs Act of June 30, 1906 (34 Stat. 768), as amended by the act of August 23, 1912 (37 Stat. 416), under an information charging an interstate shipment of drugs that were misbranded. The information charged that defendant had shipped an article called "Dr. J. H. McLean's Liver and Kidney Balm," and the misbranding charged was with reference to a number of statements made on the label on the bottle, on the carton in which the bottle was contained, and in circulars enclosed with the bottles regarding the curative or therapeutic effects of the medicine, which statements were alleged to be false and fraudulent.

The first assignment of error argued challenges the overruling of a motion in arrest of judgment. The defendant claims that the information states no offense under the statute because it is not charged that the statements made were known by the defendant to be false and fraudulent. The information alleged that these statements were applied by the defendant to the article knowingly and in reckless and wanton disregard to their truth or falsity. This was a sufficient description as against a motion in arrest of judgment of an intent to deceive which made such statements fraudulent. The allegations of the information need only be so specific as fairly to inform the defendant of the crime intended to be alleged and to make available a plea of former acquittal or conviction if a second prosecution were instituted for the same offense. Rev. St., sec. 1025; *Simpson* v. *United States*, 241 Fed. 841; *Dosset* v. *United States*, 248 Fed. 902.

In the instructions to the jury on the question of the fraudulent character of the statements made by defendant the court inadvertently said, that—

> One who makes a false statement, not knowing whether it is true or false, is as guilty of wrong as the man who makes a false statement knowing it is false.

An exception was saved to this instruction. This portion of the charge was erroneous, as it permitted the jury to find that the false statements were fraudulent, although the defendant honestly believed them to be true. In cases of this character there must be proof of an actual intent to deceive, an intent that may be inferred from facts and circumstances, but which must be proved. *Seven Cases* v. *United States*, 239 U.S. 510; *Eleven Gross Packages, etc.* v. *United States*, 233 Fed. 71; *Samuels* v. *United States*, 232 Fed. 536. Other portions of the charge correctly stated the rule as to the good faith of the defendant, but did not purport to correct the portion of the charge we have

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[5] Reversing *United States* v. *J. H. McLean Medicine Co.*, p. 850, *ante*.

quoted and did not cure the error, for the jury were at liberty to follow the erroneous portion of the instructions. *Mills* v. *United States*, 164 U.S. 644.

Complaint is made of the refusal of an instruction tendered by defendant to the effect that evidence of the good reputation of the defendant might be considered on the question of its guilt and might alone be sufficient to raise a reasonable doubt of such guilt. The court gave an instruction that this evidence might be taken into consideration with the other testimony. This was the practical equivalent of the instruction requested and was sufficient. *Sandy White* v. *United States*, 164 U.S. 100.

As a part of the Government's case some well qualified physicians were called as witnesses and asked if a drug composed according to the formula used by defendant in preparing this article would, in their opinions, be effective for the treatment of the diseases for which the defendant's labels and statements claimed it was effective treatment, and after answering that it would not be effective, they testified that there was no difference of opinion among medical men on that subject. Objections were made to this testimony, and it is urged that it calls for the opinion of the witnesses, for a conclusion that only the jury could properly make, and that no conviction could be based on such matters of opinion. The testimony that there was a general agreement of medical opinion as to the therapeutic effect of such a preparation and what that general medical opinion was, was properly admitted to show the falsity of the statements made by defendant. *Seven Cases* v. *United States*, *supra; Eleven Gross Packets*, *etc.*, v. *United States*, *supra; Simpson* v. *United States*, *supra; Samuels* v. *United States*, *supra; Moses* v. *United States*, 221 Fed. 863. The testimony of the physicians as to their individual opinions of the efficacy of the preparation would have been properly rejected, if there had been disclosed a difference of medical opinion on the subject, as a conviction could not properly rest upon a claim of fraudulent statements, when they were based upon mere matters of opinion on such debatable subjects; *School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94; *Bruce* v. *United States*, 202 Fed. 98. But a mere concurrence of such witnesses' opinions with the uniform course of medical opinion was not open to that objection.

To combat the theory of the prosecution that the statements of the defendant as to the therapeutic efficacy of its medicine for certain diseases were not founded in honest belief, the defendant offered in evidence a number of testimonials it had received. The defendant's president testified that he was the manager of its business and had found some of these testimonials in the company's safe when he had taken charge in 1911, and that others came to the company since that time. The Government's counsel objected to the offer because the testimonials had not been shown to be genuine and because the writers were not shown to have been qualified to state the nature of the disease from which they suffered. The court excluded them as not competent nor material. The defendant claims they were admissible to show the good faith of the defendant in preparing its challenged

statements. If these letters had related to the statements made and had been seen by the defendant's manager and he believed them to be genuine and in that belief he had put forth the statements in issue, they would have been admissible on the question of intent without proof of their execution or of the truth of their subject matter. *Harrison* v. *United States*, 200 Fed. 662; 4 Chamb. on Evidence, sec. 2649. As none of the testimonials are contained in the bill of exceptions, we can not say that they were pertinent to the particular statements of defendant in issue, and they were not material in any event on this record, because the witness did not testify that he relied upon them. The only question answered by him as to his faith in the medicine was asked "on the basis of those letters or any other information you had." There is no error shown in the exclusion of this line of evidence.

One other assignment of error relied upon, that the court erred in refusing to direct a verdict for defendant because there was no evidence of a fraudulent statement, requires a brief statement of the charge in the information and of the evidence in its support. The information after alleging a misbranding of defendant's medicine by reason of false statements made in reckless and wanton disregard of their truth or falsity, set forth the statements made relating to the curative or therapeutic effects of the medicine for a very large number of diseases. One of the statements will suffice as an illustration, as follows: "Gall stones—Dr. J. H. McLean's Liver and Kidney Balm will aid in dissolving the gall stones so that they may pass away." The defendant admitted the making of this statement. Competent medical men testified that no known medicine would aid in dissolving gall stones in the human body and that there was no difference in medical opinion on that subject. There was no evidence to the contrary. The president of the company, who had had the management and conduct of the business since 1911, and had dictated its policy in every way, testified that he did not know and had never attempted to learn the therapeutic action of any of the ingredients of defendant's medicine, and that he was neither a druggist nor a doctor. As heretofore indicated, he based his belief in the general efficacy of the medicine on some source which was not definitely disclosed. The defense offered evidence to show that the Secretary of Agriculture, a year and a half before that shipment had notified the defendant that the label on the bottle containing this medicine appeared to be misbranded with reference to the statement about gall stones and about other diseases, because the medicine contained no ingredient capable of producing the therapeutic effects claimed for it. This was sufficient evidence to require the court to submit to the jury the charge made in the information of a reckless disregard of the truth or falsity of the statements. *Eleven Gross Packages* v. *United States*, *supra*; *Samuels* v. *United States*, *supra*; *Moses* v. *United States*, *supra*. Because of the error in the instructions of the court, the judgment is reversed and a new trial awarded.

UNITED STATES v. ONE GROSS PACKAGES OF "A TEXAS WONDER"

(District Court, S.D. Georgia, Jan. 11, 1919)

N.J. No. 7657

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict in favor of the United States.

The following charge was delivered to the jury:

EVANS, *District Judge.* This is a proceeding instituted under what is known as the Pure Food and Drugs Act. Congress enacted a statute the purpose of which is to protect from imposition people and the public, against people who wanted to take advantage of the public by imposing upon them deteriorated or misbranded goods.

This proceeding is what is known as a libel in rem, upon information of the district attorney, wherein it is alleged that a certain product, or medicine, known as "A Texas Wonder", in the jurisdiction of this court, had been transported in interstate commerce from the city of St. Louis, Mo., to the city of Macon, Ga., and that this product was misbranded; that the carton, the box in which the product was contained, bore the statement: "A Texas Wonder, Hall's Great Discovery. Contains 43% alcohol, before diluted; 5% after diluted. The Texas Wonder, Hall's Great Discovery, for Kidney and Bladder Troubles, Diabetes, Weak and Lame Backs, Rheumatism, Dissolves Gravel, Regulates Bladder Troubles in Children." The libel alleges that that constituted a misbranding, in that this compound did not have the therapeutic effects that it is represented to have, and that the statement on the carton that it did have such therapeutic effect was false and fraudulent. Now, under this libel, certain quantities of this product were seized; and the originator or manufacturer of the compound has filed a claim. In that claim he traverses the allegations of the Government, and contends that no false statements were contained in the carton. Now that is the issue for you to try.

There is a stipulation between the district attorney and counsel for the claimant, which relieves you of passing upon some questions in the case. It is agreed that the product described in the libel, as amended, was shipped in interstate commerce as set forth in the libel, and that the said product was secured from the consignee as described in said libel by an inspector of the Bureau of Chemistry of the United States Department of Agriculture, and that it was sealed and delivered to an analyst, Nathan K. Nelson, in the identical condition in which it was collected by the inspector.

The issue thus left from the pleadings for you to determine is whether or not the statements on the carton are false and fraudulent. You are instructed that it is necessary for the Government to prove that such statements are false and fraudulent, the burden is upon the Government; and if you do not believe the Government has proved this by a preponderance of the testimony you will find for the claimant.

In passing upon that issue you are the judges of the evidence and the credibility of the witnesses. In determining the credibility of

any witness you may consider his appearance and demeanor upon the stand, his interest or want of interest in the case, his prejudice or bias, if any appears, his means and opportunity of knowing the facts to which he testifies, the reasonableness or unreasonableness of the testimony. All of these matters may be considered by you in determining whether any witness has sworn truly or falsely. You should impute perjury to no witness. If you find there is any conflict in the testimony, determine whether the conflict is real or apparent; if the conflicts are only apparent, it would be your duty to reconcile them; if they are real and irreconcilable, ascertain the truth of the case, and there base your verdict.

The contention of the Government is that this statement is false, and it becomes necessary, in that connection, for me to construe for you the meaning of this statement, the branding on this carton. "A Texas Wonder, Hall's Great Discovery * * * for Kidney and Bladder Troubles, Diabetes, Weak and Lame Backs, Rheumatism", is not a statement that it is a specific for the cure of those diseases, but it is a statement that it is recommended that it would have a therapeutic or curative effect in the treatment of those diseases. The further statement, that it dissolves gravel, is a statement of fact; it is an assertion, an affirmative assertion of the originator of this compound, that it will have the effect, if taken according to directions, of dissolving gravel in the human body; and also that it will have the effect of regulating bladder trouble in children. That is the statement upon this carton. It is recommended that it will have a therapeutic effect in the treatment of kidney and bladder troubles, diabetes, weak and lame backs, and rheumatism; it is a statement of fact that it dissolves gravel and regulates bladder trouble in children.

Now, the first question for you to determine is whether or not that statement is false. The Government has introduced as a witness the chemist, and, according to my recollection of his testimony, he says that this compound or concoction consists of three main ingredients; that is, that he found pine oil and alcohol, and I believe copaiba, and found rhubarb and colchicum in combination. That is simply my recollection; if you differ with me, of course your recollection controls. The chemist says that these are in the proportion that he testified, consisting of a very large percent of alcohol and some water, less than 50 percent of the medicinal ingredients. On that question the claimant joins issue with the Government. He testifies that it contains certain other ingredients, the nature of which he did not disclose; that under the Pure Food and Drugs Act it is improper on the part of the Government to require a disclosure of the contents of his formula. That is one of the questions for you to decide—whether or not that product has been analyzed chemically correct; whether or not the analysis given by the chemist contains, substantially, the medicinal ingredients alleged, or whether he has omitted some important drug which the claimant contends is in it. That is the first question.

In passing upon the question as to the alleged falsity of the statement you may consider the testimony of the doctors, the medical men, brought forward by the Government, as to whether or not a concoction containing the ingredients described by the chemist has any therapeutic effect for the treatment of the diseases named on

this carton. The doctors testify that they have no really curative effect. They say, further, as to some diseases, they are structural and not functional, and that they are incurable by any medicine known to the pharmacopœia; they contend, and they swear, that such diseases as chronic Bright's, or tuberculosis of the kidney or bladder, are incurable by any known medicinal aid. The claimant in this case joins issue with these gentlemen. You are to pass upon that question—as to whether or not those diseases are curable, and whether or not any of them would be remedied or relieved by the use of this medicine. If you believe that the Government has established that it had no curative or therapeutic effect, then that would be a false statement; and then you would go to another phase of the case, which I will charge you further on.

Now, the defendant produces a number of nonprofessional witnesses, who testify that they had on various occasions various disorders, and that they took this compound with beneficial results; and that it had not been misbranded, because in their own experience it had distinctly beneficial therapeutic effects. The Government contends that that testimony is not to be accepted in lieu of the testimony of doctors, professional men, for the reason that these witnesses are nonexperts, and are not supposed to know the anatomy and physiology of the human system; that they are not prepared to say whether the disease was idiopathic, or organic, or whether it was simply a symptom of some diseased condition. For instance, take the disease commonly called dropsy; it is frequently referred to as an independent disease, when it is known that dropsy is one of the symptoms of Bright's disease, and in the last stages of cirrhosis of the liver; and when a man says he has dropsy he would not say whether he had cirrhosis of the liver or Bright's disease. On the other hand, it is contended by the claimant that these witnesses had serious disorders, and that they were manifested by certain symptoms; and that irrespective of their diagnosis, professional diagnosis, that they were suffering from these diseases, and that they were relieved.

You take all this into consideration and determine whether this particular compound has a therapeutic effect in the treatment of these diseases for which it is recommended.

With reference to one of these diseases, it is a statement of fact—that it will have the effect of dissolving gravel. The Government contends that that is a false statement—that there is no formula, no medicine, taken into the human system that will have the effect of dissolving gravel but what would also destroy the tissues of the body, and that that statement is absurd. The claimant denies that contention. That is one of the questions for you to consider, that is, whether that is a false statement. If this compound will not dissolve gravel, then that is a false statement. On the other hand, if it will dissolve gravel, it is not a false statement.

The Government does not charge that colchicum cannot be used as a remedial agency, under certain circumstances; neither does it insist but what rhubarb may have its use in the medical pharmacopœia, but the Government contends that the union of these various ingredients into this product, of the character established—that although they may have a use for some particular purpose, when

brought together, as in this compound, they have no therapeutic effect, as recommended in this label.

If you reach the conclusion on this question that that is a false statement, the next question you would consider is whether or not it was a fraudulent statement.

The word fraudulent means guilty intent; that is, that the claimant intended to defraud those who should buy Hall's Great Discovery, Texas Wonder. If he honestly believed that Texas Wonder would do what he claimed it would do, then it was not fraudulently misbranded, within the terms of the law, and you should find for the claimant. If you should find that it is a false statement, then in passing upon the question as to whether it was also fraudulent, you may take into consideration the chemical contents of the concoction as proven. You may consider also the therapeutic skill and knowledge of the originator of the concoction. The claimant admits that in his early life he was deprived of educational advantages, except in the common school; that he did not attend a medical college; that he is not a doctor. He contends that he stayed with doctors, went around the country with them, rode with them, and associated with them. He contends that he was afflicted with certain disorders of the nature that he recognized this compound to be a beneficial medical agent for; and that experimenting upon himself and upon others he discovered that this union of the ingredients would be beneficial in the treatment of the diseases named on this carton; and that in that way he derived a good technical and medical knowledge of them. You take into consideration the fact as to whether a man without chemical knowledge, without laboratory experience, can medicinally understand the remedial effects of such drugs as this concoction is shown to have had in it; and determine whether or not that testimony is to be relied upon and accepted in preference to the chemist's who made the laboratory test, the chemical analysis.

There is another element that enters into the question of fraudulent intent, and perhaps the controlling element—as to whether or not this claimant honestly believed that this concoction was a cure—not a specific—but would have a remedial, a therapeutic effect upon the persons suffering with the diseases named on the carton. If he believed that, if you find that it was an honest transaction in that respect, then he would not be guilty of fraudulent intent. In passing upon that question you take into consideration all the facts of the case; determine as to whether his knowledge is that of a person who understands the effect of it, or whether or not it is the statement of a mere faker or charlatan who desires to impose upon the public a formula for sale for the making of money.

Other matters may be considered by you in determining as to the fraudulent intent; one matter as to the wording of the statement on the carton. It seems that the claimant has been engaged in the manufacture of this compound for several years, and that, perhaps, there has lately been some change in the carton; at one time he having on the carton "Dr. E. W. Hall." The Government contends that that is a circumstance going to show that he was undertaking to impress people with the fact that he was a doctor; and it seems that that has been taken off. The Government contends further that the marking, "Hall's Great Discovery"—I believe—

has been taken off. The claimant contends that the reason he did that was that he wanted to comply with the demands of one of the Bureaus of Agriculture; and that more recently he has taken off that part of the label which says it will dissolve gravel, although he still firmly believes that it will dissolve gravel; that he removed that from the more recent cartons. You may take all the circumstances, and determine whether or not there was any fraudulent intent, or whether he was putting it out in the honest belief that it would have all the therapeutic effects it is recommended to have.

Now, it is not necessarily a question as to whether this compound would have a harmful or a harmless effect on people who took it. It may be that those ingredients would have no effect at all; or they may have a harmless effect. That is for you to determine; but the main issue is whether or not they would have the therapeutic effect, that is, whether it was a beneficial formula, a medicinal aid, as recommended on this carton—whether or not that is false, and whether or not it was made with the intent to defraud.

There has been some allusion to two former trials, one in St. Louis, Mo., and the other one in Texas. The trial in St. Louis was a criminal case, and in that case the defendant was acquitted under instructions from the court. The trial in Texas was a condemnation proceeding, similar to that engaging the attention of the court at present. In the Dallas, Tex., case the jury condemned this medicine as being contained in a carton, which had on it a false and fraudulent statement. That trial occurred some time in July. Now this shipment which is before you, under investigation, was some months after that, I believe the 24th of August. You may consider that testimony, and the information or knowledge given to the claimant in that case—what he derived from the trial of that case as to the Government's contention as to the actual contents, and if you find the Government's contention true about it, that they had no therapeutic effect for the diseases recommended, then, if after that trial he continued to put it upon the market, you can consider that circumstance as bearing on the question as to whether there was any intent to defraud the people by putting the article on the market.

UNITED STATES v. 1,590 CASES OF TOMATO PULP

(District Court, E.D. Pennsylvania, Jan. 23, 1919)

255 Fed. 228

Proceeding by the United States against 1,590 cases of tomato pulp. On Government's motion for decree for costs. Motion denied.

DICKINSON, *District Judge.* This proceeding is founded upon the Food and Drugs Act of June 30, 1906, ch. 3915, 34 Stat. 768. The record discloses a libel and answer. The issues thus raised were never determined, because of a very practical situation which arose. The obstacle thus presented to the proceedings being pushed to a conclusion was borne of the fact predicament that the expense of the cus-

tody of the things which had been seized exceeded all money value which the questions at issue could possibly have to the respondents. In consequence of this they acquiesced in the Government's securing a successful conclusion of the proceedings. The question of expense had by this time become of such practical importance that the United States now asks for a decree in personam against the respondents for costs, included in the taxation of which is the expense to which reference had been made. The respondents deny such personal liability. A working arrangement was then reached by which the proceedings could terminate in a decree in favor of the United States, with this question of the liability of the respondents reserved to be determined by the court. This presents the question involved in the present motion.

The Food and Drugs Act, among its obvious purposes and objects, has in view the condemnation of food articles, if unfit for consumption as food. The act contemplates the seizure of the articles, and eventually their possible destruction after condemnation. There is a provision for the further possible fact situation that the articles, although properly subject to condemnation because unfit for food, consumption, may have a value for other uses, and any claimant of the articles may have possession of them by giving bond that no future use of them will be made which is prohibited by law. The proceedings are initially by libel, and by the tenth section of the act are required to conform "as near as may be" to proceedings in admiralty. There would seem to be no doubt that the proceeding in the first instance is one in rem. The practice indicates this by the libel being filed wholly against the rem.

The question arising in this case does not ordinarily arise, for the reason that, when a claimant intervenes, he accompanies his intervention with a bond, under the conditions of which he has made himself responsible for costs. His liability is in further consequence a contractual liability, and hence no question of its existence arises. In the present case no such bond was given, and its absence is the absence of contractual liability. The question before us, therefore, is not whether the claimant is liable for costs when he has agreed to be so liable, but whether he is liable without such an agreement; in other words, whether in a proceeding in rem a decree in personam for costs can be entered against him. Notwithstanding that the proceeding in its origin is a proceeding in rem, as under section 10 it is to follow like proceedings in admiralty, and as we have in admiralty practice proceedings both in rem and in personam, and a proceeding which begins as a proceeding in rem may be transformed into a proceeding in personam, the like change may occur in these proceedings.

We thus reach one of the subsidiary questions which arises. The Food and Drugs Act is not only unquestionably a penal statute but it is highly penal. We therefore cannot read into it the imposition of anything which partakes of the nature of punishment which is not to be found in the law. Moreover, in looking for the meaning of the law in the sense of what was intended by Congress, as it is evidently intended that property may be destroyed, and therefore whatever value it has be lost to the owner, it is fair to assume that,

if Congress had intended that, in addition to suffering this loss, the owner should also be at the expense of the proceedings, it would have so enacted in clear terms. It would follow from this that liability for costs, if not to be found directly in the act itself, could not be found by indirect search for it in the admiralty practice.

The Supreme Court has unquestioned statutory authority to enact and promulgate rules to govern admiralty practice. This power it has exercised. A pertinent rule is rule 26 (29 Sup. Ct. xlii). This relates to proceedings in rem. It contemplates that someone may intervene in the person of a claimant of the property libeled, and requires in the making of any such claim that he shall file a stipulation, with sureties, for the payment of costs and expenses, the payment of which by him may ultimately be decreed.

This rule in its terms is of no aid to us, because, in the present case, no such stipulation was entered. Counsel for the United States seem to concede that the liability for costs, if any, rests upon the following propositions: The rules promulgated by the Supreme Court are the equivalent of statutes and have the binding force of such. We are therefore to read into the law the provisions of rule 26. In further consequence a claimant cannot intervene, except upon condition that he stipulates to pay the costs and expenses. When, therefore, he does intervene, he makes this stipulation, and the fact that it is given without sureties, or is not in writing, does not affect the legal result, which is that he has stipulated to pay the costs and expenses.

Aside from the question before suggested of whether a liability which was not in the Food and Drugs Act could be thus inserted into it, the conclusion reached may be characterized as a non sequitur. It is true that the claimant cannot intervene without entering into the stipulation. It is not true, or at least not clear, that if he does intervene he enters into the stipulation. The truth would seem to be that if he does not enter into the stipulation he has not intervened, and if he has not intervened there can be no pretense that he has agreed to pay costs and expenses. The question suggested of what is the real situation may be answered by the test of applying a remedy for the omission. If a petition to intervene be filed without a compliance with rule 26, and a motion were made to strike the petition from the record, or if the claimant should ask leave to withdraw it, such a motion must prevail, and such leave would unquestionably be granted. The latter is in effect just what this claimant has done. He has abandoned his claim and withdrawn it. Had he done this promptly, the question now before us would doubtless not have arisen, and it may be said that leave to withdraw will be granted only on terms. In this view the question would remain. The test would be the same if the motion were to dismiss, and if this prevailed the whole basis for the argument is taken away. We prefer, however, to base the conclusion reached upon the more substantial foundation of the provisions of the Food and Drugs Act itself. As before stated, it has in view the possibility that the thing seized may be sold, and it provides that in such an event the costs and expenses shall be taken out of the proceeds of sale. It also has in view the possibility that the article seized may be decreed to be destroyed, in which event no provision is made for the liability of anyone for the costs and expenses. The decree here was to destroy.

The motion for the decree is denied.

UNITED STATES v. TETZ ET AL.

(District Court, W.D. Washington, Feb. 1, 1919)

N.J. No. 6874

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of not guilty.

The following charge was delivered to the jury:

CUSHMAN, *District Judge.* Gentlemen, you have had the facts thoroughly gone over before you by the arguments of different counsel, and it is the duty of the court before you go out to consider what verdict should be returned to instruct you upon the law.

This information is short. It charges the defendants with having shipped and delivered for shipment at Ridgefield, as I remember the name of the place, in the State of Washington, to be shipped to Portland, in the State of Oregon, a certain number of cans of milk which had been adulterated by having water substituted for the milk, and by having water mixed and packed with the milk, so as to decrease, lower, and injuriously affect the quality and strength of the milk.

To this information the defendants have entered a plea of not guilty. That places the burden upon the prosecution of establishing every material allegation of the information by evidence sufficient to convince you beyond a reasonable doubt. If you have a reasonable doubt concerning any material allegation of the information, it is your duty to give the defendants the benefit of the doubt and acquit them. The defendants you must consider separately; and if you have a reasonable doubt concerning the guilt of either one of the defendants, it would be your duty to give that defendant the benefit of the doubt and acquit him.

This law under which the information is drawn provides that if any person shall ship or deliver for shipment from any State to any other State any adulterated article of food he shall be punished.

Now, as I understand this testimony, there is not any particular dispute but what this milk was shipped and delivered for shipment at Ridgefield to be shipped to Portland, Oreg., that is, in interstate commerce. Of course milk is an article of food. While the defendants having entered a plea of not guilty, it is necessary that all of these things should be established; yet the real dispute in the case, as I understand it, is regarding whether, if this milk had water added to it in such a way as to lower or decrease or injuriously affect its quality and strength, whether the defendants, or any of them, had knowingly caused that to be done. This statute provides that an article of food shall be deemed, for the purpose of this act, to be adulterated if any substance has been substituted for the article. It is also provided that an article of food shall be deemed, for the purpose of this act, to be adulterated if any substance has been mixed and packed with the article so as to decrease, lower, or injuriously affect its quality or strength; and it is under that law that this information is drawn.

There is no presumption arises against the defendants by reason of the fact that this information has been filed and they have been

brought to trial before you. Every presumption of law is in favor of their innocence, and this presumption continues throughout the trial until such time as the evidence produced by the Government breaks down that presumption and overcomes it by establishing the truth of every material allegation beyond a reasonable doubt.

A reasonable doubt as used in this instruction means just what the two words mean. It is a doubt based upon reason; a doubt for which you can give a reason. The law does not require that before a verdict of guilty should be returned every possibility of mistake be eliminated from the case. Such degree of certainty is seldom ever arrived at in human transactions. But it does require that before you can arrive at a verdict of guilty against a defendant something more than a preponderance of the evidence should support the charge. That has been defined as beyond a reasonable doubt. A reasonable doubt has also been defined as being such a doubt as would cause a man of ordinary intelligence, discretion, decision, and sensibility to pause or hesitate in any of the more important transactions connected with his affairs. If you have such a doubt concerning one or more of the material allegations of the information, then you have a reasonable doubt, and it is your duty to give the defendants the benefit of that doubt and acquit. If you have no such doubt, it is your duty to return a verdict of guilty.

The court will read to you certain instructions that are requested [reads]:

The prosecution in this case is under what is known as the Food and Drug Act, and that part of the statute bearing on this case provides that any person who shall ship or deliver for shipment from any State to another State any food adulterated within the meaning of this act shall be guilty; and such food is adulterated within the meaning of the act, first, if any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength; second, if any substance has been substituted wholly or in part for the article.

The Government under this statute has charged that Gustav Tetz, Alfred Tetz, and William Tetz, Jr., trading as Tetz Bros., on the 20th day of February, 1918, unlawfully shipped and delivered for shipment from Ridgefield, Wash., to Portland, Oreg., a number of cans containing milk, and that such milk when shipped and delivered for shipment was adulterated in that water had been mixed and packed with the milk so as to reduce and lower and injuriously affect its quality and strength, and that such milk was further adulterated in that added water had been substituted in part for milk, which the article purported to be. You are instructed that the burden is upon the Government to prove all these allegations beyond a reasonable doubt.

The purpose of this act was to protect purchasers from injurious deceits by the sale of inferior for superior articles, and to protect the health of the people by preventing the sale of normally wholesome articles to which have been added substance poisonous or detrimental to health. Before you can convict the defendants it must be shown both that they intentionally added and mixed water with the milk and that the effect of adding to and mixing water with the milk was to reduce and lower or injuriously affect its quality or

strength, or by such substitution of water for milk they intended to deceive its purchaser into buying an inferior for a superior product. [Ends reading.]

In that connection I will instruct you that all persons are presumed to intend the natural and ordinary consequences of their voluntary acts.

[Resumes reading.] Crime or an unlawful act necessarily implies knowledge and intent. Our mistakes, accidents, and misfortunes carry a sufficient penalty of their own, and the law does not attempt to add additional punishment.

Under the information the Government charges that the Tetz Brothers unlawfully shipped and delivered for shipment from Ridgefield, Wash., to Portland, Oreg., this milk, and that such milk when shipped and delivered for shipment was then and there adulterated. By this language the Government necessarily implies that the milk must have been adulterated before the Tetz Brothers left it at the station for shipment, and the only way the Tetz Brothers could be held responsible for adulteration after its delivery at the station would have been for some third person to adulterate such milk afterwards with the knowledge and consent of said Tetz Brothers. If purposely adulterated by others without their knowledge or by accident they are not guilty.

If you find that some one else without the knowledge or consent of the said Tetz Brothers mixed water with this milk or removed some of the milk from the cans and substituted water therefor, then you must find the defendants not guilty; because the defendants are not responsible for the acts of third persons over whom they have no control.

If you find that the defendants did not adulterate this milk by the addition of water or by removing some of the milk from the cans and substituting water therefor, and that no one else so adulterated such milk with the knowledge and consent of the defendants, then the said defendants are not guilty as charged.

If you find that such tests are below normal and that the lowness of such tests are due to natural and not to any human agency, then such milk would not be adulterated as charged by the information and the defendants are not guilty.

You are instructed that this is not a prosecution of the defendants merely because their milk fell below some particular standard whether fixed by United States regulations or State law, and the fact that on some particular day their milk fell below such standard tests would not make them guilty; but the question for you to determine is whether they, by themselves or through some third person, added artificially water to this milk or shipped it after they knew it had been so watered. [Concludes reading.]

You are in this case, as in every case where questions of fact are submitted to a jury for determination, the sole and exclusive judges of every question of fact, the weight of the evidence, and the credibility of the witnesses. As I have instructed you in other cases, in determining the credit to be given to the different witnesses and in determining what the facts are from the evidence, you should closely heed the different witnesses as they come upon the witness stand, observe their conduct, demeanor, and actions as they give their testi-

mony, whether they impress you as showing by their manner that they were anxious to tell the truth and the whole truth, neither adding to it or taking from it, and whether they may not have impressed you as reluctant and evasive, holding back something and trying to keep from telling you all they claimed to know, or whether they may not have impressed you that they were too willing, running along and injecting something into the case that nobody seemed to care anything about and which they were asked no questions about. You will consider the testimony of each witness as to whether it appears to be unlikely, unreasonable or improbable, and as to whether it is corroborated by other evidence where you would expect it to be corroborated if true, or whether it is contradicted by other evidence. You will also take into consideration the situation in which each witness was placed as to enabling that witness to know the exact facts; as one witness might be much better situated and located to know what the facts were than another witness who was just as anxious to tell the truth. You will also take into account the interest that each witness has in the case, as shown by his manner of testifying or his relation to the case. The defendants having taken the stand in their own behalf, you will weigh their testimony by the same rules as that of other witnesses, including their natural interest in the case.

UNITED STATES v. 275 CASES OF MINERAL WATER

(District Court, W.D. Louisiana, Feb. 20, 1919)

N.J. No. 6623

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict in favor of the United States.[6]

The following charge was delivered to the jury:

JACK, *District Judge.* This is a suit brought by the United States under what is known as the Pure Food and Drugs Act for the seizure, condemnation and confiscation of 275 cases of Robinson Spring Water shipped from Pocahontas, Miss., to Shreveport, La.

The act makes it an offense to misbrand any drug shipped in interstate commerce. Section 8 of the act, as amended, provides:

SEC. 8. That the term "misbranded", as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

That for the purposes of this act an article shall also be deemed to be misbranded:

In case of drugs:

* * * * * * *

Third. If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent.

[6] Affirmed, *Bradley* v. *United States,* p. 964, *post.*

On the bottles of water are printed labels reading as follows:

Robinson Spring Water. Springs at Pocahontas, Miss. Recommended in the treatment of Bright's Disease, Diabetes, Dropsy, Cystitis, Gout, Rheumatism, Indigestion, Kidney and Bladder Troubles. Robinson Springs and Sanitarium Co., Pocahontas, Miss.

It is not contended that the water contains any deleterious substances, but that it contains no element of a thereapeutic or curative value in the treatment of the diseases for which it is recommended on the labels, and that such statements on the labels are false and fraudulent, knowingly and recklessly made in wanton disregard of their truth or falsity, for the purpose of creating in the minds of prospective purchasers thereof, the impression and belief that the water was in whole or in part composed of ingredients effective as a remedy for Bright's disease, diabetes, dropsy, and the other diseases named, when, in truth and in fact, such water was not capable of producing the therapeutic effects claimed for it.

C. L. Bradley has made an appearance in the suit, claiming the water as his property, admitting the interstate transportation of same, but denying that the bottles are misbranded, or that the labels thereon contain false and fraudulent statements. He avers that many reputable physicians have used the water in the treatment of the diseases named on the labels, and alleges that the same was beneficial in the treatment of such diseases. He especially avers that before putting the water on the market he had it thoroughly tested and made no attempt to sell any of the water until he had been advised by reputable physicians of its therapeutical value in the treatment of the diseases for which he recommends it. He avers that in labeling the bottles he acted in entire good faith and denies that he attempted to perpetrate any fraud or deception upon the public.

Thus by the pleadings the issue is made clear and distinct, and you are to determine under the evidence, first, whether or not the water in question any more than any other pure water is of curative value in the treatment of the diseases enumerated on the label. If you determine that it is, then there is no need for any further inquiry. Defendant would be entitled to judgment rejecting the demands of the Government.

On the contrary, should you find that the water in question was not of medicinal value in the treatment of the diseases named, then your second inquiry would be whether or not the recommendation made by the owner, of the use of the water in the treatment of the diseases named, was fraudulently made. That brings up the question of good faith. Did Bradley, or did he not, knowingly recommend in the treatment of these diseases water which had no medicinal value?

If you find that the water was not of value for the purposes recommended, but that defendant acted in good faith, then there should be a verdict in his favor; but, if you find that the water was not of value for the purposes recommended, to the knowledge of the defendant, and that his purpose was to deceive and impose upon the public, then you should return a verdict for the Government.

You will bear in mind that the Government does not attack the water as bad or unfit for use, but, on the contrary, admits that it is a pure water, good for table use, but denies that it has any value

in the treatment of the diseases for which it is recommended. The purpose of the suit is, therefore, not to suppress the sale of the water but to prevent the advertising and holding out of the water as of value in the treatment of diseases in which the Government claims it is of no benefit.

The Pure Food and Drugs Act is one of the best laws of its character placed on the statute books in many years. It simply means that a man shall correctly brand or label that which he ships in interstate commerce, that the purchaser must be informed of the character of the article bought, and must not be deceived as to its curative properties, in other words, that the drug must not be sold under false representations.

Barnum, the veteran showman, used to say that the American people like to be humbugged. That is, perhaps, more or less true. Consequently, a man who deliberately bets his money on a shell game, or who invests his savings in a gold brick, receives, and is entitled to, little sympathy. There is, however, a class of people, not ordinarily over credulous or gullible in ordinary matters of business, who, when stricken with a fatal malady, like drowning men, grasp at straws, and fall easy victims to quack doctors and patent medicine fakers. Such a man, when told by his physician that his case is hopeless and his days numbered, against his own better judgment, tries one nostrum after another in the desperate hope that he may find a cure. Such a man is the more easily persuaded to buy an alleged remedy whose efficacy he may doubt if he knows that it is at least perfectly harmless. These remarks are made to impress upon your minds the wisdom of the law and the importance of its strict enforcement.

If the water in question has the qualities attributed to it by the owner, it is not only his right to so advertise it but is to the interest of the public that he should do so. On the other hand, if the water has not the qualities ascribed to it, then such false advertising by labels on the bottles should be suppressed, and the deception of the public should be stopped.

These, then, are questions of disputed fact, of which you are the exclusive judges. This is not a criminal prosecution and the Government is not required to make out its case beyond a reasonable doubt. If the evidence establishes to your satisfaction the contentions of the Government, you should return a verdict for plaintiff, otherwise your finding should be for the defendant.

You may retire and consider your verdict.

UNITED STATES v. ITALIAN IMPORTING CO.

(District Court, S.D. New York, June 4, 1919)

N.J. No. 6938

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of not guilty.

The following charge was delivered to the jury:

MANTON, *District Judge*. Gentlemen of the jury: The Congress of the United States, for good and wholesome reasons, passed an act

which we have to do with here, known as the Federal Food and Drugs Act, and it is charged that the defendant violated the provisions of that act.

The grand jury for this district has found an indictment against the defendant, charging them with violations of this act in two counts. The first count of the indictment charges that the defendant shipped olive oil, in tin cans, from the city of New York to the State of Connecticut, and, therefore, that constituted interstate commerce in olive oil.

It is charged that this was delivered to the firm of Calcaterra & Son, Bridgeport, Conn. There was delivered a certain package, containing articles of food; that that package had a label upon it, and that that label, as you see it in the exhibit on the tin can which has been offered in evidence here, among other things it finds the contents was the net contents of 1 quart, but the Government says that that is a misbranding of the contents in that can, and that because it was not in truth and in fact a net contents of 1 quart, the statute has been violated.

It is further charged in the second count of the indictment that this food, contained in cans shipped and delivered as I have described it to you, was misbranded, in that the food in this package and that the quantity of the contents was not plainly and conspicuously marked on the outside of the package; that is to say, that the true quantity was not conspicuously marked on the outside of this package, this tin can.

Now, the term "misbranding" is defined in the statute as applying to all drugs and articles of food, or articles which enter into the composition of food, a package or label which shall bear any statement, design, or device regarding such article or the ingredients or substance contained therein, which shall be false or misleading in any particular.

So you see the question, then, is whether there was a false and misleading or a misbranding of this package, and the package which was shipped to this firm at Bridgeport, Conn., from New York City.

Now, if you find, gentlemen, from the evidence, beyond a reasonable doubt, that there was such a misbranding, that the net contents of the can which was shipped to Calcaterra & Son was not 1 quart, and if you find that the defendant knowingly and willfully placed a lesser quantity of olive oil in those cans, and shipped them in interstate commerce, then that would be a violation of the statute and you would find them guilty.

The second count of the indictment deals with what has been referred to as the amendment of the act. That provides that if it is in a package form and the quantity of the contents be not plainly and conspicuously marked on the outside of the package, in terms of weight, measurement, or numerical count, that is a violation of the act; that is to say, if the true contents of the quantity or measurement is not plainly and legibly found on the outside of the package, then that is a violation of the act.

The Government charges in the first count that they did print it as net contents of 1 quart, and that in truth and in fact it was not 1 quart, and in the second count of the indictment they charge that

the true net content, which the Government says was less than 1 quart, was not plainly and legibly written on the package or printed on the package on its outside.

Now, something has been said here about inadvertence or shortage due to inadvertence in filling the cans. The statute provides that reasonable variations shall be permitted and tolerances, and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provision of section 3 of the act, and that provides for rules and regulations which are made by the Secretary of Agriculture. Now, those rules and regulations permit a certain variation, but, of course, it does not permit willful conduct, or intentional or willful underweighing or undermeasuring of the contents; that is, placing and undermeasuring in the tin can or the package and then misbranding it and saying it is more than in truth and in fact it is, but inadvertence may be of importance in this regard only: If it is done in good faith, without intent to do wrong, without willful design to do wrong in the usual course of its business, in ignorance or in inadvertence filling these cans, and at underweight or undermeasurement, then you can see they would not be guilty, because no man under our law can commit a crime through a mistake. The commission of a crime depends upon a criminal intent. Of course, it is true that the law is that a man is presumed to intend the natural and flowing consequences of his act. So you must find out if this defendant intended to misbrand or misstate in its printing on these tins and packages the true weight or the true contents of the packages in question, and if they did, if you are satisfied of that beyond a reasonable doubt, then you will find them guilty. If you are not satisfied, and you have a reasonable doubt as to their guilt, then you will find them not guilty.

Now, reasonable doubt in the law, gentlemen, is a doubt which means just what that term implies. It means a doubt for which you can ascribe a reason. It is not a guess, a surmise, or a conjecture, or a reluctance to perform what may be an unpleasant duty. It is considering all of the evidence, weighing it, and after an honest, conscientious consideration of it, saying there is a doubt in your mind for which you can ascribe a reason. Then the law says if such doubt exists, you must accord the benefit of that doubt to the case and find the defendant not guilty.

The Government is obliged to prove its case beyond a reasonable doubt, and when it satisfies you of the guilt of this defendant, if it does, beyond a reasonable doubt, then, and then only, can you convict for the charge as specified in the indictment.

I think that covers all of the case, gentlemen. Questions of fact are solely for your determination. The court has no opinion as to questions of fact. I leave that to you. You will find a verdict of either guilty or not guilty, as you think the facts justify under your conscientious judgment.

JUROR No. 3. Can I ask the date of that act?

The COURT. Yes, 1913; the original act was 1909.

Mr. JOYCE. The original act was 1906.

The COURT. The amendment was in 1913.

UNITED STATES v. PARASKEVOPOLUS

(District Court, S.D. New York, June 6, 1919)

N.J. No. 6809

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

The United States attorney filed an information against Christ Paraskevopolus, alleging shipment by said defendant from the State of New York into the State of Massachusetts, of quantities of an article, labeled in part, respectively, "Finest Quality Olive Oil ¼ Gallon Net," and "Olive Oil Speciality Lucca 1 Gallon Net," which was adulterated and misbranded.

The following charge was delivered to the jury:

KNOX, *District Judge.* Gentlemen of the jury: In this case the defendant, who bears a lengthy Greek name which I shall not attempt to pronounce, is charged with trading and doing business under the name of the National Importing Company; and he is charged here with having sent a quantity of oil, which in fact was cottonseed oil, flavored with olive oil, from the city of New York to Boston, Mass., to a merchant from that city who has testified in court.

The statutes of the United States provide that whoever ships in interstate commerce adulterated food products or who ships food products which are misbranded or who ships food products in interstate commerce containing false and misleading labels, and upon which is not set forth accurately the weight and contents of the package, is guilty of an offense under the Food and Drugs Act.

This defendant is therefore charged by the Government in this case with having shipped adulterated food products; that he has misbranded his food products; that the label does not contain the net weight of the food products contained therein.

It has been argued before you that the Government by regulations that have been established by the Department of Agriculture allows a variation of weight in the contents of food packages; that is, that such an allowance is to be made and is recognized by the Government where the variation was more or less trifling and where the variation of weight of contents is in excess of the weight marked on the package along with instances where it has some with less; that is, that there should be a reasonable variation that would be liable to occur in the ordinary routine of business.

The Government in this case takes the position that there is a shortage running from 5 to 10 percent in each of these shipments of oil that have been called to your attention, and that therefore the defendant comes within the purview of the statute because there is no variation in favor I might say of the public or of the consumer of this oil who purchased it upon the assumption that the contents, either quarts or gallons, is such, as the case may be.

The oil is admittedly 90 percent, approximately, cottonseed oil and is flavored with approximately 10 percent of olive oil. The cans in

which the oil is shipped have been put in evidence before you, and it would appear from these cans, at least it would to me, to have the appearance—that is, the cans—to make you believe—but that of course is for you to determine—that they contained olive oil.

The purpose of the Food and Drugs Act was to protect the public. In the very nature of affairs, when we go to a grocery store to buy food of different sorts and different supplies, we have got to depend more or less upon the representations that are made to us as to the contents of packages of this kind and of course we have to rely upon those more or less, and Congress has assumed that the public relies more or less upon the label upon the container, and consequently has passed this regulation; and its purpose is that the dishonest person shall not deceive the public by their false labels, false notations of weight, or by the sale of adulterated foodstuffs; and in the event that merchants undertake so to deceive, that he who does that subjects himself or themselves to liability under the law.

This law is rather drastic in its terms, insofar as it does not require a specific criminal intent upon the part of the defendant to be shown. All that it is necessary for the Government to do in a prosecution such as this is to show that the person knowingly did or committed the prohibited act. Therefore, did he, the defendant here, ship the goods in question knowing that they were adulterated and containing labels which were calculated to mislead and deceive the public? And did he put upon the cans false weights which did not vary in favor of the public or which were not higher to a greater or less extent than the amount marked on the packages?

If from all the evidence in the case you find that the defendant has made these shipments, and you may so find beyond a reasonable doubt, then your verdict should be guilty. If he did not so make the shipments, your verdict will be not guilty.

You have, however, the evidence in the case here upon the part of the defendant's own witnesses that when this particular order came in, or rather was called to their attention, the order was called to the attention of the defendant, and that therefore his attention was drawn to it and that thereafter this shipment went forward. The defendant seeks to justify what he has done by the assertion that there was pasted across each of these cans a narrow paper strip which contained the statement that the contents of the package was cottonseed oil flavored with olive oil. You have heard the testimony of the Government inspector that when he saw these packages in Boston, there was no such strip upon any of the cans examined by him. You have heard the testimony of the consignee of the packages in question who said that he examined each of the cans and found no such strips upon any of the cans.

Now, even if you should find that the strip in the first instance was placed upon the can, then you can consider whether or not it was done as a mere subterfuge with the expectation and purpose that it would be taken off and that the oil was placed in these cans for the purpose of deceiving and misleading the public in any event. If you feel that the labels are of such a character that such a situation may reasonably be developed and that that situation was in the mind of the shipper so as to ultimately deceive and mislead a person who should ultimately purchase these cans, then you may find the defendant guilty.

He, of course, has the presumption of innocence with him until the evidence adduced in the case has determined in your mind that he is guilty beyond a reasonable doubt. A reasonable doubt is not a capricious doubt, one born of reluctance on the part of a jury to perform an unpleasant task, but is a doubt based upon and growing out of some lack of the evidence which leaves you short of a moral certainty of the defendant's guilt. If you have an abiding conviction of the fact that the defendant did ship the goods in the manner and form as charged by the Government there should be no hesitancy upon your part in returning a verdict of guilty.

Take the case, gentlemen.

Mr. CELLAR. I request Your Honor to charge that if the word "compound" is on the tin it is not necessary to state the proportion of the ingredients.

The COURT. Not necessary to state the proportion of the ingredients, as I understand it.

Mr. CELLAR. I ask Your Honor to charge that the defendant would not be responsible for anything that the Stellar Macaroni Company have done.

The COURT. I instruct them—there you are back to the original proposition—that if it be true that the defendant placed the oil in the cans such as has appeared here, it is a question for them to say what his intent was. You may in that connection consider that letter which went into evidence before you, gentlemen.

Mr. CELLAR. I ask Your Honor to charge that if the jury find that the strips were placed on the can they may further find that those strips may have been, in their mind, a sufficient notice to the consuming public that there was no misbranding.

The COURT. You may consider it, gentlemen. But you may also consider in that connection the narrowness of the strips as they were displayed upon the can.

Mr. CELLAR. I ask Your Honor to charge that the statutes do not prescribe any specified form or manner of misbranding.

The COURT. I believe that is true.

UNITED STATES v. GAMANOS ET AL.

(District Court, S.D. New York, July 16, 1919)

N.J. No. 6893

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

The United States attorney filed an information against Nicholas Gamanos and George Booskos, alleging shipment from the State of New York into the State of Connecticut, of a quantity of an article, labeled in part "Extra Pure Olive Oil," which was misbranded.

The following charge was delivered to the jury:

KNOX, *District Judge.* Gentlemen of the jury: I will submit to you in this prosecution the charge the Government has made against

the partnership of Gamanos & Booskos in the second count of the information which has been filed against them, which charge is that this firm in February of 1918, to wit, on the 11th day of February, shipped in interstate commerce an article of food which was misbranded within the meaning of the Pure Food Law of the United States.

Counsel this morning in summing up to you said that if this shipment had been to Brooklyn there would have been no offense here, but that it being to Connecticut, there is an offense. If the defendant here, the copartnership, has violated good morals, it would violate them none the less if the shipment was to Brooklyn; but the fact is that the United States court has jurisdiction only of cases of this character where interstate commerce is involved; that, under the Constitution of the United States, Congress has a right to regulate commerce between the States; so that on a shipment to Brooklyn, that being within the State of New York, the Federal Government must leave the matter to the authorities of the State of New York, it being powerless to act in the case by reason of the sovereignty of the State; but where the shipment crosses a State line, then the Government has jurisdiction. I simply mention this to you to make it clear to you as to why there should be a distinction by reason of what the district attorney said to you this morning.

Congress has enacted, in an endeavor to protect the public, the various pure food laws, and it has said that when a man engages in shipping food products or food to be consumed by the general public, those food products must be honestly labeled and branded, because the only thing you and I have to go by when we enter a store is the brand and the representation that is made to us through the labels upon that which we purchase. That is, if I go into a store and want olive oil for my table, I have a right to secure olive oil and not be misled by getting an inferior product and something that is not olive oil.

Of course, it is pretty obvious to us, from our general knowledge, in a case of this character, that olive oil being a foreign product which has been brought over here from Italy or paid a duty, perhaps, and entering into the trade here, must of necessity be of greater value than is corn oil, of which great quantities may be produced in the United States. Consequently it is said that if anyone misbrands and labels a food product in such a manner as to deceive or calculated to deceive the public as to what that food product actually is, the person or persons doing that thing are guilty of an offense under the law, and upon conviction are subjected to a certain punishment. So consequently the case resolves itself into this, as to whether or not this firm did, on the 21st day of February, ship, as has been charged against them, these articles, to wit, six gallon cans of oil labeled and marked so as to deceive the public. You will look at the can, you will see upon it there that it purports to contain olive oil which has come from Sicily; there is a picture of an olive tree with peasants or natives picking olives; and that it is absolutely pure. And you can say what thought or impression is that going to make upon the mind of the purchaser who wants olive oil and sees it? Is that person going to be deceived as to what is in that can?

It has been testified before you here, and indeed it is not disputed, the actual contents of the can was corn oil which had been flavored

with olive oil; that it had present in it more than 50 percent, indeed, I think perhaps 75 percent of the contents of the can was corn oil and not olive oil. Standing alone, if you have found those facts which are not disputed to be true, you would be justified in returning a verdict of guilty against the defendant copartnership.

The copartnership, however, depends upon the ground that it is said they pasted upon this can several labels, one of which has been introduced into evidence before you, wherein it indicates that this can did not contain pure olive oil, but that it contained a compound, that is a mixture of olive oil and of some other oil—corn oil; and they seek to escape liability upon the ground that they have done all that is legally required of them to take them outside of the provisions of the law under which this information has been filed against them. And the law with respect to that is: That in the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, then they are not guilty of an offense. But you will recall the testimony here that when the inspector saw these cans in the place of business of the merchant up in Connecticut, there were no tags upon the cans; and consequently the question arises as to whether or not those tags were on the cans at the time they were shipped; and even if you should find that the tags or these labels were upon the cans, were those labels honestly put there so as to inform the purchaser of that can as to the actual contents of the can, or were they put there as a mere subterfuge and a device, so that whoever got them, that they might use that as a stepping stone to safety in case the shipment was discovered. And even if they were put there, was that tag or label of such a character as to plainly indicate to the purchaser that that can contained a blend? Now those are questions for your determination. It has been suggested to you that that label might easily be rubbed off; consequently in the first place you will determine whether or not it was put there, and if it was put there, was it put there for the purpose of being rubbed off so that the purchaser would never have any idea as to what the true contents of the can were, save as to the lithographed matter contained upon the can, and that is that it shows that this was olive oil or purported to show that the contents of the can was olive oil from Sicily.

You can also consider in the event that you find that the tags were placed upon the can, as to how conspicuous or effective they would have been to serve the purposes of the law; and, in short, whether it was an honest compliance with the law or whether as I said before it was a mere subterfuge.

The mere fact that one of these partners was down in Camp Gordon does not make it impossible for you to return a verdict of guilty against the partnership here, because during the time he was away from the place of business they are charged with doing business under the name of Gamanos & Booskos. If you find that the firm made the shipment, then it is immaterial whether either of these gentlemen who are here in court as members of the firm were present at that time or not, because the theory of the law is that this partnership constituted a separate entity differing from either of these parties. And as you men know, in your everyday business affairs a partnership does acts every day in which neither of the

partners have any actual positive personal knowledge at the time, the act was done, and the theory of the law is that this being a separate entity, it can act in and of itself, and that the individuals who go to make up the partnership cannot take advantage of what someone in their employ does, and then come into court and escape liability for what may have been done. That is, if you or I set in motion a chain of circumstances, it is incumbent upon us, in good conscience and good law, that we should know what is being done under our authority; and if we do not do that either through negligence, carelessness, or whatnot, then when the law is violated we should not say we would not be hurt upon the ground that we were not there and had no actual knowledge of what transpired. It would be an easy thing for persons to escape liability on such a pretense as that, if clerks were pursuing a certain line of business and then the proprietor of that business would say, "I was absent when this particular shipment went forth; I am not responsible for that."

It is a simple case in the sense that the amount involved is comparatively little, but nevertheless it is important in that we should have the assurance that so far as the law is concerned, we are going to get that which we think we are getting when we go into a store to purchase it.

Now, that is a simple proposition as to whether or not these men have done something or this firm has done something that is calculated to deceive, and to create a misapprehension and misconception in the minds of some one who wants to buy that product. It must be inferred that these men or this copartnership which is manufacturing food products have some idea that somebody is going to buy it, and they are bound to take cognizance of the provisions of the law with respect thereto.

This defendant, the copartnership, is entitled, of course, to the presumption of innocence until the evidence adduced upon the trial convinces you beyond a reasonable doubt that it is not guilty of the offense charged against them. And a reasonable doubt is not a capricious doubt, not a fancied doubt, not a doubt based upon the reluctance upon the part of a jury to perform an unpleasant task, but it is a doubt based upon and growing out of the evidence in the case and such as leaves you short of a moral certainty of the defendant's guilt. If, after an impartial consideration of all the evidence in the case, you do not have an abiding conviction of the defendant's guilt as charged in the information, then you have a reasonable doubt, and it would be your duty to acquit. But if, after such impartial consideration of all the evidence in the case, you do have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more important affairs in your own life, that is, that certainty which would cause you to pursue a certain line of conduct, then you have no reasonable doubt with respect to the defendant's guilt and you should rerturn a verdict of guilty.

Gentlemen, you may take the case.

JUROR No. 2. May I ask a question?

THE COURT. Yes.

JUROR No. 2. What is the punishment in case of conviction?

THE COURT. The punishment in the case of conviction of a first offense is a fine.

Mr. WELCH. If Your Honor please, will you entertain these instructions to charge the jury?

The COURT. Yes.

Mr. WELCH. I ask Your Honor to charge the jury first: That a firm or partnership is not a "person" within the meaning of the word as used in the act under which the information is laid.

The COURT. I decline to so charge.

Mr. WELCH. I ask Your Honor to charge the jury that the defendant Nicholas Gamanos did not ship or deliver for shipment this particular lot of goods, and that if he did not do it himself in fact and had no knowledge of it and neither instructed, ratified, or stood by and saw any of his agents or employees do it, that it was not his act.

The COURT. I decline to so charge.

Mr. WELCH. I ask Your Honor to charge the jury that the law does not require any particular form of label or container.

The COURT. No; that is entirely a question or a matter of evidence as to the good faith there and whether or not the label is calculated to deceive or not.

Mr. WELCH. I ask Your Honor to charge the jury that they are only to consider the condition of the container when shipped, and that anything which happens afterward is of no moment.

The COURT. They will take into consideration all the evidence in the case and give to it such weight as they think it is fairly entitled to receive.

Mr. WELCH. I ask Your Honor to charge the jury that under the law it is no offense if the container bears a label which plainly states that it is a corn oil.

The COURT. I have charged the jury on that point. You may retire, gentlemen.

Mr. WELCH. And I take an exception to Your Honor's refusal to charge.

UNITED STATES v. 141 BOTTLES OF DRUG PRODUCTS

(District Court, S.D. Texas, July 16, 1919)

N.J. No. 8360

Libel under section 10 of the Food and Drugs Act. Trial before the Court. Decree in favor of the United States.[6a]

HUTCHESON, *District Judge.* This is a libel brought by the Government of the United States for condemnation of 141 bottles, more or less, of drug products under the act of Congress approved June 30, 1906, as amended by the act of August 23, 1912, chapter 352, and the act of March 3, 1913, chapter 107.

The said 141 bottles contained the preparation known and described as "A Texas Wonder."

[6a] Affirmed, *Hall* v. *United States,* p. 978, *post.*

The libel charged that on the carton enclosing the drug product or medicines in said bottles was printed the following label:

A Texas Wonder, Hall's Great Discovery, Contains 43% alcohol before diluted. 5% after diluted. The Texas Wonder! Hall's Great Discovery, for Kidney and Bladder Troubles, Diabetes, Weak and Lame Backs, Rheumatism, Gravel, Regulates Bladder Trouble in Children. One small bottle is 2 months' treatment. Price $1.25 per bottle. E.W. Hall, Sole Manufacturer, St. Louis, Mo.

That said label on said carton is false and fraudulent in that the drug or medicine contains no ingredient or combination of ingredients capable of producing the curative or therapeutic effects claimed for it, and that the said products are thereby misbranded in violation of law.

To this libel an answer and petition in intervention was filed by E. W. Hall, the person charged in the libel to be the proprietor and distributor of this medicine, claiming therein to be the owner of said property, and among other things pleading *res adjudicata* by reason of a verdict and judgment of "not guilty" in a suit entered and tried in the United States District Court for the Eastern District of Missouri, March term, 1915, of said court, in which the United States Government was plaintiff and the said E. W. Hall was defendant. The answer further denied the allegations in the libel and specifically declared that the medicine was not misbranded, for that it would in fact produce the curative and therapeutic effects when administered as directed, as claimed for it by the defendant. He prays that the articles be released to him, and further that the United States district attorney be enjoined from further levying upon or seizing any of the defendant's goods.

The plea of former judgment is denied, as "an essential element of the offense under this act is the state of mind of defendant, a factor necessarily subject to constant change. To contend that a prosecution or proceeding which turned not as most offenses do on the commission of the overt act, but on the state of mind of the defendant, would constitute a bar to a proceeding based upon the defendant's state of mind at a later date, is essentially unsound."

On the trial of the cause the Government produced an analysis of the contents of the medicine, showing its ingredients as found by the analyst. The defendant denied the correctness of the analysis, claiming that in addition to the ingredients ascertained by the chemist to be in the medicine, there was a further ingredient of sweet spirits of niter, and that in lieu of the spirits of turpentine, as declared by the chemist, the medicine in truth and in fact contained oil of juniper.

The Government made proof by physicians of standing in the community, both upon the nature and the character of the diseases claimed to be cured, and upon the medicinal properties and effects if any of the medicine itself upon such diseases.

The proof establishes very clearly to the mind of the court that there is no medicinal treatment which will aid or relieve cases of diabetes, and that no medicine has properties which will afford relief by dissolving gravel. On these two diseases, for which the carton claims curative properties in the medicine, there can be no shadow of doubt that the entire claim is false. The Government also proved beyond question that no single medicine or combination of medicine

could be helpful for all of the various forms of diseases named on the carton, and that in that respect the claims of it are false.

The evidence further established that the general claim that the medicine had curative properties for kidney and bladder troubles, without limiting the claim to particular kinds of such troubles, made the claim embrace it in certain characters of kidney afflictions, which, under the admission of the defendant himself, the medicine did not have, and could not have any curative effects upon.

The evidence further established that while in some instances a weak or lame back might possibly have its origin or explanation in some derangement of the kidney or bladder, or more properly some disturbance there, that the vast majority of weak and lame backs are ascribable to constipation, to lumbago, and to various muscular conditions having no relation whatever to kidney or bladder troubles, making it clear that the claim of the medicine in the general terms as stated must necessarily be held to be false, since in the very nature of things it was not even claimed by its manufacturer and distributor that the medicine had properties to ease muscular affections. So that it is clear that the carton, as to its curative properties as to weak and lame backs, also is misbranded.

As to rheumatism, much evidence was offered upon the nature and cause of rheumatism, and while it seems clear that at one time rheumatism was associated with kidney troubles, it has now come to be recognized as a specific infection, in no manner related to the kidney and bladder, and it seems also clear as to rheumatism, that the language used in the carton constitutes a case of misbranding.

As to the final claim on the carton, that it regulates bladder trouble in children, the explanation made by the defendant of the scope of that claim, that it refers to bed wetting, indicates plainly that his use of the term is too broad, because it does not exclude other troubles than the one he claims to cure, and would be plainly calculated, therefore, to mislead.

I am therefore of the opinion that every claim made for the medicine on the carton, in the form adopted there, is false, and that a clear and undeniable case of misbranding has been made out. But it is not sufficient in a case of this kind to establish merely the falsity of the claim; it must also appear that this false claim was made fraudulently—that is, either the defendant knew it was false or without knowledge of its truth or falsity made the claim recklessly and without a firm and honest belief in its truth. This feature of the case has given me far more concern than the question of the misbranding itself.

It is clearly settled that a mere difference of medical opinion will not sustain a condemnation. *Magnetic Healing Company* v. *McAnnulty*, 187 U.S. 94; *United States* v. *Johnson*, 221 U.S. 499. It is equally well settled, however, *Seven Cases* v. *United States*, 239 U.S. 517,

that false and fraudulent representations may be made with respect to the curative effect of substances is obvious. It is said that the owner has the right to give his views regarding the effect of his drugs, *but state of mind is itself a fact*, and may be a material fact, and false and fraudulent representations may be made about it; and persons who make or deal in substances, or compositions, alleged to be curative, are in a position to have superior knowledge and may be held in good faith in their statements.

Or, as was stated by Mr. Justice McKenna, in *United States* v. *New South Farm*, 241 U.S. 71:

> An article alone is not necessarily the inducement and compensation for its purchase. It is in the use to which it may be put, the purpose it may serve; and there is deception and fraud when the article is not of the character or kind represented, and hence does not serve the purpose.

The defendant admits that he is not himself a physician, though many of his circulars and advertisements declare him to be "Dr. E. W. Hall", nor does he claim for himself any special medical skill or knowledge. He relies most largely upon the fact of the sales to thousands of purchasers, and the numerous and glowing testimonials about cures, which he no doubt received, as an evidence that he could not be guilty of fraud in the matter. But the slightest reflection upon the well-known fact that persons given to self-medication are credulous and partisan, and prone to deny nature credit for their recovery, and that on this well-known trait of human nature these compounders of specifics and nostrums build their business, deprives this claim of any weighty significance; because it will not do for a person who has been able to prey upon the credulity of a community to escape the consequences of his acts by the very success of his scheme. I think the matter has been excellently put by Judge Dickinson, in *United States* v. *American Laboratories*, 222 Fed. 107:

> The fact that there was a widely spread disposition among people to give credence to the statement because of a superstitious belief in its efficacy, or indeed such a reputation for the remedy itself as to make people prejudiced in its favor, would not diminish, but would increase, the guilt of him who sought to make money by false statements and fraudulent devices. It is difficult, and indeed practically impossible, to draw a line in the abstract other than a broad line between these two things. There would seem to be no other way of dealing with the subject than to submit to the common-sense judgment of a jury to find whether in a given case the acts of a defendant have been honest, however mistaken, or whether they have been false and fraudulent.

Under this view of the matter, this court, sitting as a jury, can reach no reasonable conclusion other than that the defendant, whatever may have been the honesty or innocency of his attitude when the medicine was first put out, now knows, and knowing commits a fraud in his advertisements, that the medicine is not efficacious as a remedy in the form and manner under which it is advertised. It would be sufficient, in my judgment, to sustain the libel, for me to hold that the defendant did not know that his statements were false, but merely made them recklessly and without due regard for that fact. But I think the evidence establishes more, and leaves no doubt that the defendant is seeking by a broad and comprehensive claim for his medicine, to increase its sales, with an absolute knowledge on his part of the falsity of his advertisements, certainly as to a part of the matters claimed for it.

It is due the defendant, however, to say that the evidence establishes without serious dispute that the preparation contains in it no harmful or deleterious drug, nor is it, as compounded, deleterious when used in the manner prescribed. So that, while it is clear to my mind that the defendant has violated the statute by fraudulently misbranding his product, it is equally clear that he does not stand before the court as a person who practices fraud upon the public for the purpose of vending a harmful and deleterious substance.

The danger and injury to the public from this character of advertisement is, however, considerable, in that it induces persons to rely in serious cases, upon a preparation without healing virtue, when [but] for this reliance, they would no doubt secure proper advice and treatment for the ills which affect them.

Entertaining these views, it follows that the prayer of the libel for condemnation must be sustained, and a decree of forfeiture with costs entered, which decree of forfeiture may be, however, avoided by the claimant's paying all costs of this proceeding and making bond in the sum of $250 conditioned as by law, provided that the goods will not be used or handled in violation of law; or the intervenor and claimant may in lieu of bond deposit with the clerk of this court in cash the sum of $250, which said money shall be deposited on the same conditions as the conditions contained in the bond hereinbefore mentioned, and shall be held by the clerk to abide any further orders of this court to be made herein. A decree will therefore be entered in accordance herewith giving the intervener and claimant, E. W. Hall, thirty (30) days after the final judgment in this case, within which to make his bond if he so desires, or deposit the cash as hereinbefore provided in lieu of bond, and it is directed that should the claimant and intervener, E. W. Hall, not make a bond or deposit the cash, as herein provided, within the thirty (30) days allowed, that the 141 bottles of drug compound known as "Texas Wonder, Hall's Great Discovery" be destroyed. The costs of this proceeding are taxed against the claimant, E. W. Hall, and the Southern Drug Company.

UNITED STATES v. MONAHOS

(District Court, S.D. New York, July 24, 1919)

N.J. No. 7046

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

The following charge was delivered to the jury:

SMITH, *District Judge.* Gentlemen of the jury: There are two counts and certain charges in the indictment against the defendant, one of which is being tried. The first count charges him with shipping or causing to be shipped, a number of cans of a food article which is alleged to have been adulterated, and the second count charges him with shipping or causing to be shipped from one State to another, an article of food in cans that were misbranded.

The first count charges that on the 23d day of April 1918, he shipped and caused to be shipped from the city of New York, in the State of New York, to the city of New Haven, in the State of Connecticut, a number of cans containing an article of food, to Domenico Sylvestro, and the charge in this count sets out the words and figures with which these cans were branded or marked, and which is in evidence before you.

It is charged in the first count, gentlemen, that the contents of these cans were shipped as pure olive oil, and that they were adulterated

by reason of the fact that they contained cottonseed oil mainly, and that only part of the contents of the can was composed of olive oil. In other words, it was a compound or mixture of olive oil and cottonseed oil.

Now the statute provides that an article of food is adulterated if any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength, or if any substance has been substituted wholly or in part for the article.

If you find from the evidence, gentlemen, that this was shipped as olive oil, and you find that it was made up mainly of cottonseed oil as well as olive oil, the defendant would be guilty of shipping adulterated food, and it would be your duty to find him guilty on the first count.

The second count charges this shipment of cans to have been misbranded. The misbranding charged is that it was branded as olive oil, whereas in fact it was made up largely of cottonseed oil as well, and also that by certain devices on the can, and the wording of the label, taken together, it was misleading, in that it created the impression that it was an imported article from Italy, whereas as a matter of fact it was a domestic product, manufactured in this country, made up of cottonseed oil and olive oil.

Now, gentlemen, if you believe that the defendant shipped or caused to be shipped these cans, or any one of them, and that they were branded, "Olive Oil", and if you find that they were made up of olive oil and cottonseed oil, the defendant would be guilty of shipping misbranded articles of food, and you would find him guilty; or, if you find that the label represented that this was a foreign product, manufactured in and imported from Italy, you will find the defendant guilty because he would in that case be guilty of a misbranding.

On the other hand, gentlemen, if you believe from the evidence before you that the label on the can stated that it was a compound of these two ingredients, olive oil and cottonseed oil, the representation that it was something else than what it was, would not be proven.

In that case you would find the defendant not guilty, unless you believe that it contained a representation that it was an imported article. In that case it would be your duty to find the defendant guilty.

Now, gentlemen, as to the defendant in this case, as to his connection with these transactions, the law is that not only the person who directly commits an act constituting an offense is guilty, but those who aid, abet, counsel, induce, or procure another to commit an offense, are also guilty as if they themselves committed it. If the defendant was the proprietor of the business, engaged in the shipping of these articles, and he was at any time engaged in the business of shipping adulterated or misbranded articles of food, if you should find that from the facts and circumstances before you, and that his employees were specially or generally authorized to do that sort of thing, and in pursuance of that authority that some of his employees, instead of himself, made the shipment here in question, it would be the same as if the defendant himself did it; if it was done under his direction, of course it would be the same as if he did it himself.

Now, gentlemen of the jury, you have heard all the testimony in the case, and I hope I have made the law sufficiently clear to enable you to understand the issues involved in both counts of the indictment. It is for you to say what the facts are, whether or not the defendant is guilty upon the charges contained in these two counts.

A defendant is presumed to be innocent until his guilt is established by the evidence beyond a reasonable doubt. If you have a reasonable doubt, as to his guilt, it would be your duty to acquit him.

JUROR No. 7. Your Honor, will you define the word "shipper" to me? Who is the shipper?

The COURT. A shipper is any person who delivers to a carrier any article to be carried to some consignee and delivered to him, or any person who aids or abets another, or counsels or induces or procures another to do so; he is the shipper.

JUROR No. 7. Then the owner is not the shipper if he directs merchandise to be shipped to a certain point——

The COURT. He is the shipper.

JUROR No. 7. He is the shipper, the owner is the shipper?

The COURT. The owner is the shipper if he participates in it, and the person who actually does it is a shipper. All persons who actually do it, or all persons who direct it to be done, or aid or abet it to be done, or induce it to be done, or participate in it in any way, are shippers.

I do not believe, gentlemen, that I have called your attention to what constitutes a misbranding; I have overlooked that. An article is misbranded if it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so.

Mr. EILPERIN. May I ask Your Honor to charge the jury that no inference of guilt can arise from the omission of the defendant to testify on his own behalf?

The COURT. How is that? I did not get that.

Mr. EILPERIN. I say, that the failure or omission of the defendant to give testimony on his own behalf, ought not to militate against him or to justify an inference of guilt.

The COURT. The law is, gentlemen, that a defendant in a criminal case may or may not take the stand as a witness; as he chooses.

Mr. EILPERIN. And that his plea of not guilty is a denial of the matters——

The COURT. Just a moment, sir, until I get through with the charge that you requested.

Mr. EILPERIN. I beg your pardon.

The COURT. It is optional with him as to whether or not he will take the stand and testify as a witness. In this case the defendant has not elected to testify; but that fact, gentlemen, should create no presumption against him, and create no prejudice in your minds against him.

Mr. EILPERIN. That the defendant in law is presumed to be of good character, and that in and of itself is sufficient to create a reasonable doubt.

The COURT. Refused.

Mr. EILPERIN. Exception. That if the jury believe that Sylvestro testified falsely in any particular, they are at liberty to disregard his whole testimony.

The COURT. Refused.

Mr. EILPERIN. Exception. That if the jury believe that the defendant shipped cans of oil with the mark or inscription or label of cottonseed oil or compound, that in that circumstance they must return a verdict of not guilty.

The COURT. The jury has been already so instructed.

Mr. EILPERIN. I except to Your Honor's refusal to charge as requested. I ask Your Honor to charge that there is testimony in this case that the defendant did make such a shipment with such an inscription or label, to wit: Compound Cottonseed Oil, and that because of that the jury are required to find the defendant not guilty.

The COURT. Refused.

Mr. EILPERIN. Exception. I ask Your Honor to charge that the denial of the motions heretofore made by counsel, and the refusal of the court to charge as requested, do not create an inference of guilt on the part of the defendant, nor an intimation that the court believes the defendant guilty of the crime charged.

The COURT. Refused. Exception noted.

Mr. EILPERIN. Exception. That if in considering the testimony in this case the jury get to the point where there is a doubt as to whether the defendant did or did not do it, in that circumstance they must acquit him.

The COURT. The jury has been already so instructed.

Mr. EILPERIN. I except to Your Honor's refusal to charge. I ask Your Honor to charge that in considering the guilt or innocence of the defendant, it must be done in the light of this presumption, and in the light of the presumption of good character and innocence.

The COURT. Refused.

Mr. EILPERIN. Exception.

Mr. TAYLOR. If the court please, I would like the court to instruct the jury that as far as the issues in this case are concerned, it is immaterial whether the dealer, Sylvestro, knew what he was buying or not.

The COURT. Gentlemen of the jury, it is not material in this case as to whether or not the purchaser, Sylvestro, was misled or deceived in this transaction. It has nothing whatever to do with the case. The question is, did the defendant ship, from one State to another, adulterated food, or did he ship such food misbranded, under the instructions I have already given you.

UNITED STATES v. 706 BAGS OF ALLEGED MUSTARD SEED

(District Court, N.D. Illinois, Nov. 27, 1919)

N.J. No. 6319

Two libels, each in three counts, under section 10 of the Food and Drugs Act. One count of each libel withdrawn by agreement and one dismissed. Jury trial. Verdict in favor of the United States as to remaining counts. Motion for a new trial granted.

The United States attorney filed libels praying the seizure and condemnation of 405 bags and 301 bags, each containing 160 pounds of alleged mustard seed, alleging that the article had been shipped from the State of California into the State of Illinois, and charging adulteration and misbranding in violation of the Food and Drugs Act. The article was invoiced and sold as mustard seed.

Adulteration of the article in each shipment was alleged for the reason that rapeseed, brown seed, and dirt had been substituted wholly for mustard seed, which the article purported to be.

Misbranding of the article was alleged in the second count of the libels for the reason that it was an imitation of mustard seed in that it consisted wholly of rapeseed, brown seed, and dirt; and in the third count of the libels for the further reason that said article was offered for sale under the distinctive name of another article, to wit, mustard seed.

CARPENTER, *District Judge.* Gentlemen of the jury: There are only two counts in this libel that have been discussed by counsel before you, which are the first and second, the third by agreement has been withdrawn from your consideration, and I will instruct you as a matter of law that you may eliminate the first count, so that the only count that is now presented to you for your consideration is the count which we will designate the misbranding count.

Mr. DICKINSON. Yes.

The COURT. It is not your purpose to—it is not your function rather—to consider whether or not the Pure Food Law is a good law. I charge you that it is the law of this country; it is on our statute books, and in my opinion it is a very wholesome law, and it is for a very useful purpose. The issues in this case are simple, that is, the actual fact that you have to determine is a single fact, it is drawn in a very narrow channel; the evidence which has been presented to you, so that you may make up your mind what that fact is, may have been complicated, it is more or less complicated, it has come from many different sources and involves professional men, botanists, chemists, practical business men in seed lines, and personal tests that you have made and have seen made in open court.

Now, at the outset some general instructions as to the law. The Government in this case has the burden of proof, and that burden rests upon them until they have satisfied you by a clear and convincing preponderance of the evidence, that they have shown that this was not mustard seed. You will have to determine that one question. It is not so important for you to make up your minds whether or not the seed in seizure, as it has been called, is rapeseed. It is proved here in this case that the actual seed as shipped was labeled [invoiced as] mustard seed, and I charge you as a matter of law, that if you find the seed as shipped was not in fact mustard seed, the Government must succeed in this case. Whether it was rapeseed or some other kind of seed is unimportant. The shipment has been identified, and the labels on the bags have been proved, evidence has been offered here to show what they were. It has been conceded they were labeled [invoiced as] mustard seed, therefore, if you find from the evidence in this case, if you find the proof clearly convinces you by a preponderance that this was not mustard seed, in your judgment, your verdict here must be for the Government. And it is

quite as true, that if you find from the evidence on the basis that I have asked you to consider the evidence, if you find that the seed in question is mustard seed, even though it is some species hitherto unknown in this locality here in Chicago, or any other part of this country, still it is your duty in that case to bring in your verdict for the claimant. And to enlarge upon that a little, the question of fact for your determination is whether or not the product in seizure is rapeseed, as that term is understood and applied by the trade in this country or whether the product is a species of mustard seed containing qualities and characteristics substantially similar to the well-known mustard seeds of European and American commerce and in determining this question from the evidence, the jury must use ordinary common sense as reasonable and intelligent men, and if you find from the evidence that the product in question is mustard seed, then you must find your verdict for the claimant.

Bear in mind, gentlemen, it is not my purpose to tell you anything about the facts in this case. It is my duty to advise you what the law is, and it is your duty to determine what the facts are and apply the law as I give it. If I make a mistake as to the law, that is my responsibility, and the court of review will set me right. You have to do only with the questions of fact, and if during the course of this trial the court may have said something which indicated to you that the court has views on the evidence in this case, please dismiss it from your mind. The court had no such intent at any time, and anything that I may have said or anything that you may have thought I said to that end must be disregarded.

I am not here to influence you one way or the other in your determination of whether or not the seed in seizure is mustard seed. That is the only question you have to settle, and that is your responsibility.

Now, some of the witnesses in this case are Government witnesses. The mere fact that they are Government witnesses does not work for or against the case on either side. They are here as individuals, sworn to tell the truth and to advise you so far as they can of their knowledge of the facts being presented to you. A Government witness is not entitled to more credit because he is a Government witness, nor is he entitled to less credit. The professional witnesses, or rather the professional men, are not necessarily professional witnesses, and all of the witnesses that have testified here before you are to be given credence so far as you think their testimony is material.

Now, if you think any witness has deliberately sworn falsely as to any material fact, it is your right and duty to disregard the evidence of that witness, unless it is otherwise corroborated by good and substantial evidence in this case, which you believe. You have seen the witnesses and you have heard them testify, you have seen their demeanor, and you know better than anybody else whether they were telling the truth or not and how much weight should be given to their evidence. If any party has a direct interest in the outcome of the suit, you may take that into consideration. If any of these witnesses are connected with anybody with a direct interest in the outcome of the suit, you may also take that into consideration.

One further thing, you are not to be influenced by anything that you may think is going to happen after your verdict. The verdict in this case will either be for the Government or for the claimant.

What shall be done with the seed, whether under the statute it shall be destroyed, there being no deleterious matter found in it—it would be quite unusual if an order of confiscation or destruction should be entered—but whether it is destroyed or not, or whether given back to the claimant after the payment of the costs in this case, that is none of your business, and I say the word advisedly, gentlemen, not offensively, still the thing you have to determine here is whether or not this is mustard seed, because if it was mustard seed, there is no misbranding, if it was not mustard seed, there was misbranding.

Have you any suggestions, gentlemen?

Mr. DICKINSON. Might preserve an exception to Your Honor's ruling striking out the first specification.

The COURT. Yes.

Mr. DICKINSON. Exception.

Mr. VENT. I think the court should instruct the jury that there is no standard made legal by the Food and Drugs Act on mustard seed, that it is a primary question to be determined.

The COURT. I will instruct the jury so that you may preserve your exception. I think it is immaterial in this case whether the Government has established a standard on what is known as mustard seed or not, the question is, is this mustard seed.

Mr. VENT. That is all I wish, but I thought that it was proper to embody that idea.

The COURT. That will be preserved in the record. Anything further, gentlemen?

Mr. DICKINSON. In order to preserve the record, Your Honor, I don't know what will be the outcome of the case, in order that we may have the questions preserved, I desire to preserve an exception to Your Honor's instruction there, that the Government must prove its case by a clear preponderance of the evidence, or must find, if they do find for the Government, by evidence clear and preponderating.

The COURT. I might enlarge that a little so as to make the position of the court clear. This is not in the opinion of the court a criminal case, but inasmuch as it involves the possibility, on the part of the court, if there is a verdict for the Government, a possibility, I say, of ordering these goods destroyed, or ordering them seized, taken out of commerce, because they are misbranded, that the defendant is deprived of his property as a result of this trial, and so I say, that while it is not a criminal case that it is something more than a civil case, that is to say, the jury must find by a greater preponderance of the evidence than they would in a civil case. In the ordinary case you are told that, as the scale balances, if there is even a slight preponderation one way or the other, so your verdict may be found, but in this case I think before you find the scale drops one way or the other, you should have a clear and convincing proof that the scale does not tip top; that doesn't mean you will find your verdict beyond a reasonable doubt. The law doesn't require that. All it means is that you must have substantial evidence. You are business men and you have come from 12 different walks of life, and you have been in the habit of considering your own affairs in a common sense way. Now, take this case up in a common sense way.

Nobody has tried to stampede you, nobody wants to, nobody has tried to put anything over [on] the jury. All there is to the case, is to take the evidence in this case and if you find there is a preponderance of evidence founded on clear and convincing evidence, satisfactory evidence to you one way or the other, then you may bring in your verdict accordingly. Save your exception, Mr. Dickinson.

Mr. VENT. I wish to note an exception to the ruling of the court.

The COURT. Yes; Mr. Vent's request that the court charge the jury that they must find for the Government, beyond a reasonable doubt, against the defendant beyond a reasonable doubt, before a verdict can be for the Government. That is refused an exception.

Mr. VENT. Then that question in the case to the jury, we would like to preserve the question as to whether or not this is a criminal or civil case.

The COURT. That is the point. The question will be preserved, whether you have put it in the right form or whether the court has. The question is here and we will save it. That all, gentlemen?

Mr. DICKINSON. That is all I have, thank you.

The COURT. I will give you two forms of verdict, gentlemen; if you find for the United States, sign the form which reads, "We, the jury, find the issues for the libellant." If you find for the claimant, sign the form, "We, the jury, find the issues for the claimant."

Now, as to these exhibits. They will all go to the jury room. I will charge the jury further, that when they come to make tests for the prepared product which has been presented here in evidence, you must bear in mind there has been no evidence offered of what the actual ingredients were of the prepared products, further than that it was—a paste of it was made out of the seed in seizure.

Mr. VENT. No, Your Honor, I think that is not exactly accurate, the witness testified it had some vinegar and spices.

The COURT. The proportions, I mean.

Mr. VENT. The proportions were not given, but this, Your Honor, it had no other seed than the seed in question.

The COURT. Yes.

Mr. VENT. This exhibit I would ask the bailiff to handle rather delicately, it is a very delicate thing.

The BAILIFF. I will hand it in.

The COURT. The jury may retire now.

Mr. VENT. If the court please, if the jury desire to make experiments, let them take the mortars with them.

The COURT. The jury can do anything they please with the mortars when they go in the jury room.

Mr. VENT. I think the mortars are all in.

The COURT. Do you want this to go to the jury?

Mr. VENT. Yes, Your Honor.

Mr. DICKINSON. Yes.

Mr. VENT. Can that go in? We read certain sections of Circular 19, regarding rapeseed, yellow, and mustard.

The COURT. It was read to the jury, but not offered in evidence as an exhibit. No, I think not.

Mr. VENT. All right.

UNITED STATES v. 1,246 CASES OF TOMATO CATSUP

(District Court, N.D. Illinois, Dec. 19, 1919)

N.J. No. 6929

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict in favor of the United States.

The United States attorney filed a libel for the seizure and condemnation of 1,246 cases, each containing 3 dozen bottles of tomato catsup, alleging that the article had been shipped from the State of Indiana into the State of Illinois, and charging adulteration and misbranding. The article was labeled in part, "Fancy Whole Tomato Catsup."

Adulteration of the article was alleged in the libel for the reason that it consisted in part of a decomposed vegetable substance.

Misbranding of the article was alleged for the reason that the statement borne on the label of the cases, to wit, "Fancy Whole Tomato Catsup," was false and misleading in that it represented to purchasers that the catsup was made from sound, whole tomatoes, and for the reason that it was labeled so as to deceive and mislead the purchaser into the belief that the catsup was made from sound, whole tomatoes, whereas, in truth and in fact, it was made from tomatoes consisting in part of a decomposed vegetable substance.

CARPENTER, *District Judge.* Gentlemen of the jury: The proceeding in this case probably is novel to most of you, although well known in the law. It is in no sense a criminal trial. No one is charged with crime, and the Government does not ask for punishment of any individual, although as a result of your verdict, the property in this case may be ordered destroyed.

By the statutes of the United States certain things are determined to be contraband so far as their transportation in interstate commerce is concerned. There are a great many regulations made for the well-being of the people by the various States of the Union, and the Government of the United States is not concerned, generally speaking, with their enforcement. The Government, however, has a right to settle for itself, within reasonable grounds of course, what may or may not be made the subject of interstate commerce. In other words, controlling interstate commerce, it may forbid the use of the facilities of that commerce to those who do not comply with the stated regulations.

The statute under which this libel is filed is one known as the Food and Drugs Act. Doubtless you have all heard of it or read about it; popularly it is known as the Pure Food Law. It is not necessary for me to impress upon you that the law in question is a wholesome one, passed for the benefit of all the people, to safeguard them in their daily lives, and to the end that the health of the community generally may be conserved and preserved.

The libel in this case is filed under section 7 of that law, and I may say that a libel involves a proceeding against the thing that transgresses the law, and not against the person of its owner. The

Government charges that a certain number of cases of tomato catsup were shipped in interstate commerce, in violation of section 7. The cases of tomato catsup, of course, could not appear in court and make defense. The owner of those cases, however, under the law has a right to intervene and make claim to them. He is therefore designated as the claimant. The claimant's rights in this case have been presented to you by Mr. Hulbert and the Government's side by Mr. Dickinson. The Government, while it represents all of the people in the enforcement of its laws, in a case of this kind is merely a litigant. It has no more rights because it is the Government than the claimant who owns the goods. You must treat this case, therefore, because it is a civil case, exactly as if it were a suit between two individuals.

The Government is not required, as in a criminal case, to prove the essential elements of its case beyond a reasonable doubt. The rule is, however, that in a case of this kind, involving the possible forfeiture of property, the United States must establish its cause of action by a clear and satisfactory preponderance of evidence. By preponderance of evidence ordinarily is meant the side on which the scale bends. It does not have anything to do with the number of witnesses testifying. One side may have 50 witnesses; the other side may have one. It is for you to make up your mind whether the one is not after all telling the truth as against the 50. The evidence does not depend upon the number of the witnesses. And in this case, in determining which way the evidence preponderates, you must disregard the number of witnesses, and focus your minds entirely upon the determination of the true facts.

Now, you have seen the witnesses on the witness stand. You have heard them testify; you know their relations to the Government and to the defense, and you are better able than anyone else to make up your minds where the real truth lies, and whether the facts, as they gave them, are the real facts.

It is unnecessary for me to instruct you in this case that if a witness has sworn falsely to any material fact, you may disregard entirely the evidence of such a witness, save insofar as it is corroborated by other credible evidence.

Now, in considering your verdict, disregard entirely the little tilts between counsel. There may have appeared to you bits of friction from time to time, but as a matter of fact, I think I may assure you that when Mr. Hulbert and Mr. Dickinson get out in the hall, like as not they will go to lunch together. It means nothing outside of the trial; it is not evidence in the case. The little amusing incidents that we had yesterday are diverting, to be sure, but do not let those things take your mind off of the real issue, which is to determine by a clear preponderance of the evidence, that is, clear and satisfactory preponderance of the evidence, whether the Government has proved its case, or failed to prove its case.

The Pure Food Law provides against the shipping in interstate commerce of adulterated food products. That is stating it generally. Section 7, subdivision 6, is as follows: "That for the purposes of this act an article shall be deemed to be adulterated if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance." Under that section a person becomes subject

to inquiry, and even prosecution, if adulterated matter is transported in interstate commerce. It is stipulated in this case that the subject matter in controversy is a subject of interstate commerce, so that there is nothing left here for you to determine save whether or not this tomato catsup was adulterated, within the congressional definition that I have just quoted to you.

It is also admitted by the Government that the product under consideration was not filthy or putrid, so you have to settle the fact whether or not it was, in whole or in part, decomposed at the time it was shipped.

Now, in reaching your conclusion whether or not this tomato catsup consisted in whole or in part of decomposed matter you are to have recourse to the evidence and exhibits presented at the trial. You must realize, and I so instruct you, that yours alone is the right, power, and duty to determine from the evidence what are the real facts. Mine is the duty to advise you of the law to be applied to those facts. Understand this clearly, that no matter what I may say in these instructions as to the facts or the witnesses, no word of mine is permitted to influence you one way or the other so far as the determination of any material fact is concerned. If, perchance, I have made any reference to the evidence, remember, please, that it is for the sole purpose of enabling you to exercise your best judgment in settling the issues of fact involved. It is your duty to determine what are the facts, uninfluenced by any views which you may think the court has. The court has not given, or intended to give, or even intimate, at any time during this trial, or in these instructions, any view as to what the facts are, or as to what inferences, if any, may be or should be drawn from the facts. I ask you, therefore, to disregard entirely any notion you may entertain as to what my personal views may be as to the evidence or its sufficiency.

To reiterate, the Government has come into court with a process known as a libel and seized 1,200-odd cases of tomato catsup. The proprietor or owner of that catsup, designated in this case as the claimant, rests upon the proposition that the Government had no right to make such seizure; that is to say, that there was no law which justified the action of the Government or the court. On the other hand the Government claims as justification the act of Congress which I have already referred to as the Pure Food Law.

The Government insists that the tomato catsup consisted, in whole or in part, of decomposed animal or vegetable substance. That part of the law which you are especially and particularly interested in here involves a determination of whether or not the tomato catsup consisted in whole or in part of a decomposed animal or vegetable substance. You are not concerned with whether the product was filthy or putrid, but in determining the meaning of Congress in the words used, we are permitted to consider them all. I instruct you that the word "decomposed" was used by Congress in its ordinary sense. In reaching that conclusion I take into consideration the words with which it was associated. The word "filthy" means something more than merely dirty; the word "decomposed" means something more than filthy, and ordinarily is understood to mean rotten. The word "putrid" implies something that is so rotten that it is vile, or stinks. The reason I reach the conclusion that Congress meant the

public to understand the word "decomposed" in its ordinarily accepted sense is because decomposition sets in immediately upon the destruction of life. The instant the fruit is taken from the tree, the instant the corn is taken from the stalk, the instant the life of the tree or plant ceases, decomposition begins and continues to a greater or less extent. The word "decomposed" therefore must be used relatively, because from a technical standpoint it would be impossible to find a fruit or vegetable product that had not at least begun to disintegrate or decompose.

Congress addressed its words, in enacting this law, to all the people, educated, uneducated, professional, scientific; men, women, and children in all walks and classes of life. Therefore the word must be construed in its natural and obvious sense, and you should have no difficulty in making up your minds what the word "decomposed" means. We are concerned not with its scientific definition but with its general definition, and that general definition, one within the mental comprehenson of all, is that it means rotten.

That the Agricultural Department has realized that the word "decomposed" is not to be construed in its technical or scientific sense is illustrated by its various bulletins tolerating a certain degree of decomposure in food products; and therefore I charge you that you have a right to consider that degree of toleration which may be disclosed by the evidence in this case to your satisfaction by a preponderance of the evidence.

In this connection I would discuss briefly the expert testimony which has been adduced both on the part of the Government and on the part of the claimant. The men who have testified here are the leaders of their profession. No question has been made nor can be made as to their honesty of purpose or intelligence. Two schools apparently are represented, the one attacking the proposition from the microscopic standpoint, the other from the chemical standpoint, and this with a little variation of method on the part of the microscopist. Here I will say that it is for you to determine from the evidence whether the method pursued by Dr. Howard, and advised by him, is accurate, or whether it was improved upon by the method adopted by Dr. Brooks and one or two others. That is to say, the examination of 50 or 100 portions of the microscopic drop instead of 35. These scientific gentlemen have testified that they found certain things microscopically and chemically. As to those things, you will determine first whether you find them, by a preponderance of the evidence, to represent the fact. The same scientific gentlemen have drawn certain deductions from their experiments. Those deductions are merely their opinions founded upon their experiments and their experience. You may—you must, give due consideration to their qualifications, but nevertheless it is your duty to make up your own minds as to what deductions shall be made from the facts which you find to be proven in this case. What they found on the microscopic slide or in the crucible was a matter of fact. Their deductions, of course, are matters of opinion. You have as much right to make deductions from the facts as the experts, although you will no doubt give due consideration to their experience and means of knowledge. As I have said, we have heard this proposition of decomposition attacked from two different standpoints, the microscope and the

crucible. The microscopists say that having found a given percentage of mold in the field indicates to them a certain percentage of rot in the raw material. The chemists, on the other hand, say that the appearance of certain acids, and a finding of cell walls, tissues, and the cell content relatively intact, indicated to them a certain other and perhaps lower percentage of decomposition in this particular product. It is for you to consider all of the evidence in this case and make up your minds what the fact is.

I instruct you further that while the act under consideration prohibits interstate shipment of food which consists in whole or in part of decomposed vegetable matter, nevertheless the plaintiff in this case, the Government, in the administration of the law voluntarily modified the strict requirements of the statute, and permitted a certain amount of decomposed matter to enter into the finished product. This was a toleration advertised to all, a toleration which every one might accept of, and the Government may not now complain of the claimant's alleged failure to comply with the strict requirements of the statute, if you find by a preponderance of the evidence that the product seized in this case was within the Government's modification. That is to say, if the degree of decomposition was not in excess of that permitted by the Government in its bulletins, your verdict should be for the claimant.

You are not concerned with the question of bacteria, yeast, or spores, although we have had much interesting evidence with reference to these things. And you are instructed that no claim is made that the catsup is in any way deleterious to health or unfit for human food.

The sole question for you to determine, as a matter of fact, is whether or not the product contained decomposed vegetable matter in excess of the amount designated in the Government's bulletins as tolerable.

Of course in reaching your verdict you must consider all of the evidence, not only that of the scientific men, the experts, but that of the lay people; those who testified as to conditions at the factory where the catsup was made.

There have been several exhibits, photographs, offered in evidence here. They are for the purpose only of illustrating the testimony that the various expert witnesses have given here. They are not evidence of any fact at all. They are, after all, as I say, illustrative of evidence, and are to be used by you for that purpose only.

UNITED STATES v. SCADUTO

(District Court, S.D. New York, Jan. 16, 1920)

N.J. No. 7708

Information in nine counts alleging violation of section 2 of the Food and Drugs Act. Seven counts dismissed. Jury trial. Verdict of guilty on two counts.

The United States attorney filed an information in nine counts against Anthony Scaduto, New York, N.Y., charging violation of the Food and Drugs Act. Counts 1 to 4, inclusive, and 6, 7, and 9 of

said information were dismissed. The two remaining counts, 5 and 8, were tried before the court and a jury.

It was alleged in substance in count 5 of said information that said Scaduto shipped from the State of New York into the State of Maryland a quantity of an article of food contained in cans each labeled, marked, and branded "Fontanella Brand Olio Finissimo * * * Net contents Half Gallon Quest Olio E Garentito Ottimo Per Insalata E Per Cucinore This Oil is Guaranteed to be Excellent for Salad and Cooking", and (in very small type) "Cottonseed oil slightly flavored with pure olive oil"; and that said article was misbranded in that the statements, "Olio Finissimo" (not corrected by the statement, in inconspicuous type, "Cottonseed oil slightly flavored with pure olive oil"), and "Net Contents Half Gallon", borne on the cans containing the article, were false and misleading, and in that said article was labeled so as to deceive and mislead the purchaser, for the reason that said statements and labels represented that the article was olive oil, and that each of said cans contained one half gallon net of the article, whereas in truth and in fact, said article was not olive oil, but was a mixture composed in large part of cottonseed oil, and each of said cans did not contain one half gallon of the article, but did contain a less amount.

It was alleged in substance in count 8 of said information that said Scaduto shipped from the State of New York into the State of Maryland a quantity of an article of food contained in cans labeled, marked, and branded "First Quality Table Oil Tipo Termini Imerese Sicilia—Italia ¼ Gallon Net Guaranteed Absolutely Pure", and (in very small type) "Cottonseed oil slightly flavored with olive oil"; and that said article was misbranded in that the statements, "Finest Quality Table Oil, Guaranteed Absolutely Pure, Tipo Termini Imerese Sicilia—Italia, ¼ Gallon Net", together with designs of natives gathering and packing olives (not corrected by the statement, in inconspicuous type, "Cottonseed oil slightly flavored with olive oil"), borne on the cans containing the article, were false and misleading, and in that said article was labeled so as to deceive and mislead the purchaser, for the reason that said statements and labels represented that the article was olive oil, and that said article was a foreign product, to wit, an olive oil produced in Sicily, in the Kingdom of Italy, and that each of said cans contained one-quarter gallon net of the article, whereas in truth and in fact, said article was not olive oil, but was a mixture composed in large part of cottonseed oil, and said article was not a foreign product, to wit, an olive oil produced in Sicily, in the Kingdom of Italy, but was a domestic product, to wit, an article produced in the United States of America, and each of said cans did not contain one quarter gallon net of the article, but did contain a less amount.

HAND, *District Judge.* Only two counts are for your consideration. The portion of count 5 which alleges that there was a representation on the Fontanella can of an incorrect amount. The so-called Fontanella count says: "Net contents, ½-gallon", and the part of count 5 which you are to pass on which still stands is whether that was a true representation or not.

The other count which you are to pass on is count 8, which represents that the cans of Termini Imerese oil were falsely branded in respect to the representation as to what the oil was and in respect to the amount, which is one-fourth gallon net on the outside of the can

Now, the defendant in the case of both the Fontanella and the Termini Imerese brands insists that this amount represented on the can should be read in connection with the trade custom of 7½ pounds of cottonseed oil to the gallon. He says that based on that trade custom of weight that this representation as to the half gallon and quarter gallon is true.

You are to determine whether in fact the statement on the Fontanella can that it contained a half gallon, in view of all the evidence, was a true statement. It is not a question of the intention of the defendant, but it is a question of what, in view of all the facts shown to you, is the truth. He has no right, whether he is innocent of purpose or not, under the Pure Food Act to make an incorrect representation as to the contents of his can. So that in regard to count 5, the Fontanella can, the only question for you to determine is whether the Government has proved beyond a reasonable doubt whether the statement that the net contents of the can is a half gallon is true or not.

The second question for you to pass on, for both of these misbrandings are alleged in count 8, is whether, as count 8 says, the can was labeled so as to deceive and lead the purchaser into the belief that said article was olive oil and that said article was a foreign product, to wit, an olive oil produced in Sicily in the kingdom of Italy, and that each of said cans, etc.

The question for you to determine as business men, and it is a typical question for a jury of fact based on business experience and common sense, is what would the person, the purchaser, a member of the public getting that kind of a can, upon such examination as they would be likely to give it, say about it? Would they think it was olive oil, or would they think it was cottonseed oil? The defendant says cottonseed oil slightly flavored with olive oil is the compound indicated there, and that it is clearly stated in these letters. The Government says those are the only small letters, except the quarter of a gallon net, on the whole can; and that they do tend to mislead the public and are a false branding. The Government further says: "What could have been the object of putting this tree and the 'Termini Imerese' on?" There is no proof that any cottonseed oil ever came from that part of the world, in Sicily. What would it mean except that this was olive oil.

The question for you to determine on count 8, as in the case of the Fontanella oil in count 5, is, what is the effect of this? What did one fourth of a gallon net mean in view of all the evidence, and was it correct? Next, what is the effect of this description? Is it a misbranding? Is it something calculated to deceive the public or not? If you find on count 5 in respect to the Fontanella oil that the can did not contain a half gallon, and are satisfied beyond a reasonable doubt of that fact, then you will find a verdict for the Government upon count 5.

If you find on count 8 that the Termini Imerese can either did not contain one fourth of a gallon net, or was misbranded in respect to the description of the contents, that is to say, the kind of oil and where it came from, in either of those events, if you find either fact beyond a reasonable doubt, you are to find a verdict for the Government; otherwise for the defendant, who, of course, is entitled, as in all criminal cases, to the presumption of innocence until he is proved guilty beyond a reasonable doubt.

Mr. STANTON (attorney for defendant). If the court please, might I request you to charge the jury that the character of this defendant should be taken into consideration in their deliberations?

The COURT. No; it is a question of what he did, not a question of intent; it is a question, Mr. Stanton, of whether this statement as to what the can contained is correct, and the picture and descriptive words on the other can indicating or not indicating, as the jury may think, origin, whether that is correct. If the defendant's concern put it out and traded in it, even though he did not know it, he has got to know it; it is not a question of a man's motive.

This Pure Food Law, of course, is a very important law. It is for the purpose of protecting people and seeing that the public get fair statements as to weights, origins, and all that sort of thing. It should be administered also, of course, both by the courts and juries, in a rational and sensible way.

The jury thereupon retired, and after due deliberation returned a verdict in favor of the Government on the charges of short measure.

UNITED STATES v. NEWTON TEA & SPICE CO.

(District Court, S.D. Ohio, Jan. 21, 1920)

275 Fed. 394; N.J. No. 9290

Information alleging violation of section 2 of the Food and Drugs Act. Motion to quash overruled. Jury trial. Verdict of guilty.[7]

PECK, *District Judge* (on motion to quash the information). The defendant, upon the filing of the information, voluntarily appeared thereto and moved to quash the same, upon the grounds first, that the information is indefinite and does not apprise the defendant of the facts constituting the alleged crime with such certainty and particularity as to enable the defendant to know what it has to meet; second, the information attempts to charge the defendant with the commission of a crime by way of argument and conclusion; and third, the court has no jurisdiction.

First. The information is brought under the Food and Drugs Act of Congress, June 30, 1906 (34 Stat. L. 768), and charges the defendant with shipping in interstate commerce 50 cases of an article designed for food, known as "Newton's Eggno", which the information alleges was labeled to read:

> An excellent substitute for eggs * * * to be used for baking and cooking purposes * * * an article of real merit and far superior to the usual

[7]Affirmed, *Newton Tea & Spice Co.* v. *United States*, p. 1089, *post*.

egg substitutes on the market. * * * composed of pure materials * * * one even teaspoonful to be used in place of each egg called for in recipes requiring eggs—

with directions for using and place of manufacture. A poster and a circular are alleged to have been enclosed within the package, making like representations; but the contents of these, even if false, cannot be considered as violations of the act. *United States* v. *American Druggists Syndicate*, 186 Fed. 387.

The information further alleges that the aforesaid statements of the label were false and misleading in that they represented to the purchasers that the article was a substitute for eggs and could be used in place of eggs for cooking and baking, whereas, in truth, said article was not then and there a substitute for eggs, nor could the same be used in place of eggs for baking and cooking.

The defendant contends that the information is deficient in that it does not set forth why, or in what manner, the article cannot be used as a substitute for eggs in baking and cooking.

The statements of the label above set forth were evidently designed to lead the ordinary housewife to believe that the contents of the package could be used in substitution for eggs in the ordinary preparation of food. The information expressly negatives the usefulness of the article for that purpose. It would seem, therefore, to be entirely sufficient to draw the issue upon that question, and, therefore, the motion in this respect is not well taken.

This disposes of the first and second grounds assigned.

Third. Defendant contends that the court has no jurisdiction over the subject matter, for the reason that the information does not state an offense within the terms of the act. In support of this contention it is argued that the article comes within the proviso of the fourth subsection of section 8 of the act, by which it is provided that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in case, first, of mixtures or compounds which may now, or from time to time hereafter, be known as articles of food under their own distinctive names and not in imitation of, or offered for sale under the distinctive name of, another article if the name be accompanied on the label or brand with a statement of the place where said article has been manufactured or produced; and, second, in the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends. Even though we assume it to be the duty of the pleader under this act to negative the terms of the proviso, or assume that the article in question is shown by the label to be a mixture or compound known as an article of food under its own distinctive name, not alleged to be in imitation of another, nevertheless the protection afforded by this proviso goes only to the branding or name of the article, and does not furnish a refuge for one who has on the label otherwise falsely stated the nature of the contents of the package. It is not against the use of the name of "Eggno" that the information is directed, but against the statement that the contents are useful and fit to be substituted for eggs in ordinary cooking recipes.

In *United States* v. *150 Cases of Fruit Puddine*, 211 Fed. 360, having the subject under consideration, at page 364 the court says:

> It does not seem to me that the proviso in question was intended to except them absolutely from the provisions of the act, and to leave the manufacturers free to make misrepresentations concerning them. Such a construction is out of harmony with all the rest of the statute, and disregards one of the principal purposes of it. It seems to me that the protection afforded by the proviso is limited to the distinctive name; and, as so limited, I have no doubt that the proviso applies to the first paragraph of section 8, and fully protects distinctive names from being misbranding.

It was there accordingly held that the words "Fruit Puddine", being false and misleading with reference to the product known as "Puddine", constituted misbranding within the statute.

It is further contended that the statement, "substitute for eggs in baking and cooking," is not one of fact, but of opinion only, and therefore not, in law, misleading; that the substitution of one thing for another is largely a matter of judgment, and that to call a thing a substitute is not to affirm that it is even similar to the original; that one article of diet may be a substitute for another without any necessary similarity. In this case, however, the defendant chose its own definition for the term "substitute" when it expressed upon the label that the article could be used in place of eggs "in baking and cooking." Nothing else could be inferred but that in ordinary culinary compounds the article in question would produce the same or similar results as the use of eggs. This is a direct affirmance of a fact and a definite description, so far as obtainable results are concerned, of the article sold.

It is further contended that the mere representation as to the results which may be obtained by the use of an article do not constitute misbranding under the act, and reliance is had upon *United States* v. *Johnson*, 221 U.S. 448, where it was held that the curative effect of a medicinal preparation of which the labels stated that the contents were effective in curing cancer, contrary to the fact, was not an offense against the provisions of the act relating to the sale of drugs, as the act then stood. But the terms of the act at that time were very much narrower in scope with regard to drugs than with regard to food. By the amendment of 1912 the prohibition relating to the misbranding of drugs was made to expressly cover any statement regarding the curative effect of the article, and under that amendment it has been held that statements of curative effect in reckless and wanton disregard of their truth come within the act. *Simpson* v. *United States*, 241 Fed. 841. With regard to food, the act makes it an offense if the package containing it, or its label, shall bear any statement, design, or device regarding the ingredients or substances contained therein, which statement, design, or device shall be false and misleading in any particular; and the allegations of the information would seem clearly to bring the statements in question within that category.

The information is not upon oath, and it is contended that the same is therefore violative of the Fourth Amendment, and for that reason the defendant should not be held to answer. But the information is not required to be upon oath; it is only required that the same shall be supported by oath before warrant may be issued thereon. *Weeks* v. *United States*, 216 Fed. 292. As the defendant

has voluntarily appeared and filed the motion now under consideration, no question concerning the validity of a warrant is here.

Motion overruled.

On December 9, 1920, the case having come on for trial before the court and jury after the submission of evidence and arguments by counsel the following charge was delivered to the jury by the court.

PECK, *District Judge* (charge to jury). Gentlemen of the jury: It becomes now my duty to charge you with regard to the law in this case. You are the sole judges of the facts; the facts are entirely within your province. The law you will take from the court, and, applying the law as I shall give it to you to the facts as you shall find them to be, you will reach your conclusion in this case.

The essential elements of this information upon which the defendant is here upon trial are, first, that the defendant did ship in interstate commerce 50 cases of cartons. While the burden of proof is upon the Government to establish this beyond reasonable doubt, the defendant has admitted by a stipulation offered in evidence here that it did ship the 50 cases of cartons in interstate commerce; second, that these cases contained an article designed and intended to be used as an article of food. The burden likewise is upon the Government to establish that beyond reasonable doubt. It is next set forth that these cases were then and there denominated as to the contents thereof, labeled, marked, and branded, as follows:

(On cases) "2 doz. Newton's 25c size Eggno Manufactured by the Newton Tea & Spice Co., Cinti, Ohio;" (on top of carton) "Flat Top Gro. Co. Bluefield, W. Va. Food Products, Prepaid, Pieces 51;" (on carton) "Newton's Eggno Artifically Colored. To be used in place of eggs in baking and cooking 3½ Oz. Net. An Excellent Substitute for Eggs. Eggno is an excellent Substitute for Eggs and is to be used for Baking and Cooking purposes. Splendid for Cookies, Cakes, Muffins, Fried Cakes, Bread Puddings, Gravies. Just the thing for Griddle Cakes, Noodles, etc. Eggno is an article of real merit and is far superior to the usual Egg Substitutes on the market. Eggno contains the constituents that cause fresh eggs to fill such an important place in every kitchen. Eggno is the result of scientific research, is composed of pure materials, is nutritious and is economical, as one even teaspoonful is to be used in place of each egg called for in recipes requiring eggs. This package contains 36 even teaspoonfuls. Guaranteed to conform to the Pure Food Laws. Directions. Dissolve Eggno in lukewarm water or milk by first making a paste then adding the balance of the water or milk. Use a teaspoonful for each egg called for in recipes requiring eggs. In making use a trifle more Baking Powder than if eggs were used. Eggno does not take the place of Baking Powder. Prepared and Guaranteed by The Newton Tea & Spice Co. 12–14–16–18 East Second St., Cincinnati, Ohio."

And while the burden is upon the Government to prove the truth of this labeling beyond reasonable doubt, defendant has filed a stipulation here admitting the facts concerning the labeling as thus set forth.

The next material contained in the information purports to set forth the contents of certain circulars that were contained in these cartons. I have withdrawn that from your consideration and you will pay no attention to it. I have marked it in the margin of the information "Ruled out. Omit", and you will pay no attention to that; likewise the phrase upon the next page, of similar import, is ruled out and withdrawn from your consideration.

The fourth element of the information—and it is around this one that the contest here principally turns—is this: That the article of food was misbranded in that the statements, "to be used in place of eggs in baking and cooking * * * an excellent substitute for eggs * * * to be used for baking and cooking purposes * * * Eggno contains the constituents that cause fresh eggs to fill such an important place * * * one even teaspoonful is to be used in place of each egg called for in recipes * * * use a teaspoonful for each egg called for", were all false and misleading. It is also alleged that the carton contained the phrase, "takes the place of fresh eggs," which was false and misleading; but I am unable to find those words upon an examination of the carton—were all false and misleading, says the information, in that they represented to purchasers of the article that the same was a substitute for eggs and could be used in the place of eggs for baking and cooking purposes, whereas, the Government charges, said article was not then and there a substitute for eggs and could not be used in the place of eggs for baking and cooking, and that it was so labeled to deceive—that being so labeled it would deceive and mislead purchasers into the belief that it was such a substitute for eggs and could be so used. And the question of the truth of this, the fourth element, as I have described it, of the information is the principal question for your determination.

The Government does not claim that the product Eggno is poisonous, deleterious, or injurious to human health. The question, therefore, raised by these allegations of the information, which I have denominated the fourth element, is whether or not these statements were false in the respects charged in the information.

Now, by what rules are you to judge of the truth or falsity of this language? The principal rule is this: You will take this language in the ordinary meaning and significance of the words used; that is, as they would be understood by the ordinary purchaser, of ordinary intelligence, familiar with the English language. The purpose of the label is to truthfully advise the purchaser of the contents. That is the purpose of the label—or should be. It is, as it were, the voice of the manufacturer speaking to the prospective purchaser, as though they had met in person and the manufacturer verbally stated to the customer, "I made this product. It is the result of scientific research. It is an excellent substitute for eggs. It contains the constituents that cause fresh eggs to fill an important place; that is, an important place in every kitchen. An even teaspoonful is to be used in place of each egg called for in the recipe." Now, is this statement false and misleading? That is the essence of the matter. It says "An excellent substitute for eggs." The word "excellent" hardly requires us to go to the dictionary to find its meaning. One meaning is "remarkably good." However, little stress is to be laid upon mere adjectives commendatory of wares; manufacturers and others who sell wares are to be expected, and are generally expected by purchasers, to use such adjectives with regard to the wares that they offer for sale. More important are the words, "substitute for eggs." What does the word "substitute" mean? What does it mean to the ordinary purchaser, the ordinary housewife or householder who goes to a grocery store to buy articles

of this kind—what does it mean to her or to him? One definition found in the dictionary for the word "substitute," and perhaps the one that best gives the meaning of the word as here used, is "a thing serving the purpose of another." The representation, therefore, on this label that the contents are an excellent substitute for eggs may perhaps be taken—may be taken in the ordinary acceptance of the word—to assert to the public that the article therein contained is good for serving the purpose of eggs in baking and in cooking.

Now, it is further asserted on this label that it "contains the constituents." What are constituents? Those things which go to make it up, the components, the elements. "Contains the constituents that cause fresh eggs to fill such an important place"—that is, such an important place in the kitchen. The truth or falsity of that statement is also for you to determine. The label also affirms that one even teaspoonful is to be used in place of each egg called for in the recipe; that is, in the cooking recipe. Is this the equivalent to an assertion that one teaspoonful is equal to an egg in the recipe in cooking and baking?

The information alleges that these statements, taken together, amount to a representation to purchasers that the article was a substitute for eggs and could take the place of eggs in cooking and baking, whereas, in fact and in truth, it was not such, and could not be so used; and that the purchasers thereby—that it was misleading thereby to the purchaser.

Generally speaking, to correctly determine whether a falsehood has been told—that is the essence of this case, that this label told a falsehood to the people; that is what the Government charges in these respects that I have indicated, that this label told a falsehood. Now, to correctly determine whether a falsehood has been told, ordinarily it is first necessary to ascertain just what has been told and then to compare the statement so made with the fact. Concerning the statement made, the label is here; it has been admitted by the stipulation, and there is no contest about what the language was that was used. Now, what are the facts? Does the product contain the constituents which cause fresh eggs to fill an important place in the kitchen? Is the product a substitute for eggs, as that language would be understood by the ordinary purchaser? May one teaspoonful be properly used in cooking recipes in place of each egg called for? The evidence offered by the Government tends to show that the product is inferior to eggs in nutritive value, and of little physical or chemical value in cooking and baking operations. The evidence of the defendant, on the contrary, tends to show that the product has been used with satisfaction and apparently good results by many housewives. If the product is, in fact, well adapted to be used instead of eggs in baking and cooking, if it is in truth genuinely fit to be used in place of eggs in those processes, then the label would seem to me to be not false. On the other hand, if the article is not honestly well fit to be used as a substitute for eggs in baking and cooking, if it is not genuinely well adapted to be used instead of eggs for such purposes, then and under such circumstances the label would seem to be false; but the question of its truth or falsity I leave to you.

The burden of proof is not upon the defendant to prove the label true; the burden of proof is upon the Government to show beyond

reasonable doubt, on consideration of all the evidence, that the label is false and misleading in the respects charged in the information.

Now, the question here is not, on the one hand, whether the product is an absolutely worthless article, or, on the other hand, whether it is a complete and perfect substitute for eggs in all respects; the true question is whether the language of the label complained of in the information is false and misleading to the ordinary purchaser in the respects charged in the information. That is the true question for your determination.

As I have said, you are the sole judges of the facts, gentlemen of the jury.

Now, the presumption is that the defendant is innocent, and this presumption prevails until it is overthrown by evidence of its guilt beyond reasonable doubt. The defendant is to be presumed innocent until it is proven guilty. You will begin your deliberations on that basis. You will remember that the mere fact that an information has here been filed by the district attorney against the defendant, in and of itself, raises no presumption that the defendant is guilty. One charged with the commission of an offense can only be convicted, if convicted at all, upon the evidence produced at his trial. The burden of proof is upon the Government of the United States to prove the offense charged and all its essential elements beyond a reasonable doubt.

What is meant by a reasonable doubt? By a reasonable doubt is meant this: When you lack an abiding conviction to a moral certainty of the truth of the charge, considering all the evidence, then there is a reasonable doubt. A reasonable doubt is an honest uncertainty. If you have an honest uncertainty, then you have a reasonable doubt. It is not a mere captious doubt, a mere ingenious doubt, such as one might, by some process of ingenuity, raise in his mind. To be a reasonable doubt it must be an honest uncertainty.

I shall now state to you under what circumstances you will find a verdict of guilty. If you find that each of the essential elements of this information, as I have defined them to you, has been proven beyond reasonable doubt, then it is your duty to find a verdict of guilty. I shall now state to you under what circumstances you shall find a verdict of not guilty. Unless you do find that each essential element of this information has been proven beyond a reasonable doubt, then it is your duty to find a verdict of not guilty.

You are the sole judges of the credibility of the witnesses. You may consider, in judging of their credibility, their demeanor upon the witness stand; any bias or prejudice that they may have shown in the case, if they have shown any; their interest in the outcome of this trial, if any they have; the probability or reasonableness of their testimony; their intelligence; their means of observation; their knowledge of that whereof they have spoken. You will consider their connection with either party to the case, if any they have; and any and all circumstances which bear, or tend to bear, upon the credibility of the witnesses. And then, having done this, having considered all the testimony bearing upon their credibility, you will give to the testimony of each and every witness such credit as you find it entitled to receive. You are not to reject any of the testimony arbitrarily or without reason. You are not, as a matter of

fact or as a matter of law, bound by the greater number of witnesses, although number is a matter for you to consider.

Certain expert witnesses have testified before you. As to matters of opinion, expert witnesses are permitted to give opinions about matters which are not within the common knowledge of all. As, for instance, the chemical science. We are not, generally speaking, chemists, or familiar with the chemical science; therefore, the law permits witnesses to be called to give an opinion, state to you an opinion, as to matters pertaining to the chemical science. And so, in this science of food known as dietetics, and so of the refinements of the art or the science of cooking, witnesses have been permitted to give their opinions. Now, the opinion of a witness depends not only upon his truthfulness, but upon the amount that he knows about the subject that he is giving an opinion upon. The opinion of one upon chemistry who knew little of chemistry would be of very little value; so that you will see, in considering the value of opinion evidence, it is necessary for you to carefully consider the qualifications of the witnesses to give the opinions which they have given. Opinion evidence is ordinarily not binding upon the jury, but it is to be considered in determining the matters submitted to the jury.

Gentlemen of counsel——

Mr. ROUDEBUSH. Nothing, Your Honor.

Mr. LANNIN. May it please the court, I wish to take exceptions to the failure of the court to instruct the jury that the question of the element of food value and nutritional value of the product involved in this case is not in issue in this case.

And also to the failure of the court to instruct the jury that in determining whether this product is misbranded or not, they must confine their considerations to its use for baking and cooking purposes, and not for its use as an article of food, for food purposes.

And I also save exceptions to the statement of the court to the effect, as near as I can remember now, that the element of nutritive value and food value is involved in this case. I understand Mr. Simmonds has some objections. I don't know just what the rule of this court is, as to whether both of us can save exceptions or not.

The COURT. Yes; I will permit each counsel to take such exceptions as he wishes. Mr. Simmonds——

Mr. SIMMONDS. If Your Honor please, we desire to reserve exceptions to the fact that the court has not charged that it is necessary, in addition to establishing the other charges, to establish that the label was so labeled as to deceive the purchaser.

And likewise to the proposition of the qualitative words, as used by the court in his charge, as to the degree of proficiency that must be reached by the product. We think that——

The COURT. It is not time for argument—just your exceptions. Anything further, gentlemen of counsel? Gentlemen of the jury, you will now retire and deliberate upon your verdict. When you have reached your conclusion you will notify the court.

Mr. KROHN (a juror) (after a portion of the jury had retired from the jury box). I don't understand that charge——

The COURT. If you wish any further instructions the jury will have to return as a whole, Mr. Krohn.

(Thereupon the jury retired from the court room.)

Mr. LANNIN. May the jury not take the exhibits with them to the jury room?

The COURT. The marshal will take all the exhibits to the jury room.

Mr. LANNIN. Take them out of the pans——

Mr. ROUDEBUSH. Is the jury permitted to take the exhibits to the jury room, Your Honor?

The COURT. It will be just exactly as they are. Just pick these tables up and carry these exhibits into the jury room.

Mr. LANNIN. The jury is permitted to eat the cakes?

The COURT. Wait until the jury has retired. Are all the jurors out of the room? Now you ask if the jurors will be permitted to eat these cakes?

Mr. LANNIN. Yes, Your Honor.

The COURT. It seems to me that that should not be so, for this reason: It is undoubtedly the rule that the jurors must receive the evidence in the court room. Is that not the rule? The Constitution requires that no evidence can be taken outside of the court room in a criminal case, and practice so requires. Now, the tasting of these foods would be one way of the juror exercising his senses; it would be one way of his brain receiving information from the evidence, and it seems to me that that might have been done during the taking of the evidence in the court room, and I thought of it and was of a mind to permit it had either side so requested. But now the taking of the evidence has been concluded. Of course, the point is novel; I rule without precedent, so far as I know. But upon general principle it seems to me that the taking of evidence having been concluded, I would have the right to submit to the jury that which their senses have already received—nothing new. And, therefore, the rule will be that the exhibits may all be removed by the marshal to the jury room, as they are.

Mr. ROUDEBUSH. Your Honor, isn't that contrary to the rule that has been heretofore, that any exhibits go to the jury room?

The COURT. No; I have permitted the exhibits to go to the jury room in other cases.

Mr. ROUDEBUSH. In criminal cases?

The COURT. I should not permit the exhibits to go contrary to the objection of the defendant, perhaps, but at the request of the defendant——

Mr. ROUDEBUSH. I want to object to it.

The COURT. I am inclined to send the exhibits to the jury room. It doesn't seem to emphasize the exhibits of either side. Each side has introduced its exhibits of this nature. It is a matter that is discretionary with the court. Where it tends to emphasize the evidence of either side it ought not to be permitted, but here it seems to be about as long as it is broad, and I will let all of the exhibits go to the jury room. That includes all of them, the stipulation and everything else.

Mr. LANNIN. Your Honor, I don't want to take any time, but I might say the only experience I had on the subject was where we had a vast number of food exhibits introduced last winter before Judge Faris in St. Louis; in that case he permitted the jurors to eat the exhibits in the court room.

The COURT. I should have done that.

Mr. LANNIN. And even served drinks with them—coffee and things of that kind. There was no objection to it. I have never had a case under these circumstances.

The COURT. I think you will see, upon reflection, that the eating of the exhibits in the jury room would be the receiving of evidence out of the jury room.

Mr. LANNIN. I might suggest this—I don't want to get the court in bad—that the marshal tell the jury as to the order of the court.

The COURT. No; we will just follow what seems to be the law in the matter. Is the marshal here? Call him. Have you copies of these special charges requested, Mr. Roudebush?

Mr. ROUDEBUSH. Yes, Your Honor.

The COURT. I have refused them and have noted upon them some of the reasons I have for refusing them. You may copy them and then hand them to the other side. [At this point a deputy marshal came into the court room.] Mr. Marshal, please get an assistant and carry all of these exhibits on them to the jury room. All of these exhibits go to the jury room, just as they are.

(Thereupon the court retired from the bench.)

The special charges requested by counsel for defendant, with the notations made thereon by the court, are here set out, by true copy, as follows:

No. 1

The court instructs you that if you find from the evidence that purchasers of Eggno in purchasing the same for baking and cooking purposes, do not have in mind the question as to the food value or nutritive value of the product and are not concerned with whether it has or has not any food value or nutritive value or contains any vitamins or food calories, but are concerned solely with the question as to whether it will produce substantially the same effect as eggs for baking and cooking purposes in the way of a binder for food, a settler of food, or to obtain in food the desired form, fluffiness, or texture, or color as the purchaser may desire, and that Eggno will fairly and reasonably, but not necessarily as perfectly as eggs, perform these functions respectively or collectively to the satisfaction of the average purchaser of ordinary intelligence, then you may disregard all testimony as to food value and nutritional value, the presence or absence of calories and vitamins, and you will return a verdict of not guilty.

Refused. (Signed) Peck, *J.*

No. 2

The court instructs the jury that if you find from all the evidence in this case that there is a well founded difference of opinion, based upon honest covictions, one way or the other, among purchasers and users, of the Eggno involved in this case, as to whether or not the Eggno involved in this case is a substitute for eggs to a fair and reasonable degree for cooking and baking purposes, you will find the defendant not guilty.

And in this connection the court instructs you that you may take into consideration the extent to which such users have used the

product for baking and cooking purposes, the length of time they have used the same, and all other circumstances that would enable such purchasers and users to form a fair opinion on the subject.

Refused. The witnesses have given facts as to its use, not their opinions as to its being a substitute. (Signed) Peck, *J.*

No. 3

The court instructs the jury that there is no question involved in the case of wholesomeness or healthfulness of the product Eggno, or any of its ingredients, there being no claim that it is poisonous, deleterious or injurious to human health (given), and it being admitted by the Government to be a wholesome article.

Refused—tends to exclude the consideration of nutrition—see label " nutritious." (Signed) Peck, *J.*

No. 4

The issue involved in this case is not to be determined by the question as to what persons with lack of familiarity with the product involved herein would understand the label involved in this case to mean, but is to be determined by what idea the label might convey to persons of ordinary intelligence who are conversant with our language.

Refused. (Signed) Peck, *J.*

No. 5

I charge you that if you find from the evidence that it is the consensus of opinion of actual purchasers of Eggno; of ordinary intelligence, for ordinary baking and cooking purposes, that the product is a satisfactory substitute for eggs for baking and cooking purposes and will fairly and reasonably take the place of eggs for such purposes, you will find the defendant not guilty.

And in this connection you will not regard purchasers of the product for technical or scientific purposes as purchasers within the meaning of the law in this case.

Refused on same ground as No. 2. (Signed) Peck, *J.*

No. 6

I charge you, gentlemen of the jury, that the following statements appearing upon the label on the package in this case, to wit, " Eggno is an article of real merit and is far superior to the usual egg substitute on the market. Eggno contains the constituents that cause fresh eggs to fill such an important place in every kitchen. Eggno is the result of scientific research and is composed of pure materials and is economical," are not statements as to the identity of the article or statements of ingredients of the package, but rather are statements commendatory of the article, and are therefore not within the provision of section 8 of the Food and Drugs Act of June 30, 1906, and you will disregard the same in your deliberation as being withdrawn from your consideration. *United States* v. *Johnson*, 221 U.S. 488.

Refused. (Signed) Peck, *J.*

The second sentence quoted is a distinct affirmation of fact concerning the contents.

No. 7

I charge you, gentlemen of the jury, that there is no legal standard provided by law fixing the degree of efficiency which any given article must contain when sold as a substitute and in this case there is no legal standard provided by law fixing the degree of efficiency which the product known as "Eggno" must possess when sold as a substitute for eggs in baking and cooking, when compared with eggs.

Therefore, if you find from the evidence that the article involved in this case, known as "Eggno", was sold as a substitute for eggs in baking and cooking, and that said "Eggno" did have any fair and reasonable degree of efficiency as such a substitute, or was a substitute to a fair and reasonable degree, for eggs for baking and cooking purposes, you will find the defendant not guilty. And in this connection I charge you further that a product sold as a substitute for eggs for baking and cooking purposes is not required to be 100 percent as efficient in all or any respects as eggs, but is only required to be fairly and reasonably as efficient as eggs for the purpose mentioned.

Refused. (Signed) Peck, *J.*

No. 8

The court instructs the jury that the Eggno involved in this case was not sold as a food for its food value, but that the label fairly construed represents the product to be sold as an accessory in baking and cooking, and in that respect as a substitute for eggs. And in considering whether the product is or is not a substitute for eggs for baking and cooking purposes you are only permitted to take into consideration the purposes for which eggs are used in baking and cooking.

Refused—see label "nutritious." (Signed) Peck, *J.*

No. 9

I charge you, gentlemen of the jury, that the basis of the charge in this information is not one of adulteration. The Government undertakes to and must prove beyond a reasonable doubt that the product is so labeled as to deceive the ordinary purchaser of ordinary intelligence purchasing said product for baking and cooking purposes, and if you should find from the evidence herein a reasonable doubt as to whether or not such purchasers in purchasing the product for cooking and baking purposes were so deceived, then your verdict will be not guilty.

Refused—would require Government to establish actual deceit of purchasers. (Signed) Peck, *J.*

No. 10

The court instructs the jury that in considering whether the product involved in this case is or is not a substitute for eggs for baking and cooking purposes, the question as to its own food value, or the

food value (so far as the question of nutrition is concerned) of the finished baked or cooked foods imparted to them by it, is immaterial and you should disregard all testimony relative to the same.

Refused—same ground as No. 8. (Signed) Peck, *J.*

UNITED STATES v. ST. LOUIS DAIRY CO.

(District Court, E.D. Missouri, Feb. 7, 1920)

N.J. No. 11,430

On demurrer to indictment for alleged violations of Food and Drugs Act. Demurrer overruled.

Faris, *Judge.* The defendant has been indicted on eight counts for alleged violations of the act of June 30, 1906, as amended. To this indictment, and to each count thereof, defendant demurs. The ground of demurrer to each of the counts of the indictment is identical; so but one count need be considered.

The indictment contains apt allegations to the effect that heretofore, to wit, in the year 1911, this same defendant was upon its plea of nolo contendere to a criminal information convicted and fined the sum of $50 and costs for a violation of the same act under which defendant here stands charged in the indictment now pending. Toward these allegations of prior conviction the demurrer herein is aimed. Touching the above allegations of the indictment it is strenuously urged in the demurrer that they are impertinent, irrelevant, and that they have no relationship to, or connection with, the offense now charged in the several counts of the instant indictment. After a careful consideration of the point urged I am of the opinion that the demurrer ought to be overruled.

The statute under which the defendant is indicted provides, among other things, that for a first offense thereunder the punishment shall on conviction be a certain minimum in the statute set forth; but that on conviction for a second offense, or any subsequent offenses thereunder, the punishment shall be increased in a certain definite manner in the statute prescribed. Notwithstanding this provision, it is strenuously insisted by defendant that the setting out of such former conviction at length in the indictment is without warrant of law and that the same will be hurtful and prejudicial to it upon its trial.

I have been unable to find any case directly in point upon the question mooted. The Government contends that since it is well settled in the practice in the State courts, under the so-called habitual criminal acts, that former convictions must be set out in the indictment, the decisions so holding, which are numerous (*State* v. *Austin*, 113 Mo., 538; *State* v. *Schumacher*, 12 Mo. App. 569; *Ward* v. *State*, 53 N.Y. 511), are decisive of the point here involved. Against this insistence the defendant contends that there is no analogy existing between the two propositions. This, for the reason that in the State courts (except in a few negligible exceptions) a trial jury both finds the fact of guilt and fixes the punishment, while in the Federal courts the trial jury simply finds the fact of guilt and

leaves it to the court, under the several statutes, to fix the punishment.

I do not think that the reason urged by defendant is conclusive. It is well settled that the indictment is a mere formal charge; that it is not in any way evidentiary. Besides it is difficult to perceive the nature of the procedure which could be invoked, in order to acquaint the court, when fixing the punishment, with the fact that a former conviction, unless such convictions were pleaded. While the court is required to take judicial notice of the whole record in a given case, the court is not required to take judicial notice of the record of one case which is pending, or which has been pending in such court, upon the trial of another and wholly disconnected case, such as two prosecutions, even against the same defendant, would constitute. Therefore absent the pleaded fact of a former conviction, the fact of such conviction would or might easily escape the attention of the court. The fact, therefore, of such former conviction, ought, I think, to be pleaded by the Government, so that the court would have the formal charge thereof before it when it comes to fix the punishment. Moreover, a question of the identity of the defendant upon trial with the person formerly convicted might well arise and become an issue in the case.

Whatever ill effect might accrue to the defendant upon the trial by reason of the recital in the indictment of a former conviction, could, if necessary, be obviated by a proper charge as to the lack of probative effect of the averments of the indictment. For these reasons, as well as others that might be mentioned, it occurs to me that the ills which might accrue to defendant, if charged in the indictment with the fact of former conviction, are more than offset by the harm which would accrue to the Government from the fact that such charge was not contained in the indictment. All these considerations induce me to take the view upon a question which seems to be of first impression under this statute, that the demurrer herein is not well taken. Let it be overruled.

UNITED STATES v. TWO CANS OF OIL OF SWEET BIRCH AND THREE CANS OF OIL OF GAULTHERIA

(District Court, S.D. New York, Mar. 10, 1920)

268 Fed. 866; N.J. No. 7691

Libel under section 10 of the Food and Drugs Act. Motion by claimant for release of product under bond. Motion denied.

The United States attorney filed a libel for the seizure and condemnation of 2 cans, each containing 60 pounds of a product purporting to be oil of sweet birch, and 3 cans, each containing 30 pounds of a product purporting to be oil of gaultheria, charging adulteration and misbranding. The alleged birch oil was labeled in part, "Oil Sweet Birch U.S.P." The alleged oil of gaultheria was invoiced as "Wintergreen Leaf Oil (Gaultheria)."

The claimant by his attorney filed a motion for the release of the product under bond. Said motion was denied.

HAND, *District Judge.* The claimant transported in interstate commerce the above-named merchandise which was misbranded. The articles seized had a much lower market value than the articles which the false labels described. They were branded as oil of birch and wintergreen, which are used in the manufacture of confectionery. The imitation so branded contained but a small percentage of the ingredients and consisted mainly of a chemical of different composition.

The claimant asks to be allowed to furnish a bond and to have the merchandise released so that he can sell it by correct description. It is not denied that the merchandise is not deleterious. The release of these articles after bond is in my opinion discretionary with the court. Section 10 of the Food and Drugs Act provides that any article of food that is adulterated or misbranded and is a subject of interstate commerce "shall be liable to be proceeded against in any district court of the United States within the district where the same is found and seized for confiscation by a process of libel for condemnation."

There follows in a subsequent clause in section 10, supra, a provision empowering "the court by order (to) direct that such articles may be delivered to the owner thereof."

This is not mandatory but clearly permissive. The claimant here has been convicted of a similar offense before and has numerous other proceedings pending against him. I regard the application as addressed wholly to my discretion and I decline to exercise it in favor of the claimant under existing circumstances. The misbranding was fraudulent and injurious to competitors in the trade.

The motion to release on bond is denied.

BRADLEY v. UNITED STATES

(Circuit Court of Appeals, Fifth Circuit, Mar. 18, 1920)

264 Fed. 79; N.J. No. 8701

Appeal from District Court for Western District of Louisiana. Judgment affirmed.[8]

Before WALKER, Circuit Judge, and GRUBB and CALL, District Judges.

CALL, *District Judge.* Libel was filed in the United States District Court for the Western District of Louisiana, against 275 cases of mineral water, praying for confiscation and condemnation of same for having been shipped in interstate commerce in violation of the Food and Drugs Act.

The libel, after alleging the shipment of the cases of mineral water in interstate commerce and the presence of the same within the jurisdiction of the court, alleges that the same were misbranded in the following respects:

That the following statements regarding the therapeutic or curative effects thereof, appearing on the label aforesaid, to wit, "Robinson Springs Water.

[8] Affirming *United States* v. *275 Cases of Mineral Water,* p. 920, *ante.*

Springs at Pocahontas, Miss. Recommended in the treatment of Bright's Disease, Diabetes, Dropsy, Cystitis, Gout, Rheumatism, Indigestion, Kidney, and Bladder troubles. Directions * * * Robinson Springs and Sanitarium Co., Pocahontas, Miss.," were false and fraudulent, in that the same were applied to said articles knowingly and in a reckless and wanton disregard of their truth or falsity, so as to represent falsely and fraudulently to the purchaser thereof, and create in the minds of purchasers thereof, the impression and belief that it was in whole or in part composed of or contained ingredients or medical agents effective among other things, as a remedy for Bright's disease, diabetes, dropsy, cystitis, gout, rheumatism, indigestion, kidney and bladder troubles, when in truth and in fact said article was not in whole or in part composed of and did not contain ingredients, nor a combination of ingredients, capable of producing the therapeutic effects claimed on the labels, and therefore not effective as a treatment for said above-mentioned ailments.

C. L. Bradley put in a claim to the water seized by the marshal, and excepted to the libel: (1) That the label does not disclose that the waters contained in the bottles are misbranded, because the label does not claim that the waters contain any ingredients or substance for the cure of any human ailment; (2) the label described in the libel does not pretend that the waters contain medical agents effective as a remedy for human disease; (3) that the labels set out in the libel do not amount in law to a misbranding.

An answer was also filed admitting the shipment in interstate commerce, and the labels as set out in the libel, and were intended for sale as a mineral water recommended to be freely used in the treatment of certain diseases; that the same were in the jurisdiction of the court, but denies that they were misbranded or that the brand was false or fraudulent. The answer then proceeds to allege that before putting the waters upon sale he had the same thoroughly tested and was advised by reputable physicians that the use of said waters were beneficial in the treatment of certain kidney troubles mentioned in the libel; that the water was sold under a guaranty that those not satisfied with the result of the use of the water might have their money back; that said label had been submitted to the proper board in Washington and it expressed itself as having no objection to same; that the labeling was in good faith and not in any attempt to perpetrate a fraud upon the public.

The exceptions were overruled and the cause went to trial before a jury. After the Government case was in, the claimant moved for an instructed verdict. This motion was renewed at the close of the entire evidence. Each of said motions were refused, and the jury returned a verdict in favor of the Government, upon which a judgment was entered condemning said water.

The errors assigned are as follows: (1) The court erred in failing to sustain exceptions to the libel; (2) the court erred in refusing to instruct the jury to find a verdict for claimant; (3) the court erred in refusing the charge that the label on the bottles of water did not violate the act of Congress in that the said label made no statement regarding the therapeutic or curative effect of said waters; (4) the court erred in refusing to grant a new trial.

The first and third assignments raise the same question of law. Does the label as set out in the libel bear the interpretation sought to be placed on it by the Government, i.e., that the words, "Recommended in the treatment of," the diseases named, properly construed, mean that the said water had a curative or therapeutic quality? If

the court could say that they did not have this meaning, then it should have sustained the exceptions and given the charge asked. If it could not, then no error was committed in overruling the exception and refusing to give the charge. The construction of the language used in the label was in the first instance for the court; the falsity or truth and the intent of the claimant were for the jury to find from the testimony before it.

It seems to us that words, "Recommended in the treatment of Bright's disease", etc., "Directions, * * *" could only mean that the use of the water in the treatment of the diseases named would effect a cure or alleviation of such diseases, otherwise why recommend it? Unless this means that the water did contain elements or ingredients which would alleviate or cure the diseases named, when taken according to the directions thereon contained, it was a waste of printers' ink. Would not anyone suffering from any one of the diseases named understand that by the taking of the water his ailment would be alleviated or cured by reason of the ingredients contained in the water? It seems to us that he would. Treatment would only be taken with a view to alleviation or cure, and a water possessing elements or ingredients favorable to that end only would be recommended.

We think this label clearly susceptible of this construction, and that no error was committed either in overruling the exception or refusing the charge.

The contention is made that the water condemned in this case is not a drug within the meaning as used in the act. To confine the meaning of the word "drugs", as used in the third subdivision of section 8, to any definition of drug found in dictionaries or pharmacopœias would in our judgment be entirely too narrow. As Justice Hughes says, in *Seven Cases* v. *United States*, 239 U.S., 517, "That false and fraudulent representations may be made with respect to the curative effect of any substance is obvious", and when so made of water it seems to us it would be trifling to say that water ordinarily is not a drug in the true meaning of the word, and therefore does not fall within the condemnation of the third subdivision of section 8 of the act. If the allegations of the libel are true, the claimant has put the substance, water, in interstate commerce with the recommendation that it possesses certain elements or ingredients which are curative or at least alleviative for the diseases named in the label. He will not be heard now to say the substance recommended is water and not a drug. Such a construction would nullify the act of Congress.

After the Government had closed its case the claimant moved for an instructed verdict, which motion was denied, and this action of the court is assigned as error in the third assignment.

The evidence produced on behalf of the Government tended to show the shipment of the water in interstate commerce, the wording of the label as set out in the libel, the analysis of the water and absence therein of any medicinal ingredients possessing curative or alleviative properties in the treatment of the diseases named in the label, and the position of the claimant in respect to the article.

Under that condition of the proof it seems to us clear that the trial judge would have had no right to withdraw from the jury the determination of the two main questions at issue, namely, whether the claims made in the label were true, and if not true, whether they were made knowingly and fraudulently. The judge is only justified in withdrawing a case from the jury when the testimony is such that no reasonable construction of it would justify a verdict for the plaintiff. "The case should not have been withdrawn from the jury unless the conclusion followed as matter of law, that no recovery could be had upon any view which could be properly taken of the facts the evidence tended to establish." *Texas & Pacific Railway Co.* v. *Cox*, 145 U.S. 606. After a full review of the testimony for the Government we cannot say the testimony is of this character. The jury would have been justified in finding from this testimony, unexplained or uncontradicted, the falsity of the label and the fraudulent intent of the claimant in putting forth the claims made therein.

The motion for an instructed verdict was renewed at the close of the testimony in the entire case and denied by the court. The testimony in its then condition made an issue of fact upon conflicting testimony, which could only be decided by the jury in the case.

The last error assigned is the refusal of the court to grant the motion for a new trial. The refusal or granting of a motion for a new trial is in the sound discretion of the trial judge, and cannot be reviewed upon writ of error or appeal. *Mattox* v. *United States*, 146 U.S. 140.

The case was submitted to the jury by the trial judge in a full and clear-cut charge defining the issues, and the jury found against the claimant.

We find no reversible error in the record, and therefore the judgment of the trial court is affirmed.

UNITED STATES v. 154 CASES OF TOMATOES

(District Court, W.D. Pennsylvania, Mar. 29, 1920)

N.J. No. 8727

Libel under section 10 of the Food and Drugs Act. Motion to dismiss. Motion sustained.

ORR, *District Judge*. This is a proceeding instituted by the United States for the seizure and condemnation of 154 cases of canned tomatoes, upon the ground that they have been adulterated and misbranded, in violation of the Food and Drugs Act. The Phillips Packing Company, which is named in the libel as the shipper, has presented its motion to dismiss the libel for the reason that it does not set forth any facts showing a violation of the act of Congress aforesaid. The libel was signed and filed by the United States attorney. The only affidavit attached to it is by one who says that

he is an "inspector of the Bureau of Chemistry, United States Department of Agriculture; that he has read the foregoing libel and the averments contained therein as to his own knowledge are true, except as to those matters and things stated to be of his information and belief, and as to those matters and things he verily believes them to be true." It is unfortunate that there is such a lack of correlation between the affidavit and the libel, that we cannot tell what averments in the latter are made upon the knowledge of the affiant and what are made upon his information and belief. There is, therefore, a lack of that certainty of allegation which should always be found in a libel before the property of a citizen should be seized. Turning to the libel, we find a representation to the court that the canned tomatoes are labeled, inter alia, as follows: "Castle Haven Brand Tomatoes Our first quality carefully selected Packed for Fine Family Trade Contents weight 2 lbs. Packed by Phillips Packing Co., Cambridge, Md., U. S. A." We find it further represented in the libel "that said article of food as analyzed by the Bureau of Chemistry, Department of Agriculture, United States of America, is shown to be adulterated in violation of said act of Congress commonly known as the Food and Drugs Act, in that tomato pulp has been mixed and packed with and substituted wholly or in part for the article." This is not an averment that tomato pulp has been mixed and packed with and substituted for the article, but is an averment that a certain analysis shows such mixture, packing, and substitution. In other words, there is the averment that a certain analysis will show an adulteration, yet no averment of the fact of such adulteration. Further, it is a matter of common knowledge that tomato pulp is derived from tomatoes, yet there is no averment that canned tomatoes, according to a custom of the trade, are supposed to be free from tomato pulp. It is provided by the act itself that the proceedings in cases like the present shall conform as nearly as may be to the proceedings in admiralty. We find in General Admiralty Rule No. 23 the provision that, "the libel shall also propound and articulate in distinct articles the various allegations of fact upon which the libelant relies in support of its suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article."

There is not the particularity required of the pleader in admiralty which is required of a pleader at law or in equity, yet where there is to be a seizure of the property of a citizen there should be distinct allegations of fact which if provided, would justify the seizure. In *du Pont de Nemours & Company* v. *Vance*, 19 Howard, 162–171 and 172, we find this language in the opinion of the Supreme Court, as delivered by Mr. Justice Curtis:

> The rules of pleading in the admiralty court are exceedingly simple and free from technical requirements. It is incumbent on the libelant to propound with distinctiveness the substantive facts on which he relies, etc.

The same views, although greatly elaborated, are expressed in the earlier case of *The Hoppett and Cargo* v. *United States*, 7 Cranch, 389–393:

> It is not controverted, that in all proceedings in courts of common law, either against the person or the thing, for penalties or forfeitures, the allega-

tions that the act charged was committed in violation of law, or of the provisions of a particular statute will not justify condemnation, unless, independently of this allegation, a case may be stated, which shows that the law has been violated. The reference to the statute may direct the attention of the court and of the accused to the particular statute by which the prosecution is to be sustained, but forms no part of the description of the offense. The importance of this principle to a fair administration of justice, to that certainty introduced and demanded by the free genius of our institutions in all prosecutions for offenses against the laws, is too apparent to require elucidation, and the principle itself is too familiar not to suggest itself to every gentleman of the profession. Does this rule apply to informations in a court of admiralty? It is not contended that all those technical niceties which are unimportant in themselves, and standing only on precedents of which the reason cannot be discerned, should be transplanted from the courts of common law into the courts of admiralty. But a rule so essential to justice and fair proceeding as that which requires a substantial statement of the offense upon which the prosecution is founded, must be the rule of every court where justice is the object, and cannot be satisfied by a general reference to the provisions of a statute. It would require a series of clear and unequivocal precedents, to show that this rule is dispensed with in courts of admiralty, sitting for the trial of offenses against municipal law. It is, upon these and other reasons, the opinion of the court that the information is not made good by the allegation that the offense was committed against the provisions of certain sections of the act of Congress.

Taking up now the charge of misbranding, the representation is made "that said article of food, so designated as aforesaid and analyzed as aforesaid, is also shown to be misbranded in violation of said act of Congress in that labels contain statements 'Tomatoes', and a cut of a ripe tomato, which are false and misleading and deceive and mislead the purchaser." This averment is insufficient to justify the seizure. There is no allegation in the libel that the contents of the cans are not derived from tomatoes, whether ripe or unripe. There is no averment in the libel that they are not tomatoes of the Castle Haven Brand, whatever that may mean, and there is no averment in the libel that the contents of the cans are not of the first quality available to the packer, and that they had not been carefully selected. The picture of a ripe tomato upon a can cannot deceive people into the belief that what is in that can is what is pictured on the label. It indicates merely the source from which the contents of the can may be derived.

The court must reach the conclusion that the libel is insufficient in that it does not contain allegations of substantive facts which clearly show the right of the Government to seize and condemn these canned goods. The great value of the Food and Drugs Act, and its amendments, to the social life of the citizens of the United States must be recognized by all who have given thought to its provisions and its purposes. That value should not be diminished either by obstacles raised to interfere with its enforcement, or by the disregard of the legal requirements which must be followed in order to reach offenders. The property rights of shippers and other citizens cannot be lightly regarded, and before their property can be seized there should be a strict adherence to the provisions of the acts of Congress and to the reasonable rules and regulations to be found in admiralty proceedings.

The motion will be sustained.

KAR-RU CHEMICAL CO. v. UNITED STATES

(Circuit Court of Appeals, Ninth Circuit, May 3, 1920. Rehearing denied. July 6, 1920)

264 Fed. 921; N.J. No. 8021

In error to the District Court for the Western District of Washington. Judgment of conviction affirmed.[9]

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, *Circuit Judge.* The Food and Drugs Act of June 30, 1900 (34 Stat. 768), provided in section 2 as follows:

> That the introduction into any State * * * from any other State * * * of any article of food or drugs which is * * * misbranded, within the meaning of this Act, is hereby prohibited; and any person who shall ship or deliver for shipment from any State * * * to any other State * * * any such article so * * * misbranded *within the meaning* of this Act, * * * shall be guilty of a misdemeanor.

Section 8 of the act provided:

> That the term "misbranded", as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular.

In *United States* v. *Johnson*, 221 U.S. 488, this act came before the Supreme Court of the United States upon the question as to the meaning of the word "misbranded" as defined in the act with respect to a false statement on the label. The court held "that the phrase is aimed not at all possible false statements, but only at such as determine the identity of the article, possibly including its strength, quality and purity", and not at statements as to curative effect. In that case it was charged that the label stated or implied that its contents were effective in curing cancer, the defendant well knowing that the representations were false. The court held that, even if the statement was misleading, it was not covered by the statute. This decision was rendered in May 1911.

President Taft almost immediately transmitted to Congress a special message calling attention to the necessity of passing at an early date an amendment to the Food and Drugs Act supplementing the existing law to "prevent the shipment in interstate and foreign commerce of worthless nostrums labeled with misstatements of fact as to their physiological action." In the course of the message the President said:

> In my opinion, the sale of dangerously adulterated drugs, or the sale of drugs under knowingly false claims as to their effect in disease, constitutes such an evil and warrants me in calling the matter to the attention of the Congress. Fraudulent misrepresentations of the curative value of nostrums not only operate to defraud purchasers, but are a distinct menace to the public health. There are none so credulous as sufferers from disease. The need is urgent for legislation which will prevent the raising of false hopes of speedy cures of serious ailments by misstatements of fact as to worthless mixtures on which the sick will rely while their diseases progress unchecked. (62d Cong., 1st Sess., vol. 47, Cong. Rec., pt. 3, p. 2379.)

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[9] Affirming *United States* v. *Kar-Ru Chemical Co.*, p. 900, *ante*.

In response to this message an amendment to the act was introduced in the House, which was explained by Mr. Sherley, its author. In the course of his remarks he referred to the President's message and the decision of the Supreme Court in the *Johnson case*, in which he stated that the court had held:

> That the sections of the Pure Food Law relating to misbranding did not embrace statements as to the curative or therapeutic properties of drugs. There was a very strong dissent handed down by Justice Hughes and concurred in by Justice Day and Justice Harlan, holding that a proper construction of the act would embrace such cases. The majority of the court seem to have gone on the idea that it was not the intention of Congress to enter into the domain of matters in issue between rival schools of medicine, but, as is very clearly set out by the minority in their dissenting opinion, there were great many cases that did not belong in this twilight zone, but represented plain cases of fraud and deceit. In the opinion of the minority of the court, it was the intention of the law to reach such cases, and believing it certainly ought to be the intention of the law to reach them, I introduced the bill now before the House. Just after its introduction, the President called attention to the importance of the decision and the need of a remedy by a special message to Congress. This act has been drawn with some care, and as perfected by the amendments offered will certainly reach these cases of fraud without undertaking to have the Government enter into the disputed domain that lies outside of proper legislation. (62d Cong., 2d Sess., vol. 48, Cong. Rec., pt. 11, p. 11,322.)

The amendment was passed. It provided among other things the addition of a paragraph to section 8 of the act of June 30, 1906, defining misbranding, as follows:

> Third. If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent.

The information in this case contains four counts. The first count charges the defendant with the unlawful shipment and delivery for shipment via United States mail from the city of Tacoma, State of Washington, to the city of Portland, State of Oregon, consigned to Clarke Woodward Drug Co., a certain package containing three boxes, each box containing an article designed and intended to be used in the cure, prevention, and mitigation of diseases of men. The character and brand of the boxes is set forth, and it is charged:

> That when shipped and delivered for shipment as aforesaid said article of drugs was then and there misbranded within the meaning of the said act of Congress, as amended, in that the following statements regarding the therapeutic or curative effect thereof appearing on the label aforesaid, to wit, "'Kar-Ru,' the constitutional remedy for Rheumatism * * * It is effective in Kidney, Liver, Bladder, Stomach, and Catarrhal Troubles, Mental and Physical Debility, Neuritis, Eczema, Blood Diseases, Irregular menstruation, and the most Acute and Chronic Rheumatic Afflictions," was false and fraudulent in this, that the same was applied to said article unlawfully and in reckless and wanton disregard of its truth or falsity so as to represent falsely and fraudulently to the purchasers thereof and create in the minds of the purchasers thereof the impression and belief that the article was in whole or in part composed of or contained ingredients or medical agents effective among other things as a remedy for rheumatism * * * or effective as a remedy for kidney, liver, bladder, stomach, or catarrhal troubles, or effective as a remedy for mental or physical debility, neuritis, eczema, blood diseases, irregular menstruation, or the most acute and chronic rheumatic afflictions, when in truth and in fact said article was not in whole or in part composed of and did not contain any ingredients or medical agents effective, among other things, as a remedy for rheumatism, or effective as a remedy for kidney, liver, bladder, stomach, or catarrhal troubles or effective as a remedy for mental of physical debility, neuritis, eczema, blood diseases, irregular menstruation, or the most acute or chronic rheumatic afflictions.

The three other counts were identical with the first count, except as to the name of the article shipped, namely, Gon-Nol for diseases of men, Kar-Nitum for diseases of cattle, and Kar-Kol for diseases of man and hogs. Upon the trial of the case before a jury, the corporate capacity, identity, and domicile of the defendant and the shipment of the articles described in the information were admitted. And evidence was introduced in support of the information and for the defendant. The jury found the defendant guilty upon all four counts. The defendant contends that there was no substantial evidence to sustain the charges in the information that the packages in question were misbranded within the meaning of the act of Congress as amended. The claim of the defendant is that this is a controversy relating to the efficacy of homeopathic remedies, and that the theory of the prosecution arises upon the testimony of its medical witnesses that homeopathic remedies were worthless. Assuming that the exceptions reserved by the defendant at the trial were sufficient to raise whatever questions there may be in this contention, the question is: What were the questions of fact submitted to the jury?

The prosecution introduced the testimony of E. O. Eaton, a chemist in the employ of the Government at the San Francisco laboratory, who testified that he had analyzed samples of Kar-Ru which showed sugar 83.4 percent; starch, 12.6 per cent; charcoal, 1.63 percent. He did not find any other active medical ingredient, except one part to a million of arsenic in some of the samples. There was a certain amount of water and a small amount of ash or inorganic salts. When samples were burned, ash was left. Some samples showed ash 0.15 of 1 percent, and all of them mixed together one part arsenic to a million. Alkaloids, chloroform, and ammonium salts were absent, as well as heavy metals, except a trace of iron.

He analyzed samples of Gon-Nol in which he found sugar, 61.75 percent; starch, 30.1 percent; ash, 0.65 percent, consisting of calcium, sodium phosphate, potassium, iron salts, ammonium salts, arsenic one part in a million, charcoal 12 percent, heavy metals, trace of iron.

He analyzed samples of Kar-Nitum and found sugar, 76.7 percent; starch, 15.9 per cent; charcoal, 2.85 percent; ash 0.55 percent; arsenic, five parts to a million.

He analyzed Kar-Kol and found sugar, 81.9 percent; starch, 13.8 percent; charcoal, 215 percent; ash, 3 percent; arsenic, six parts to a million.

On cross-examination this witness testified that he first made a qualitative analysis to find the different ingredients and then a quantitative analysis to find the amount of each. He was asked whether in his tests he could have caught small quantities of certain elements such as ammonium salts, ferric chlorid, and iodin. He thought he could have detected any small amount, but could not say whether he would have detected a quarter of a grain of ammonium salts. He knew he could have detected a half grain. With respect to ferric chlorid and iodin he could have caught one tenth of a grain, but could not say if he would have detected minute parts or indeterminable quantities. He made a test for nitric acid. He would have detected probably a drop in a gallon. He found one part in a million of arsenic.

The prosecution called Calvin S. White, a major in the Medical Reserve Corps of the United States Army, educated in the University

of Pennsylvania and Oregon. Analysis of the elements in Kar-Ru was submitted to the witness, and he testified that it would be worthless in the cure of any disease. "It is all inert, and there is nothing there which could possibly be a curative agent in any disease. It is not possible to get any one medicine which will cure all of the different diseases enumerated." The analysis of the elements of Gon-Nol was submitted to the witness, and he testified that "it would have no effect at all. It would do neither harm nor good." On cross-examination the witness testified that he had informed himself of the practice of the homeopathic school of medicine. "There is no school which teaches the use of those things for rheumatism" (referring to pulsatilla and lycopodium). The homeopaths did not recognize arsenic as a remedy for chronic rheumatism.

J. B. McNerthney, a witness for the prosecution, testified that he had been practicing medicine for 16 or 17 years. That he had a medical education in the University of Minnesota and New York and a postgraduate at Berlin and Vienna. The synoptical analysis of the formula of Kar-Ru was submitted to him. He testified that "It would have no medical value. * * * Absolutely no school of medicine would recognize it as a remedy."

The synoptical analysis of Gon-Nol was submitted to him. He said it appeared to contain no medical qualities and was absolutely worthless as a cure for gonorrhea. In his opinion, it would not be recognized in any school of medicine.

From an examination of the synoptical analysis of the formula of Kar-Kol, he testified that it appeared to contain no drugs of medical value and was absolutely worthless in the treatment of cholera or diarrhea in human beings. It would not be considered a remedy in any recognized school of medicine. That the medicine contains six parts in a million of arsenic would not give it any medical value. The addition of lycopodium, pulsatilla, sulphur, nitric acid, and thuja in such small quantities as not to be discovered by the chemist would be worthless in the cure of any disease.

Chester H. Woolsey, for the prosecution, testified that he had studied medicine at the University of California, took a postgraduate course at Cornell, did some work at Columbia, and was then an instructor at Stanford University.

From what the analysis of Gon-Nol shows, it would not have the least effect and would be absolutely worthless in any form of gonorrhea. It would do more harm than good, because the patient would be wasting time with the useless remedy while the disease would be getting a firmer hold on him. The formula which the analysis disclosed would not be recognized by any school of medicine that I know of as a remedy for gonorrhea. From the examination of the synoptical formula of the analysis of Kar-Ru, I would say that Kar-Ru is absolutely worthless as a remedy for rheumatism, kidney, liver, stomach, and catarrhal troubles, mental and physical debility, neuritis, eczema, blood diseases, irregular menstruation, and the most acute and chronic rheumatic afflictions.

H. K. Faber, a graduate of medicine from the University of Michigan and associate professor of medicine at Stanford University, at that time in the base hospital at Camp Lewis; P. B. Swearingen, a graduate of the St. Louis University, had taken a special postgraduate course in New York and Chicago and had been a practicing physician for 26 years; and Royal M. Gove, who had been practicing medicine in Tacoma for 28 years, were called as witnesses for the

prosecution and all testified to substantially the same effect as the preceding witnesses.

H. J. Shore, holding a veterinary degree and employed as a bacteriologist by the United States Department of Agriculture; N. A. Madsen, a graduate of Iowa State College and Veterinarian College of Copenhagen, employed by the United States Department of Agriculture as meat inspector; and Samuel B. Foster, a graduate of the Washington State College for Veterinary Medicine and employed by the United States Government in the tuberculosis eradication work in Washington and Oregon, testified for the prosecution that from the analysis of Kar-Nitum the preparation would not be a remedy for tuberculosis or relief of the disease at any stage.

At this point the prosecution rested its case. The defendant did not move for an instructed verdict in its favor, but proceeded to introduce evidence for its defense.

P. H. Hebb was called and testified that he was the president, manager, and practically the only stockholder of the defendant corporation; that he was not a medical man by profession, but for 7 or 8 years had been reading and studying medicine, particularly homeopathic medicine; that they put upon the market some medicines for common ailments, both for man and beasts; that he wrote the labels for Kar-Ru, Gon-Nol, Kar-Nitum, and Kar-Kol, and in so doing he used common and accepted terms rather than medical terms; that they all contained medical curative agents; all are made on a base of triturated sugar, carbo-vegetalis, commonly known as charcoal. This base merely carries the medical agents and is similar in purpose to the half glass of water in which medicine is often administered. The witness was asked on cross-examination how much tuberculinum is there in Kar-Nitum? His counsel objected to this question on the ground that the witness could not be compelled to disclose to the public his trade secrets. It was sufficient, he contended, to meet the charge in the information, to show that the remedies contained curative agents, even one curative agent, in quantity sufficient to act medicinally as recognized and practiced by any school of medical practitioners. The objection was overruled, and the witness answered: "In the sixth potency." How much that was he could not say; it was less than one in a thousand. The witness was asked the potencies of arsenic and pulsatilla in Kar-Ru. He replied that he used the sixth potency of arsenic; from the seventh up of pulsatilla; thuja, the eighth; nitric acid, the ninth; lycopodium, tenth; sulphur, eleventh. In Gon-Nol he used the following potencies: Medorrhinum, sixth; sulphur, seventh; arsenicum, eighth; thuja, ninth; lycopodium, tenth; nitric acid, eleventh.

A. H. Grimmer, for the defense, testified that he resided in Chicago; was in general practice as a physician; had been adjunct professor in the Hahnemann Homeopathic Medical College of Chicago for 10 years, and for 12 years had conducted classes in postgraduate work, members of which came from all over the world—many from Europe, particularly from the London Homeopathic Hospital. That homeopathy is an organized system of medicine which maintains colleges and hospitals, has its county and State medical associations, is recognized in every State in the Union, and in Michigan, Iowa, and California has homeopathic departments in the State

universities, maintained at State expense. Potencies are in general use in the homeopathic practice. The degree varies with the individual practitioner. That homeopathy, as other schools of medicine, seeks to diagnose a case before prescribing. He testified as to the potencies of the remedies used for the diseases mentioned on the labels attached to the packages in controversy. That the remedies would contain curative agents for such ailments. The witness was the father-in-law of Mr. Hebb, the president, manager, and practically the only stockholder of the defendant corporation.

Upon this evidence it was clearly a question of fact for the jury to determine whether the preparations offered to the public by the defendant and described in the information were in fact misbranded in the statements regarding their therapeutic or curative effect and whether such statements were false and fraudulent. The defendant having defended on the ground that the preparations were remedies in accordance with the theory and practice of homeopathy, that question also became a question of fact for the jury, to be determined under proper instruction from the court. Upon this issue the court instructed the jury as follows:

> Do the several preparations put upon the market in interstate commerce by the defendant in fact contain curative agents for the several ailments set forth upon the labels of these respective preparations? If you find from the evidence that each and every of these preparations do in fact contain such curative agents, your verdict will be not guilty under each and every count of the information. If you find as a fact that one or more of these preparations does not in fact contain such curative agents, then, as to such preparations, it will be necessary to consider the second question in the case which is: Did the defendant in fact believe that the preparation in question would be effective in alleviating the ailments for which its label says it is intended to be used?
>
> It is not proper in such a case as this to try rival well-established schools of medicine, and if you find that the defendant has only used in its several preparations homeopathic remedies for the alleviation of ailments then your verdict should be not guilty, and you will not be called upon to consider any other question in the case.
>
> If you find, however, as a fact, that some or all of the preparations put upon the market by the defendant do not in fact contain remedial agents used in any school of medicine for the relief of the ailments for which it is put upon the market, then you will be called upon to consider the second question in the case, and that is: Did the defendant honestly believe that such remedy would have a curative effect upon the ailments for which it is offered to the public? The law requires that the Government must prove beyond a reasonable doubt, not only that the statements upon the labels are false, but also that the statements are fraudulent. The statements may be false and not fraudulent. To be considered fraudulent within the meaning of the law requires that the defendant should either know that the remedy which he offers to the public is of no curative value or that he represents to be of curative value recklessly and without caring whether it would cure or whether it did not, for the purpose of defrauding his customers and getting their money for an article which he knew in fact, or ought to have known, was of no value. If you find from the evidence that the defendant honestly believed and had reasonable ground to believe that his remedy was of curative value, then your verdict must be not guilty, no matter if in fact the remedies were worthless from a medicinal point of view.

These instructions were in accordance with the law as declared by the Supreme Court in *Seven Cases of Eckman's Alterative* v. *United States*, 239 U.S., 510–517–518, where the court excluded the field where there might be differences of opinion between schools and

practitioners, and explained the words "false" and "fraudulent" to conform to such exclusions.

The court said:

> It can not be said, for example, that one should put inert matter or a worthless composition in the channels of trade, labeled or described in an accompanying circular as a cure for disease when he knows it is not, is beyond the reach of the lawmaking power. Congress recognized that there was a wide field in which assertions as a curative effect are in no sense honest expressions of opinion but constitute absolute falsehoods and in the nature of the case can be deemed to have been made only with fraudulent purpose. The amendment of 1912 applies to this field and we have no doubt of its validity.

It is objected that the court allowed Dr. White, a witness for the prosecution, to testify that the preparations which had been analyzed by the chemist, Eaton, and shown to the witness were absolutely worthless and had no food, curative, or medical value. The testimony was clearly admissible. In the case just cited, the court held that the law does reach one who puts inert matter or a worthless composition in the channels of trade labeled as a cure for disease when he knows it is not.

The remaining errors assigned relate to the action of the board in overruling objections to questions put to witnesses as to the curative value of arsenic in a portion of one part to a thousand; as to whether there was any known medicine that would cure kidney, bladder, liver, stomach, catarrhal troubles, mental and physical debility, neuritis, eczema, blood diseases, irregular menstruation, and the most acute and chronic rheumatic afflictions, gonorrhea, cholera, and diarrhea in human beings. The objection was overruled and the witness answered, "Why, no", and then said ,"I might modify that by "——. The court said: "You have answered the question. Is there anything further?" The objection was the use of the word "cure." In support of the objection it was said:

> There is no representation by the defendant that the medicines will "cure" any of these diseases or that he has any one medicine which is a remedial agent for all of them.

On the cross-examination of the witness, which immediately followed his answer, he said:

> Medicines might be combined so that the combinations would have a beneficial effect upon persons suffering from one or more of the diseases enumerated. For instance, if a man were suffering from kidney disease or Bright's disease the physician would have to make a diagnosis of Bright's disease and then select the drug, and then he would have to have some dosage. Then, if a man had stone in the bladder, or some bladder trouble, you would have to make a diagnosis first and select a drug and have a proper dosage, a dosage strong enough to dissolve or neutralize whatever acid there was in the kidney or bladder; but first you would have to diagnose it. Then you would use a medicine just the same as you would use a knife, to remove it, and it must be in a sufficiently powerful dose to work. That is my method of practicing medicine, and there are no other methods which are any good, that I know of.

In view of the fact that no exception was taken to the answer of the witness, his proposed modification, and modification on cross-examination, we do not see that the defendant was prejudiced by the question.

With respect to the remaining objections as to whether the remedies contain any alkaloids, mercury, salicylates, arsenic, or other medicines of a similar nature; as to the effect of giving Kar-Nitum

to certain cattle; as to the food value of the sugar, starch, etc., found in Kar-Ru and Kar-Kol; as to the classification of various diseases; the cost of homeopathic remedies; the exclusion of a letter written by someone in New Jersey addressed to Mr. Hebb concerning the administration of Kar-Kol to hogs; and as to the potency of certain of the remedies in some of the articles mentioned, we find no substantial error on the part of the court in its ruling upon these questions. The testimony was admitted under well-known rules of evidence or was without prejudice to the defendant.

The judgment of the court below is affirmed.

UNITED STATES v. GINGEROLE CO.

(District Court, W.D.Pennsylvania, June 10, 1920)

N.J. No. 8720

Information alleging violation of section 2 of the Food and Drugs Act. Trial before the court. Judgment of not guilty.

The United States attorney filed an information against the Gingerole Co., a corporation, Washington, Pa., alleging shipment by said company from the State of Pennsylvania into the State of Maryland of a quantity of an article labeled in part "Gingerole" which was alleged to be misbranded. It was alleged, in substance, in the information that the article was misbranded for the reason that certain statements regarding the therapeutic and curative effects thereof, appearing on the labels of the jars and cartons containing said article, falsely and fraudulently represented it to be effective as a treatment, remedy, and cure for pneumonia, rheumatism, neuralgia, pleurisy, croup, and asthma, when, in truth and in fact, it was not.

ORR, *District Judge.* Inasmuch as the court will enter at the time of filing this opinion a general finding that the defendant is not guilty, it is proper that the court give some reason therefor lest the inference be drawn that by such finding there is an indorsement of the defendant's product. The real reason for entering such judgment is because the court has not been convinced that the defendant is guilty under the statute. This is a proceeding under the Food and Drugs Act (34 Stat. 768), as amended by act of August 23, 1912 (37 Stat. 416), which, among other things, provides a drug shall be deemed to be misbranded—

> If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein which is false and fraudulent.

The drug in this case is a drug called "Gingerole," which word appears therefrom to be a trade-mark. The carton contains the statement "Will not blister," a statement also of the place of manufacture and by whom it is manufactured. It contains directions "Do not apply to open sores"; "Apply to parts affected"; "For pneumonia or cold in chest apply to chest and cover with flannel

cloth"; "For rheumatism, neuralgia, sore or stiff joints, apply by rubbing ointment in well"; and it contains in addition the words "For pneumonia, cold in chest, croup, rheumatism, sore or stiff joints, neuralgia, pleurisy, asthma." The label on the jar contains directions: "Apply to parts affected. When applied to children use sparingly", and also "Do not bind." From all that appears upon the carton and jar, the drug is intended for external use only, and in order to produce a secondary irritation. I am satisfied from the evidence that it is a counterirritant, notwithstanding the testimony of certain physicians who had applied some to their hands while preparing to testify in the case. It is a matter of common knowledge that the old-fashioned mustard plaster was prepared by hand and that it took considerable time before it had produced any effect upon the more tender skin of other parts of the body. I am satisfied that the drug in question would not be of any substantial value in the cure of some of the diseases above mentioned, but I am not satisfied that the officers of the defendant company do not believe that their drug would be of benefit to a patient who was suffering from any one of the diseases mentioned. The label may be false in its suggestiveness, but in the absence of a positive statement, which would never be made without some positive belief in its truth, I cannot find that there is anything on the carton or the label which is fraudulent within the meaning of the act of Congress. The statement, design, or device regarding the curative [or] therapeutic effect of the drug must be both *false and fraudulent*.

This phrase must be taken with its accepted legal meaning, and thus it must be found that the statement contained in the package was put there to accompany the goods with actual intent to deceive—an intent which may be derived from the facts and circumstances, but which must be established. (*Seven Cases* v. *United States*, 239 U.S. 510–517.)

I am unable to find under the evidence in this case that any such statement upon carton or jar is both false and fraudulent. It is not necessary to determine which, if any, of the various statements may be false, because that would not be sufficient to establish the guilt of the defendant.

HALL v. UNITED STATES

(Circuit Court of Appeals, Fifth Circuit, July 16, 1920)

267 Fed. 795; N.J. No. 8360

In error to the District Court for the Southern District of Texas. Judgment of condemnation affirmed.[10]

Before WALKER, Circuit Judge, and FOSTER and CALL, District Judges.

WALKER, *Circuit Judge.* This was a libel by the United States praying that 141 bottles, more or less, of described drug products or medicine be seized for condemnation, and be condemned and sold

[10]Affirming *United States* v. *141 Bottles of Drug Products*, p. 931, *ante*.

or destroyed. The libel contained allegations to the following effect: Each bottle mentioned was encased by a carton with the following printing or label thereon, to wit:

A Texas Wonder, Hall's Great Discovery, Contains 43% alcohol before diluted. 5% after diluted. The Texas Wonder! Hall's Great Discovery, for Kidney and Bladder Trouble, Diabetes, Weak and Lame Backs, Rheumatism, Gravel, Regulates Bladder Trouble in Children. One small bottle is 2 months' treatment. Price $1.25 per bottle. E. W. Hall, Sole Manufacturer, St. Louis, Mo.

There was enclosed in each of the cartons a circular containing the following:

Louis A. Portner * * * testified he began using the Texas Wonder for stone in the kidneys * * * and tuberculosis of the kidneys as diagnosed by his physician * * *. He was still using the medicine with wonderful results, and his weight had increased.

That said label and the said carton, and the circular contained in each of said cartons, regarding the curative or therapeutic effect of the said drug or medicine are false and fraudulent, in that the said drug or medicine contains no ingredient or combination of ingredients capable of producing the curative or therapeutic effects claimed for it as set forth by the printed matter on said carton, and thereby the said products are misbranded in violation of paragraph 3 of section 8 of the Food and Drugs Act of June 30, 1906, and the amendments thereof. Said bottles were shipped in interstate commerce in a way described, and, as a result of such shipment, were, at the time of the filing of the libel, in the possession of a named party in the district in which the proceeding was instituted. The plaintiff in error intervened, claimed the bottles proceeded against, and by answer put in issue material averments of the libel. Pursuant to a stipulation of the parties waiving a trial by jury, the case was tried by the court without the intervention of a jury. The court made findings of fact to the effect that the articles libeled were transported in interstate commerce in cartons labeled as alleged, that every claim made for the medicine on the cartons was false, and that the medicine as compounded has not and could not have the curative properties claimed for it; that the defendant-intervener made the claims shown on the carton recklessly and without a sincere belief in their truth, and that he had actual knowledge that the claims as made were false; and that, in so far as the question of false and fraudulent misbranding is a question of fact, the medicine as distributed was misbranded falsely and fraudulently. Based upon such findings of fact the court concluded, as a matter of law, that the bottles of medicine libeled were falsely and fraudulently misbranded within the meaning of the statute, and because thereof were subject to forfeiting and condemnation. There was a judgment in pursuance of such findings of fact and conclusion of law. The case is here on exceptions to the last-mentioned action of the court, and to rulings on objections to evidence in the course of trial.

Counsel for plaintiff in error in argument made objection to the consideration by this court of the part of the opinion rendered in the case by the district judge, which was quoted in the brief filed by the counsel for the defendant in error. This objection is based,

not on a claim that there was any inaccuracy in the quotation, but on the ground that the opinion of the trial judge is not properly a part of the record to be considered by this court. If a provision of a rule of this court (rule 14) had been complied with, a copy of that opinion would have been a part of the record before us. The objection on the ground stated is without merit. Certainly it is not an obstacle to a proper consideration of a case by an appellate court, for it to be authentically informed by an opinion of the trial judge of the manner in which the evidence adduced was considered by him and of the reasons relied on to support the conclusions he reached.

Language used in the label is to be given the meaning ordinarily conveyed by it to those to whom it was addressed. When so read and construed it amounted to an assertion that the article referred to, if used as directed, might be expected to have a curative or alleviating effect on the classes of ailments mentioned. There was no indication of an intention to except any ailment embraced in those classes. Evidence adduced showed what were the ingredients of the article called "A Texas Wonder," and that those ingredients could not, singly or in combination, have any remedial or beneficial effect on any ailment of the kinds mentioned in the label. The plaintiff in error, the claimant below, the manufacturer and distributor of the article, was a witness in his own behalf. Admissions made by him showed that he was fully aware that his product did not, and could not, have any remedial effect on certain well-known kinds of kidney trouble. Evidence disclosed that it was bought and used as a remedy for ailments as to which admittedly it was wholly ineffective. It cannot with any plausability be contended that there was an absence of evidence to support a finding that the plaintiff in error put the articles in question into the channels of interstate trade, labeled as a cure or remedy for stated classes of ailments, when he knew that it was ineffective as to an ailment or ailments embraced in those classes, and that this was done with actual intent to deceive buyers and users of the article. Such a finding was enough to support the further conclusion that the alleged label contained a statement as to the curative or therapeutic effect of the article referred to which was false and fraudlent within the meaning of the statute. 37 Stat. 416; *Seven Cases* v. *United States*, 239 U.S. 510.

It is urged in argument that there should be a reversal because of the overruling of objections to the following questions propounded by the court to a physician who was a witness for the claimant:

> I will ask you whether or not such a combination as has been read to you as contained in this bottle is recognized by the medical profession generally, or any portion of it, as a specific for either kidney or bladder troubles, diabetes, weak and lame back, rheumatism or gravel?
>
> I will ask you whether any physician that you know of would advise, and I am not speaking with reference to any particular person, but whether the medical opinion crystallized by discussion and exchange of views, would recommend for treatment to a person afflicted with kidney trouble, as a great discovery or solvent of that trouble, this thing?
>
> Would it be considered good or bad practice for a physician to give it to a man from the standpoint of protecting a man's health?

The asking of the first-quoted question was justifiable by the circumstance that the witness, at a preceding stage of his examination,

had made a statement to the effect that the combination of ingredients which evidence had showed constituted the article in question would have a definite and specific effect on the various organs of the body. Certainly it was not improper for the court to seek to ascertain from the witness what he meant by that statement. The negative answer given by the witness to the question made it plain that he was not to be understood as asserting that the combination in question was regarded as a specific for the class of ailments for which the label suggested its use; in other words, that it was specially adapted to have a beneficial effect with reference to such ailments.

The action of the court in overruling objections to the other questions above set out was treated in argument in behalf of the plaintiff in error as showing or indicating that the case was tried on the erroneous theory that condemnation of the articles proceeded against could be based on opinions of physicians that those articles did not possess the remedial qualities claimed for them. That the court in asking the questions and in overruling objections to them was not influenced by any such erroneous theory is made plain by the opinion rendered. That opinion discloses that it was recognized that the condemnation sought could not be adjudged unless the evidence adduced proved (1) that the label's statement in regard to curative or therapeutic effect was false; and (2) that such statement was fraudulently made. Falsity in the label's statement of remedial effect being one of the elements required to be proved, it was not improper to admit expert evidence on that issue. On such an issue, the opinions of persons whose occupation, training, and experience are such as to make them acquainted with the qualities of the ingredients of the article in question is admissible. And it is permissible to prove that these comprising such a class generally regard the ingredients of an article in question as ineffective, singly or in combination, in the treatment of ailments mentioned, and would in practice refrain from using it in such treatment because of the recognized futility of doing so. It may be assumed that if the issues of fact had been tried by a jury the objections to one or more of the questions asked might properly have been sustained as a means of keeping the jury from being confused or misled into basing their verdict on legally insufficient evidence. But when the issues were tried by the court without a jury, and there was evidence tending to prove all that was required to be proved to support the judgment rendered, and findings were made in pursuance of such evidence, and it is disclosed that the court correctly apprehended what was required to be found to support its judgment, that judgment is not to be disturbed in the absence of the record clearly showing erroneous action prejudicially affecting the substantial rights of the party seeking a reversal.

The conclusion is that the record does not show any reversible error. The judgment is affirmed.

UNITED STATES v. 100 CASES OF CANNED RED KIDNEY BEANS

(District Court, W.D. Kentucky, Nov. 8, 1920)

N.J. No. 9794

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict in favor of the United States.

The United States attorney filed a libel for the seizure and condemnation of 100 cases, more or less, each containing two dozen cans, of so-called red kidney beans, alleging that the article had been shipped and transported from the State of Iowa into the State of Kentucky and remained unsold in the original unbroken packages, and that the article was adulterated and misbranded in violation of the Food and Drugs Act.

Adulteration of the article was alleged in the libel for the reason that long cranberry beans had been mixed and packed with, and had been substituted wholly or in part for, the article. Misbranding was alleged in substance for the reason that the statement "Red Kidney Beans", and the design of a dish containing red beans, appearing on the label of the cans containing the article, were false and misleading and deceived and misled the purchaser, when applied to the article consisting of long cranberry beans, and for the further reason that the said article was an imitation of, and was sold under the distinctive name of, another article.

The court charged the jury as follows:

Evans, *District Judge*. Gentlemen of the jury: This is a suit by the United States in the form of what lawyers call a libel for a judgment against certain packages of beans which you have heard described many times today. The pleadings of the United States on which these packages are seized are of such a character as to permit an inquiry which will be left to the jury and the only thing is this: Was the label on these cans and on the packages that contained these cans misleading in that the statement was that they were red beans and the design on the can contained red beans; whether that was false and misleading and tended to deceive and mislead the purchaser when applied to this product consisting of what the label says and charged were long cranberry beans. The pleadings of the United States are of such a character as to exclude from your consideration, in my judgment, any other feature in the case, and this alone is the claim on which the United States bases its prayer for a judgment of condemnation of this property in this suit, that is, that the statement "Red Kidney Beans" and the design containing red beans are false and misleading and deceived and misled the purchasers when applied to this product. That is a very simple statement—that they are misleading and deceived and misled the purchasers when applied to this product. The defendants have denied all of those charges and put them in direct issue, and it is for you, gentlemen, to say from all the evidence as to whether that was the purpose of these cans and of the packages that contained them, that is, that the purchasers were misled and deceived.

You are the sole judge of the weight and credibility of this testimony. It is for you to say what the evidence leads you to conclude about the facts.

This is not a criminal case. This is a case at law where the preponderance of the evidence is submitted to you to pass conclusion upon. You have heard it all, and as there is a great deal of it, it will probably be a little hard to remember it in all of its details, but you must do the best you can.

The statute upon which this prosecution is based is called the Pure Food and Drugs Act. The Congress thought it was necessary to protect food, but Congress did not have in mind, I have no idea, certainly it did not say so, that you should prevent people from getting cheaper food. I believe it is a pretty good idea these days if you can get something cheaper. I doubt if Congress intended by this act anything like upholding high prices of food. They are very much reduced here from the testimony here. That may or may not be important in your consideration of this case, but certainly vast quantities of beans have been sold, according to the testimony, many millions of cans of these beans. In this case they were beans that came into this country in a dry state and when they got here they were treated by the packers and canner in the way the testimony has shown; and the question for you to determine is whether they put this brand upon them to deceive or mislead the purchaser into buying, and it is for you to say whether there was any testimony to warrant you in believing that. Upon the facts, there is a plain statement that these are red kidney beans. They are kidney beans, though sometimes called by one name and sometimes by another. My bean experience as a farmer did not lead me to think that there could be the number of beans that I have heard testified to here. But at all events these were beans that were brought into this country and only used for a food product, and the question for you to determine is whether these beans were colored in such a way when cooked as to deceive the purchaser. It is said the boiling brought out the color, but it is for you to say whether that did make the beans red. They were beans in great quantities and they were sold, and the question is: Was it the purpose of the defendant to mislead the public or was it to give the public a good bean at a cheap price? If it was to deceive the public, they brought themselves within the law. Otherwise, I cannot say they did under the testimony.

It is a very simple thing. There are only two alternatives; one is to find for the United States, that is the plaintiff, and to do that you must believe from the preponderance of the evidence that this branding on the can and package was made for the purpose of deceiving the public and in that event you should say, "We the jury find for the United States." That is all. If on the contrary you do not believe that and cannot find that this branding was done in this way for the purpose of deceiving—and it might be very strong testimony—it would have been a very strong suggestion but no evidence is here to prove by any purchasers that anybody was deceived. But whether that is so or not, that is not the thing in the case. It might be a circumstance for you to consider. But if you should find from a preponderance of the testimony in this case that this

branding was for the purpose of deceiving the purchasers, you should find for the United States; but if upon the other hand you should find that the contrary is the fact, you should say, "We the jury find for the claimant."

Take the papers and retire to the jury room, gentlemen, and see if you can reach a verdict.

UNITED STATES v. GANDARA

(District Court, District of New Mexico, Nov. 23, 1920)

N.J. No. 9008

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

The jury was charged as follows:

NEBLETT, *District Judge*. The defendant is being tried under the provisions of what is known as the Pure Food and Drugs Act. For your information I will read the law applicable to this case:

> The introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this Act, is hereby prohibited.
>
> * * * * * * *
>
> The term "misbranded", as used herein, shall apply to all drugs * * * the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular.
>
> * * * * * * *
>
> That for the purposes of this Act an article shall also be deemed to be misbranded if its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent.

In the first and second counts of the information you must determine whether or not the defendant shipped the bottles of medicine described in the information and introduced in evidence in this case in interstate commerce; that is, in the first count, whether or not he did ship from Albuquerque, in the State of New Mexico, to Imperial, in the State of California, addressed to Belen Sandoval, a box containing one bottle of medicine mentioned in the first count of the information and the evidence.

In the second count, that he did ship 1 box containing 2 bottles of medicine from Albuquerque, in the State of New Mexico, to Gila Bend, in the State of Arizona, addressed to Anita R. Alvizo, you will first determine whether or not the allegations that he shipped this medicine in interstate commerce is true or not.

It is essential for the Government to establish these facts by the evidence to your satisfaction beyond a reasonable doubt, for the reason that this court would have no jurisdiction to try this defendant on the charges he is now being tried on unless the articles were shipped in interstate commerce. The sending or shipping of any articles by mail from a point in one State to a point in another State constitutes an interstate shipment.

The material allegations of the first count of the information which must be established by the evidence to your satisfaction beyond a reasonable doubt are as follows:

That the defendant did, on July 30, 1920, ship from Albuquerque, in the State of New Mexico, to Imperial, in the State of California, a box containing 1 bottle; that said bottle contained an article designed and intended to be used as a cure, prevention, and mitigation of diseases of man; that the bottle was marked, labeled, and branded and contained the statement regarding its therapeutic and curative effects, the English translation of which is as follows:

LA NOBLEZA

Directions: This is for the blood, scrofula, for curing cancer of the blood; cures leprosy and syphilis and cures tuberculosis of the blood; is good for all impurities of the blood; is good for producing noble blood. This preparation contains Sarsaparilla root, juniper, Cascara Sagrada, Cascara Copalquin (Mexican Cinchona) Anise, Vanilla, sugar and sufficient alcohol to preserve. Every person who uses this remedy until he is cured will be sure of not having any contagious diseases; even a year old child can use it, because its components are vegetable and it cannot harm anybody. Adults should take a spoonful every 3 hours; boys and girls from 20 to 15 years should take a spoonful every 4 hours; boys and girls from 14 to 8 years should take a teaspoonful every 3 hours; children from 7 to 4 years should take a teaspoonful every 5 hours; from one to 3 years they can take a teaspoonful every 6 hours; this medicine does not require any diet, and can be bought of Don Juan Gandara, 518 W. Marquette Avenue, Albuquerque, N. M. Price $6.20.

That the statements on the label, mark, or brand placed upon the bottles were false and fraudulent; that the defendant knew that the statements on the label on said bottle were false or fraudulent, or that he made a wanton and reckless statement in said label, not knowing whether it was true or false. That said label did falsely and fraudulently represent to purchasers and create in their minds the impression and belief that the article contained in the bottle was composed of ingredients or medicinal agents which would cure scrofula, cancer, tuberculosis, leprosy, syphilis, and all impurities of the blood and was effective as a preventive for all contagious diseases. That in truth and in fact said article was not composed and did not contain ingredients or medicinal agents effective as a cure for scrofula, cancer, leprosy, syphilis, tuberculosis, and all impurities of the blood, and was not effective as a preventive for all contagious diseases.

If each and every one of the foregoing material allegations are established by the evidence to your satisfaction beyond a reasonable doubt, then you will find the defendant guilty as charged in the first count of the information.

The material allegations of the second count of the information which must be established by the evidence to your satisfaction beyond reasonable doubt are:

That the defendant on July 30, 1920, shipped from Albuquerque, in the State of New Mexico, to Gila Bend, in the State of Arizona, addressed to Anita R. Alvizo, 1 box containing 2 bottles containing an article designed and intended to be used in the cure, prevention, and mitigation of disease.

That the bottles contained in the box shipped were labeled, marked, and branded, the English translation of which is as follows:

SIN IGUAL (Without Equal)

Directions: This remedy is for curing the kidneys. It cures the liver, cures gravel of the kidneys, cures the bladder, cures suffocation of the chest. It is good for diseases of the urine, cures retention of the urine, cures stone in the bladder, puts the kidneys in order, cures jaundice, and is good for yellow fever. This remedy does not contain alcohol, it is a pure vegetable curative. This medicine contains Althea Root, Cascara of Copalquin (Mexican Cinchona), Mexican barley, licorice and Cascara Sagrada. Adults should take a spoonful of this remedy in 4 spoonfuls of warm water every hour. Boys and girls 15 years of age should take a spoonful every 2 hours, under the same conditions. Boys and girls 10 years of age should take a teaspoonful of this remedy and 4 of warm water every hour. From 5 to 3 years, they should take a teaspoonful of this remedy in 4 teaspoonfuls of warm water every 2 hours. When this remedy is taken, do not eat chillies, nor meat, nor use coffee nor liquors nor cold things. Hot food is most favorable and hot water also. Guard against air and cold; not much exercise should be taken. This remedy is on sale at 518 W. Marquette Avenue, Albuquerque, New Mexico, Mexican Herb Remedy Company, Don Juan Gandara, Proprietor.

That the label or brand appearing on the bottles so shipped were false and fraudulent; that the same were applied by the defendant to the medicine in the bottle, knowing the same to be false, or in reckless and wanton disregard of the truth or falsity of the same, so as to create in the minds of purchasers thereof the impression and belief that the article was composed of and contained ingredients or medicinal agents effective as a cure for diseases of the liver, bladder, for gravel, suffocation of the chest, retention of urine, stone in the bladder, yellow fever, and jaundice. That the statements on the bottles so shipped were not true; that is, the bottles upon which said labels were placed did not contain ingredients or medicinal agents which were a cure for diseases of the liver, and bladder, gravel, suffocation of the chest, retention of the urine, stone in bladder, yellow fever, and jaundice.

If each and every one of the foregoing material allegations above mentioned are established to your satisfaction beyond a reasonable doubt, you will find the defendant guilty as charged in the second count of the information.

It is sufficient if you believe from the evidence that one or more of such statements as to the curative powers of this medicine are false, provided you find the other material allegations as stated above.

If you believe from the evidence that the medicine called La Nobleza is composed of the ingredients named on the label thereon, viz, sarsaparilla root, juniper, cascara sagrada, cascara copalquin or Mexican cinchona, anise, vanilla, sugar, and sufficient alcohol to preserve it, and that such preparation is made in such a way [that] it is [a] remedy for tuberculosis, scrofula, cancer, leprosy, syphilis, and all impurities of the blood, and is effective as a preventive for contagious diseases, then such a label is not false or fraudulent; and if the jury further believes that the medicine or preparation called Sin Igual is composed of the ingredients named in the libel thereon, viz, althea root, cascara of copalquin or Mexican cinchona, Mexican barley, licorice, and cascara sagrada, and that such preparation is made in such a way that it is a cure for the liver, gravel of the kidneys, bladder, suffocation of the chest, disease of the urine, retention of the urine, stone in the bladder, kidneys, jaundice,

and yellow fever, then such label is not false or fraudulent, and it will be your duty to find the defendant not guilty.

You are instructed that in determining the truth or falsity of the preparation called La Nobleza and the preparation called Sin Igual, you are to take into consideration all of the evidence relative to their curative effects as testified to by all of the witnesses in the case, both those on behalf of the Government and those on behalf of the defendant, and if from all of the evidence in the case, you entertain a reasonable doubt as to the falsity of such statements, and as to their being fraudulent, then it will be your duty to resolve such doubt in favor of the defendant. In this case, there appeared some doctors. These witnesses are known as expert witnesses, and as to them I instruct you that one who testifies as an expert witness must possess special knowledge or skill necessary to make his opinion or judgment a fact of pertinent value, and the value of such expert's testimony depends largely on the extent of the experience and study of the witness. It is not whether the subject matter of his testimony is common or uncommon, but whether the witness offered as an expert has any peculiar knowledge of the subject matter of the inquiry not common to the world, which renders his opinion an aid to the jury in determining the questions at issue.

So far as the expert testimony is concerned, you will consider that and treat it as you would any of the other testimony in the case; the simple fact that it was offered by an expert should not be given preference over the other testimony in the case, and everything else being equal, has the same weight as that of any other witness. Under the law the opinion of an expert witness is admissable in evidence and is to be given such weight and value as the jury thinks proper. The value of expert opinion is to be determined not only from the qualification and experience of the witness, but must be considered in connection with the facts upon which he bases his opinion, which facts must be established by the evidence the same as any other material fact in the case, and the jury must look to see that the facts are established by the proof or not. You cannot take the assumed facts upon which such expert testimony is based as proven, but you will look to the proofs to determine whether such facts are proven or not in considering such expert testimony.

In this case the element of good faith on the part of the defendant in placing the label upon the bottles of medicine made by him, and which, it is claimed by the Government, he shipped in interstate commerce, is a question for you to determine. The defendant claims that the medicine placed by him in the bottles which have been introduced in evidence would cure the diseases mentioned and described on the label of the bottle. If you believe from the evidence that the defendant shipped in interstate commerce the drugs or medicine mentioned in the information and in the evidence, and further believe that the representations on the labels were false, but further find that the defendant honestly believed, at the time he placed the labels on the bottles and shipped them in interstate commerce, that the medicine contained in the bottles would do just what he claims on the label it would, that is, it would cure each of

the diseases he claims on the label it would cure, then it would be your duty to return a verdict in favor of the defendant. On the other hand, if you believe from the evidence that the defendant knew that the medicine in the bottles would not cure all of the diseases mentioned in the label, or that he made the statements wantonly and recklessly, not knowing whether such statements were true or false, and the other elements of crime are established, then you will find the defendant guilty.

The third count in the information charges that the defendant was, on July 22, 1920, convicted in the United States District Court for the District of New Mexico of a violation of the provisions of the Pure Food and Drugs Act, the law under which the present prosecution is brought against him. The court may impose a greater penalty for the second offense, and that is why this has come to you consideration. If you believe from the evidence that the defendant shipped in interstate commerce boxes containing bottles of misbranded drugs, to wit, La Nobleza and Sin Igual, the contents of which and the labels thereon being identical with the contents and labels of the misbranded drugs shipped and delivered for shipment as hereinbefore in the first and second counts hereof set forth; that such proceedings were had upon such information and that said Juan Gandara pleaded guilty to the said information so filed in the District Court of the United States, for the District of New Mexico, then you will find the defendant guilty as charged in the third count of the information.

You are the sole judges in this case of the credibility of the witnesses and the weight to be given to their testimony. And for that purpose you may consider the fairness or the unfairness, the prejudice, bias, or interest in the result of your verdict, if any, of any witness who has testified before you, his demeanor while testifying, his apparent carefulness and fairness on the stand, his opportunity to know and correctly relate the facts, and whether his testimony is positive or negative in character, and determine, from the whole of the evidence, where the truth in the case lies.

The defendant is presumed to be innocent until his guilt is established by the evidence beyond a reasonable doubt; to the benefit of this presumption the defendant in this case is entitled, and it stands as his sufficient protection until the same has been removed by evidence establishing his guilt beyond a reasonable doubt.

A reasonable doubt is such a doubt as would cause a reasonable and prudent man, in the graver and more important affairs of life, to pause and hesitate to act upon the truth of the matter charged. But a reasonable doubt is not a mere possibility of innocence, nor a caprice, shadow, or speculation as to the innocence not arising out of the evidence or the want of it. The jury should patiently and dispassionately weigh and consider the testimony and bring to bear upon it the exercise of common sense and judgment as reasonable men. And if, after considering the evidence, you can say that you have an abiding conviction of the truth of the charge then you are satisfied beyond a reasonable doubt.

The jury thereupon retired and after due deliberation returned a verdict of guilty, whereupon the court sentenced the defendant to serve one year in jail and to pay the costs of the proceedings.

UNITED STATES v. LONG

(District Court, W.D. Oklahoma, Feb. 1, 1921)

N.J. No. 9614

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

The jury was charged as follows:

WADE, *District Judge.* Gentlemen of the jury: This is a simple case. I don't want you to become confused and wander off into fields of speculation suggested by counsel in the arguments or in the opening statements, including Christian Science, prejudice of doctors, the origin of the medical profession, and all that sort of thing. Get down to the thing to be tried. What is it?

This man here is sending out some medicine which he solemnly represents will do certain things. The question here is whether it is true. If not true, it was sent out with the purpose to defraud.

Don't get a notion that this law was made by somebody to do something to help somebody that is not entitled to help, because this law was made by the people of the United States. They make the laws in this country. And this law was made in the same spirit in which they have here in Oklahoma, and in every other State in the Union, a law providing that no man can practice medicine unless he has taken a certain course of study or is a graduate from certain institutions, and in the same spirit in which the people of every State spend thousands of dollars every year to enable men to become qualified to practice medicine for us, because it is the only source of aid which we have when sickness comes.

Now let's get away from some of these suggestions that have been made.

In addition to providing a bar against the attempted practice of medicine by persons who know nothing about the human body or its elements, they passed a law providing that if persons are selling food, it shall not be adulterated; if they are selling drugs or medicine, they shall not misbrand it. That is all. No law prohibits a man from making any medicine he wants to and selling it to the people if he tells the truth about it. Anybody in this country has the right to buy any medicine that he wants to buy if he knows what it is.

The law which punishes men for misbranding drugs and medicines is the same law which is enforced every term of court for misbranding food, for shipping eggs that are rotten when they are represented to be fresh, all of those things for the protection of the people against things which would defraud them or endanger their lives or health, or get their money for something without getting value received.

What is charged here? It is charged here that this product made of vinegar and berries—and there is no dispute upon that point—was sent out under a certain brand and a certain label. Now, in order that we may thoroughly understand what is before the jury, let us look at this label:

World's Greatest Kidney and Bladder Remedy. The greatest discovery of medical science for Kidney and Bladder Trouble. Removes Gravel, dissolves

and passes it away without the aid of the knife. Speedy relief for Bright's Disease, Diabetes, Bed Wetting, Female Weakness, Sugared Urine, Rheumatism, and all Uric Acid Troubles. Removes all impurities and infections from bad blood in a few days after Doctors give you up. Don't let them use the knife, come and get well. Don't take poisonous drugs and opiates, when nature, in her great laboratory, in the forest, has prepared the remedy. The Almighty saw clear down to the end of time and provided a remedy for all diseases. The Medicine Man of the wild tribes handed down these formulas from father to son and never used the surgeon's knife or poisons, but dug the roots and herbs nature provided, and kept the secret, but of late a few of these formulas have been obtained at a high price to be kept inviolate, and we are able today to compound and distribute to suffering humanity, the World's Greatest Kidney and Bladder Remedy. We have living testimonials that foiled the Medical Profession that are now well. This remedy has been used successfully in Pellagra cases. Directions: Adults, one tablespoonful before meals, three times a day. Children, teaspoonful three times a day. Guaranteed Under Pure Food and Drugs Act, June 30, 1906. Price $2.00 per bottle. William T. Long Medicine Co., 208 West Washington Street, Oklahoma City, Okla. Trial Package, Three bottles for $5.00.

The Government charges that those representations were false. The defendant denies the charge that they were false, and denies the charge that there was any fraud in the label.

In this case, as in every case, the burden is upon the Government to prove beyond a reasonable doubt the charge it makes, that this medicine was falsely and fraudulently labeled, and unless it is established here beyond a reasonable doubt that that is true, of course you must acquit.

What is a reasonable doubt? I have explained it to you so often you thoroughly understand it now. It means a doubt which naturally arises in your minds, not being sought after or conjured up, but one which naturally arises in your minds after a full, fair, and honest consideration of all of the evidence. If your mind wavers and oscillates, so to speak, between guilt and innocence, then the law requires you to give the benefit of that state of mind to the defendant. But if there is no reasonable doubt in your mind as to the truth of the charge made, you will convict.

Now, then, does this proof require that the Government prove that all of the representations were untrue? Not at all. Not at all. If any one of them is untrue and fraudulent, that is sufficient. In other words, if the representation as to the effect of his medicine on Bright's disease is false and fraudulent, the defendant is guilty. If the representation is untrue and fraudulent as to diabetes, he is guilty. If the charge is true as to any of them, he is guilty.

In other words, you can plainly see that the defendant has the right to make any representations he wants to so long as they are true. A man might represent that a certain medicine would cure coughs and colds, and that might be substantially true, but if he went further and said coughs and colds and tuberculosis, you know that the representation is false because humanity has not yet found a drug that is a cure for tuberculosis. Therefore, if he had stopped at the coughs and colds he might be within the proper bounds, but he steps outside when he represents that it will cure something that is incurable through any drug medium.

So in this case if the representation here had been that it would cure frequent urination, and stopped at that, then we would have same evidence here to which he could point as establishing the proof of the thing that he represented. But, of course, under the un-

contradicted evidence here, frequent urination is not proof of Bright's disease, nor of diabetes. If he had represented that it aided painful menstruation there might be some proof here that it had afforded some relief in such cases. If he had stopped with saying that it would cure bed wetting, there might be proof here upon which he could rely and ask you to believe that the representation was true.

But, of course, under the uncontradicted evidence in this case, there is no case of Bright's disease or diabetes before this jury where any witness testified that the medicine was taken and that it effected in any manner a cure. Nobody claims that there is any such proof. Both sides have been heard, and outside of gossip or suggestions of persons suffering from something of the kind above stated, nobody could tell—from the description and from the method of determining diseases of that type—no one could tell you that we have any proof with reference to any Bright's disease or diabetes in this case—under the uncontradicted evidence in this case. You are the final judges of the evidence. Nobody claims in this case that this medicine would cure Bright's disease or diabetes, and we are dealing in scientific matters about which the average man has no knowledge. When it comes to finding the truth, we cannot set up our judgment without experience and education against the statements of men who devote their lives to these studies. We must accept the word of science in these things, except insofar as we, with our limited vision, can see and thus judge what the truth is. The uniform testimony in this case is that in a case of Bright's disease there is no drug cure at all, and that the thing here before the court would not affect it in any way. That in diabetes there is no drug cure, and that this remedy would not cure it. There is no evidence to the contrary so far as Bright's disease and diabetes is concerned. If the representations were false as to these, and fraudulent, he is guilty. Now, I think it is perfectly safe to say that, under the uncontradicted evidence in this case, while you are the judges of the matter finally and of this man's guilt, I can see no possible conflict in the evidence here that these representations were false. There don't seem to be any evidence to the contrary. But you are the judges of that matter. I can recall no evidence in conflict in the case.

Several witnesses testify that this thing is not a cure for Bright's disease or diabetes. Nobody claims that it is, the defendant's claim being that he knew nothing about what these persons were suffering from except what they told him, and those people probably knew no more about it than the average person who, when he gets sick, often imagines a name for the disease which he has. But what the people told this defendant would be hearsay. It would not be competent proof that the person had such a disease.

So, gentlemen, if these representations are false, there is only one other thing to consider in this case, and that is whether they were fraudulent, the statute providing that the branding must be false and fraudulent before you can convict.

Well, what does fraudulent mean? A representation is fraudulent, of course, when a man knows that it is not true. Nobody would dispute that. Fraudulent means, with reference to representations,

things that are said or represented to somebody when the person making the representation knows that that representation is not true. It don't make so much difference what his purpose is providing it is a serious purpose of getting one to part with his money or property, or something of that kind. That, of course, would be fraudulent. But other things are fraudulent besides that. The man who has no knowledge of a thing, and knowing that he has no knowledge, represents as a fact that a certain thing is true, in the hope that the person to whom the representations are made will rely upon it and accept his statement, that man is committing a fraud. His representation is fraudulent. If he knows, now, that he doesn't know, and he represents to a man a fact which he knows he doesn't know expecting the other man to rely upon it, that is a fraud because there is fraud in the assumption of knowledge when he knows he hasn't got it. It is generally true that any representation which is made in reckless and wanton disregard of whether it is true or false constitutes a fraudulent intent and purpose.

So, gentlemen, taking these things and these definitions into consideration, if you determine beyond a reasonable doubt that the evidence here establishes that these representations, or some of these representations, were false, were they fraudulent within the meaning of the rule I have stated?

Now, it is not a question, gentlemen, of how much money he was making. I think counsel suggested something about those coming to him and having treatment, whether they had money or not. There isn't any evidence of that in this case. Just stick to the evidence, gentlemen.

Now, don't be misled or carried away by the suggestions that this wouldn't hurt anybody. The people when they enacted this law didn't say, "If a person misrepresents a medicine or drug which hurt somebody." They said that anybody who misrepresented any drug, medicine, anything of that kind, and sends it through interstate commerce, should be punished. A person should not thus be induced to part with his money, no matter how small it may be, nor should a person be thus led to believe and rely upon a certain thing as a cure for a dangerous and deadly disease, and thus perhaps be led to defer consultation or inquiry which might help him if taken in time, and which might not help him later. I only refer to those things because of the things suggested here in the argument of the case.

It is a question of whether or not this man has sent misbranded medicine through interstate commerce, that is what gives this court jurisdiction. If it didn't get out of the State it would have to be tried in the State court. But where a man falsely represents in the label statements in connection with medicine, and that false statement is made fraudulently within the meaning of what I have said to you, the man is guilty, even though the price is made low and it would harm no one.

So, gentlemen, taking all these considerations together, look at the evidence in this case, frankly without any feeling of prejudice, and determine whether or not, beyond a reasonable doubt, any of the representations on this label were false, and if so, if they were also

fraudulent, and shipped into Iowa, and if you find beyond a reasonable doubt that they were, you will find this man guilty. If you do not find they were false and fraudulent, either in whole or in part, you will find a verdict of not guilty.

UNITED STATES v. KRUMM

(District Court, E.D. Pennsylvania, Feb. 8, 1921)

269 Fed. 848; N.J. No. 9292

Information alleging violation of section 2 of the Food and Drugs Act. Demurrer by defendant. Demurrer sustained.

THOMPSON, *District Judge.* The United States attorney filed an information against the defendant charging violation of the Food and Drugs Act in shipping and delivering from Philadelphia, Pa., to Baltimore, Md., a number of packages, each containing an article of food labeled, marked, and branded as "Krumm's Macaroni." The first count charged that the article of food was adulterated "in that a substance, to wit, a product prepared from flour, had been substituted in whole or in part for macaroni, to wit, a product prepared from semolina, which the article purported to be." The second count charged that the article of food was misbranded in that the word "macaroni" "was false and misleading in this, that it represented that said article was macaroni, to wit, a product made from semolina, whereas, in truth and in fact, said article was not macaroni, to wit, a product made from semolina, but was a product made from flour."

The defendant demurs upon the ground that the information does not set out any offense against the United States; that it is not averred that the packages were original unbroken packages; that it is not averred that semolina is not flour or a product made from flour; that it is not averred that macaroni is a product wholly prepared from semolina; that the definition of the word "macaroni," as given in the information, is not in consonance with its meaning as accepted by the general public; and that it is not set forth that the article of food contained in the packages was dangerous to the health or welfare of the people, or intended to deceive the purchaser.

The first ground of demurrer may be dismissed for the reason that while the Food and Drugs Act prohibits shipping or delivering for shipment in interstate or foreign commerce any article of food which is adulterated or misbranded, it does not restrict the offense of shipping or delivering for shipment to articles in original unbroken packages, the restriction to original unbroken packages applying only to those who receive in interstate commerce and, having received, deliver in original unbroken packages any adulterated or misbranded articles.

As to the averments in relation to the substance contained in the packages, I think they are lacking in that particularity in both counts which should be observed to inform the defendant with certainty of the charge he is to meet at the trial. The offense under the first

count, adulteration, arises in the case of food, "if any substance has been substituted wholly or in part for the article", and the offense of misbranding arises "if the packages containing it or its label shall bear any statement, design, or device regarding the ingredients or substance contained therein, which statement, design, or device shall be false or misleading in any particular." According to the Century Dictionary, macaroni is a paste or dough prepared originally and chiefly in Italy from the glutinous granular flour of a hard variety of wheat. According to the Standard Dictionary, it is an Italian paste made into slender tubes from the flour of hard glutinous wheat mixed with water. Semolina is defined to be the hard grains retained in the bolting machine after the fine flour has passed through.

If the article in question, as averred in the first count, was prepared from flour, or, as averred in the second count, was made from flour, it was apparently macaroni. But if it is intended to charge that macaroni is not made from the whole of the flour which comes from the mill, but in order to be macaroni must be made from the large, hard grains retained in the bolting machine after the fine flour had passed through, the counts are lacking in averments that semolina is not a part of the substance known as flour. Flour may be fine or coarse, it may be made from the whole grains of the wheat, as, "whole-wheat flour", or it may be the fine bolted flour. If it is meant by the indictment to charge that in order for a substance to be macaroni, it must be made wholly from semolina and not contain any of the fine flour which leaves a residuum of semolina, the information should plainly so state. It is of vast importance to the public that foodstuffs shall be what they purport to be through the labels, marks, and brands upon the packages. It is a matter of common knowledge that in the fine wheat flour of commerce much of the nutritive property of the grain is absent which remains in "whole-wheat flour." A purchaser of an article labeled "whole-wheat flour" is entitled to receive what he is led to believe he is purchasing from what appears upon the label. Similarly, one who is purchasing an article labeled "macaroni" is entitled to receive the article containing nutritive ingredients which genuine macaroni is known to contain. Otherwise the party substituting some other substance for the proper ingredients or designating it by names which falsely represent the contents or mislead the public is liable to the penalties of the act. If, however, one is charged under the act with adulteration and misbranding, he must be informed with sufficient particularity and certainty of the charge against him to enable him to prepare his defense. This particularity and certainty are obviously lacking in the information filed.

It may be that in the course of manufacture, trade, and public use the name "macaroni" has come to mean an article made from flour without regard to its containing semolina alone, and it may be that the word as accepted by the general public is not consonant with what was intended to be set out in the information. These, however, are trial questions.

As to the remaining ground of demurrer, it is not necessary under the Pure Food and Drugs Act that an article in order to be unlawfully adulterated or misbranded must be dangerous to the health of the people.

Demurrer sustained.

UNITED STATES v. 1,459 CASES OF CANNED SALMON

(District Court, W.D. Washington, Apr. 12, 1921)

N.J. No. 10512

Two libels under section 10 of the Food and Drugs Act. Trial before the court. Decree for the United States in one case, for claimant in the other.

The United States attorney filed libels for the seizure and condemnation of 80 cases of canned salmon, labeled in part "Medium Red Salmon * * * Lionax Brand Cohoe Sockeye Salmon", and 1,379 cases of canned salmon labeled in part "Northern Brand Pink Alaska Salmon Packed by Northern Packing Co., Juneau, Alaska", alleging that the article had been shipped and transported from the Territory of Alaska into the State of Washington, and charging adulteration with respect to both consignments and misbranding with respect to the 80-case consignment of Lionax Brand salmon.

Adulteration of the article was alleged in the libels for the reason that it consisted wholly or in part of a filthy, decomposed, and putrid animal substance.

Misbranding of the Lionax Brand consignment was alleged for the reason that the word "sockeye," appearing only partly obliterated on a portion of the label of the article, was false and misleading and deceived and misled the purchaser by representing the article as sockeye salmon, when it was not.

CUSHMAN, *District Judge*. I have too many matters under advisement now, and I am not going to take this matter under advisement.

So far as the misbranding is concerned, I hold with the Government. I think, according to the decisions which you read, that it is not whether the brand is going to deceive the jobbers and wholesalers and retailers and people who trade in these things, but whether it is liable to deceive the consuming public. I am very much like Miss Kolmitz—I never heard of the word "Cohoe" until this case began, and if I saw it on a can of salmon I was about to buy, I would not know whether it referred to canner or the fish or what it referred to. I have lived here almost 30 years and eaten canned salmon most of the time, so I presume I am an average specimen of the public. I take it everyone in this country is familiar with the word "sockeye", and finding it on a can of salmon not completely obliterated, but with this fancy stamp on there, more or less ornamental, would tend to deceive. I think a purchaser going into a retail store to buy a can of salmon would reasonably conclude that that was intended to be a part of the label and might very easily be misled. The decree that is appropriate for forfeiture in that case will be prepared and submitted to the court.

As regards the other lot of salmon, and so far as the 80 cases are concerned also, the court is inclined to agree with Judge Sessions, that this act certainly does require definition. Where the Government asks for forfeiture—where the rules of strict construction obtain—the law should be brief and as clear as it is possible to make it.

Now, that word "article"—Judge Sessions found some trouble in construing "consists of" or "consists"—that word "article", I find fully as much trouble with it as Judge Sessions did the other. Now,

salmon is an article of food, but because some cans of salmon are found to be putrid does not warrant the entire salmon output being condemned. A can of salmon is an article, but is the output of one cannery for a season an article, or is a shipload of salmon an article, or half of the output of a cannery an article? I can't agree with any such construction. It would be reasonable to conclude, in the light or the purview of this act—possibly you could construe the output of a cannery to be an article if the evidence showed that all of the output of the cannery was subjected to those conditions that rendered the part that you found to be putrid or filthy, but it seems like instead of this being in part putrid or filthy that a part of it is [not] putrid or filthy. If a very small percentage of the contents of each can was filthy, even a very, very small portion of it, that would condemn the whole lot, but because part of the cans are found to be filthy and putrid, I am unable to conclude that the court would be warranted in condemning the entire lot of these cases of salmon. Now, if Congress does intend that the courts should give that construction to this law, a definition would clear the matter up.

Now, I find that instead of the entire output of this cannery having been subjected to conditions that caused this putrescence—this filth in certain of the cans—it is more reasonable to conclude that these old salmon that got into this pack were the salmon, as pointed out by the prosecutor, that they picked up locally when they were short of fish to complete the day's output or whatever reason there was, without knowing their age, and not those that Mr. Hanson went out to the fishing grounds and got from the purse seiners. That being true, why, the output of the cannery for those days on which they purchased these old fish would contain putrid fish. If you are going to construe "article" as limited to the condition that created the putrescence, why, then you are going to limit it to those days and the output on those days when they did buy such fish, and not the whole season's pack. If the department wants to make rules that these salmon canners shall can and keep their cans separate, and put one day's pack up separate from another, and not mix up the cans of the separate days' pack and thereby render—put themselves in the position to test and sample cases canned on a particular day when they might bring in a scowload of old fish, why, the public would be protected, and the commercial end of it would not be jeopardized by incurring the destruction of a large amount of fish that might have been canned on days when they were getting perfectly fresh fish. I can see very easily how one scowload of fish, if it was canned and thrown into a shipload and brought in from Bering Sea and samples were taken from that one scowload all canned on one day, would show up a percentage high enough to condemn the whole shipload if we are going to adopt that rule and enforce it that the Government seems to ask in this case.

Miss KOLMITZ. Your Honor, may I interrupt?

The COURT. No.

Now, this statute does not give the court any warrant or does not give the department, so far as I see, any warrant to fix a proper percentage of filth. It says "in part." One decision you read said that meant substantial part, and if it was where human excrement entered into oysters that I take it must have been taken up from the

mouth of a sewer some place, so small a percentage as could only be detected by a microscope, I believe, would be a very substantial portion. But I don't find any warrant under a forfeiture—how would anyone instruct a jury where your articles, like cans of salmon, are separate? They are separate articles; the cases are separate.

So far as health and comfort are concerned—that part of the law regarding misbranding is to prevent fraud being committed upon the consuming public—but the other part, keeping filth and putrescence out of it, that was not to prevent a fraud; that was to protect the public in the matter of its comfort if not health; and the more rotten salmon was, the less liable you would be or the more liable you would be to be disgusted by it as a food, because you would be warned in the kitchen before you ever got it to the table; but a very small bit, the smaller the portion of putrescence, the more likely you would be to get it on your table.

I would think that also in sampling there might have been something satisfactory worked out here, and possibly something could be worked out yet, if I am right in my conclusion that the putrid salmon found in fact was caused by these old fish that were bought occasionally. It is only reasonable to presume that in those cans there would be a greater percentage of putrid fish; that is, in handling them, it would only be natural that they would find their way into particular cases scattered through the entire pack. It would seem to me in careful sampling, not only the cans should be marked but the cases in which they were taken, and where a putrid can was found, there should be some further test made of that case, if I am right in my assumption that the cans that are canned on a particular day are liable to find themselves—liable to be put up in—limited to the cases in which they appear and are not scattered through the entire pack.

The court finds not only on the law, but the facts as well, that there has not been sufficient evidence here to convince the court to that degree that is required in forfeiture cases to warrant a decree for the Government, both as to the 1,379 cases and the 80-case lot.

Mr. RYAN. What is that?

The COURT. I find against the Government in both cases on the law and the facts insofar as the charge is that these were adulterated.

Miss KOLMITZ. The Government desires to except to the court's instruction that the Government should make regulations that each batch be labeled. The law is now that the claimant may separate the good from the bad.

The COURT. What is that you are excepting to?

Miss KOLMITZ. That the Government make regulations that the batches be labeled—each day's canning.

The COURT. That is only a suggestion. Of course, it would be a burden put on the salmon canners, but it would be one way to keep these things separate and not condemn a whole lot.

Miss KOLMITZ. The law now allows the claimant to separate the good from the bad. And the Government excepts to the court's definition of an article of food——

The COURT. Exception allowed.

Miss KOLMITZ. And the Government excepts to every ruling of the court upon the question of adulteration.

UNITED STATES v. 186 BOTTLES OF TRATAMIENTO ZENDEJAS

(District Court, District of Arizona, Mar. 21, 1921)

N.J. No. 9433

Libels under section 10 of the Food and Drugs Act. Trial before the court. Decree in favor of the United States.

The United States attorney filed libels for the seizure and condemnation of 6 bottles and 180 bottles, more or less, respectively, of Tratamiento Zendejas, alleging that the article had been shipped from the State of California into the State of Arizona, and remained in the original unbroken packages at Tucson and Phoenix, Ariz., respectively, and charging misbranding in violation of the Food and Drugs Act, as amended.

Misbranding of the article was alleged for the reason that the following statements, regarding the curative and therapeutic effects of the said article, appearing on the label attached to the bottles, on the wrapper around the said bottles, and in accompanying folders, to wit:

(Bottle, in Spanish) "Tratamiento Zendejas A Strong Purifier of the Blood For Rheumatism, Constipation, Kidney Troubles, Eczema," (in English) "A Blood Repurator For Rheumatism, Constipation, Kidney Troubles, Eczema," (sticker on wrapper) "Diabetic patients will have to take the medicine straight or with the amount of sugar prescribed by their doctor," (light gray folder, in Spanish) "Zendejas Treatment for Men, Women and Children. Strong purifier of the blood * * * Patients suffering from tumors, ulcers, eruptions and all kinds of suppurated manifestations * * * those who suffer from suppurations whether tumors, scrofulas, wounds, fistulas, etc., etc. * * * the Zendejas Treatment removes all these impurities from the blood * * * During the treatment with Zendejas Treatment no other medicine should be taken * * * To those suffering from rheumatism * * * pains will disappear in the first days not to appear again * * * If the teeth have become loose on account of mercury taken by the patient * * * As * * * the Treatment works with such rapidity that their pains disappear * * * they should not believe * * * they are already safe but should continue the treatment until a cure is obtained. The treatment to be complete should be * * * without interruption until 10, 12, or 15 bottles have been taken * * * If the disease * * * is paralysis, loss of sight, chronic rheumatism, or extremely large or deep ulcers, a greater number of bottles should be taken," (light green folder, in Spanish) "Zendejas Treatment Strong Purifier of the Blood. For all sexes For all ages. * * * is notably antagonistic to some germs * * * it makes it unnecessary for the patients to incur the expense of consulting physicians * * * No disturbance of the digestion and no loss of appetite * * * the Zendejas Treatment has the same effect on the blood as a purgative or laxative on the digestion. On account of its composition the Zendejas Treatment acts as a very strong purifier of the blood; as the most active regenerator of the nutritive fluid, as the most energetic reconstituent which may create well being and hope in a large number of patients whose depressed and sad appearance is a sure sign of constant disturbances in the digestive apparatus, impoverishment of blood and lack of nervous energy * * * the most assimilable and eliminable medicine for all impurities of the blood * * * the inventor is able to recommend this medicine with so much confidence being convinced that so far none has given such good results with blood diseases of all kinds and diseases of secondary order such as anemia, chlorisis, jaundice and some skin diseases * * * diseases originating from impurity of the blood * * * pimples, headache (acute pain in head), dyspepsia, intestinal irregularities produced by the use of mercury, eczema, epilepsy or fits, insomnia, sores, lack of respiration, memory, sleep, and appetite, poor digestion, consti-

pation, seasickness, neurasthenia, rheumatism, suppuration of the eyes or ears, tumors, scrofula, fatigue caused by overwork, wounds, suppurating fistulas and tumors which do not heal, some diseases of the sight, nervous affections, paralysis, lack of blood circulation, sleeping of the arms, legs or other parts of the body * * * the cause of all these diseases is a single one * * * the cause of the diseases for which the Zendejas Treatment is used is impurity of the blood; the effects are the diseases mentioned. If the blood is purified, all these diseases will disappear,"

were false and fraudulent in that the article contained no ingredient or combination of ingredients capable of producing the curative and therapeutic effects claimed.

The case against the 6 bottles of the product, at Tucson, came on for trial, the claimant, Panfilo Zendejas, Los Angeles, Calif., having entered into a stipulation with the Government that the decision in this case should also be the decision in the case against the 180 bottles at Phoenix.

SAWTELLE, *District Judge.* In this case the Government seeks to condemn 6 bottles of Tratamiento Zendejas, and the libel alleges that the same were branded and shipped by the claimant herein in interstate commerce in violation of the act of June 30th, 1906, as amended by the act of August 23d, 1912. This act provided:

That for the purpose of this Act an article shall be deemed to be misbranded: In case of drugs: * * *

Third. If its package or label shall bear or contain any statements, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent.

The claimant admits that he printed and published the statements contained in the circular and labels and also admits the interstate shipment, but expressly denies that such statements were false and fraudulent.

A careful reading of the evidence convinces me that the statements which accompanied the packages in question were made and published by the claimant with the intent to deceive and that the representations therein made with respect to the curative or therapeutic effects of the mixture contained in the bottles and packages were knowingly false and fraudulent. *United States* v. *Eckman's*, 239 U.S. 510; *Bradley* v. *United States*, 264 Fed. 799, C.C.A.; *McLean Medicine Co.* v. *United States*, 263 Fed. 694. A judgment may be entered for the libelant.

UNITED STATES v. WILSON & CO.

(District Court, Kansas, Apr. 13, 1921)

N.J. No. 9615

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of acquittal.

The United States attorney filed an information against Wilson & Co., a corporation, Kansas City, Kans., alleging shipment by said company, from the State of Kansas into the State of Missouri, of a

quantity of shell eggs which were adulterated, in violation of the Food and Drugs Act. Adulteration of the article was alleged in the information for the reason that it consisted in whole or in part of a filthy, decomposed, and putrid animal substance.

The case having come on for trial before the court and a jury, after the submission of evidence and arguments by counsel the court delivered the following charge to the jury.

POLLOCK, *District Judge.* In this case Wilson & Co. are charged on the information of the Government, prepared by the district attorney, with the offense of violating what is known as the Pure Food and Drugs Act of the country. The precise offense that is charged against Wilson & Co. is that they shipped in interstate commerce (and you understand, gentlemen of the jury, it is only because these eggs were carried in interstate commerce here that the Government has any control of the matter at all), but that Wilson & Co., the defendant in that case, shipped in interstate commerce, that is, from Kansas City, Kans., into Kansas City, in the State of Missouri, 10 dozen of eggs; that these eggs were spoiled or decayed at the time they were shipped to such an extent that they were unfit for human use or food.

The defendant, Wilson & Co., denies this. From all the evidence in the case the defendant admits it did transport these eggs in interstate commerce about the 23d day of October last year, but says at the time that they were transported they were not in this spoiled or decayed condition.

This is a criminal case. It is a prosecution of Wilson & Co. by the information of the district attorney for a violation of a criminal law. And so it is, that the defendant in law, in your mind, is presumed to be entirely innocent of the offense charged against it, or of any wrongdoing whatever so far as this case is concerned, until the Government shall have proven beyond a reasonable doubt that it is guilty of the offense charged against it.

Now, lest you may have any misunderstanding what I mean by that term "reasonable doubt", I say to you, it means exactly what it says, a reasonable doubt. On the one hand, it does not mean the mere possibility of innocence, because almost anything is possible in this world. It does mean such a substantial doubt in the mind as will require a man of reasonable prudence and caution to pause or hesitate before engaging in the graver affairs of life. Whenever a juror, taking all the facts and circumstances in evidence in a case, there is produced by that evidence, taking it in all its various lights, an abiding conviction that the defendant must be guilty, then there is no longer a reasonable doubt in the mind. But until that point is reached, being a criminal case, the defendant is entitled to a verdict at your hands of not guilty.

Now, this presumption of innocence attends the defendant in this case until that point is reached, if it ever is reached, that the offense charged has been proven beyond a reasonable doubt.

Now, as I remember the evidence, these eggs were transported, 10 cases of them, on the 23d day of October and delivered to this grocery man who testified here. He placed them in an ice box, and so far as the Government's evidence goes there is no evidence whatever as to the condition of these eggs until the 8th and 10th days of Novem-

ber. So, the condition of the eggs on the 8th and 10th days of November was shown for the purpose of showing, or tending to show, if it does, the condition of the eggs, not at that time, at all, but on the 23d day of October at the time they were shipped. Now, for example, in this case, gentlemen, suppose these eggs were spoiled as badly as the Government contends on the 8th and 10th days of November; yet, unless that proves to your minds beyond a reasonable doubt the condition of these eggs at the time they were shipped over there on the 23d day of October, and convinces your minds beyond a reasonable doubt that they were decayed at that time and unfit for use, then the Government has not discharged the obligation it must discharge before it asks a verdict at your hand. If the evidence does convince your minds beyond a reasonable doubt, as I have defined that term, that these eggs were decayed, as claimed by the Government, at the time Wilson & Co. had the car in interstate commerce over in Kansas City, Mo., then your verdict would be for the Government. Failing to so find, and that must be found beyond a reasonable doubt, and from the evidence in the case, or the only other thing you can do in doing justice, is to return a verdict of not guilty.

You, gentlemen of the jury, are the exclusive judges of the weight of the evidence; and by that I mean what the evidence proves; the credibility of the witnesses, and what facts are established by this evidence beyond a reasonable doubt. So that is the case.

Two forms of verdict will [be] handed to you in this case. You will retire and consider your verdict.

UNITED STATES v. 426 BAGS OF ECONOMY SPECIAL HOG FEED

(District Court, W.D. Michigan, May 6, 1921)

N.J. No. 9478

Libel under section 10 of the Food and Drugs Act. Motion by United States attorney to strike claimant's answer from files and for decree of condemnation, granted.

Sessions, *District Judge*. This is a proceeding under section 10 of the Food and Drugs Act of 1906 to condemn 426 bags of feed owned by claimant and, under its direction, shipped and transported in interstate commerce from Milford, Ind., to Augusta, Mich. At the time of the shipment and transportation and of the seizure the feed was misbranded in that the labels upon the bags contained false and misleading statements as to percentages of its ingredients. Claimant faintly urges that such false statements in the labels did not constitute misbranding within the meaning of the act of Congress; but this insistence is so plainly without foundation as not to require discussion. Claimant was the original manufacturer of the feed in question and had sold and shipped it to one of its customers at Milford, Ind. Upon being notified that the feed did not contain the percentages of ingredients stated and set forth in the labels, claimant instructed and directed its customer to reship the feed to

Augusta, Mich., in order that it might be remanufactured, or remixed, and thus made to conform to the statements in the labels. The shipment and transportation of the feed from Indiana to Michigan was not for sale. At the time the libel in this case was filed and the seizure made, the transportation of the feed in interstate commerce had been completed, but the feed still remained in the possession of claimant and in the original unbroken packages.

The principal contention of claimant is that the feed in question is not subject to seizure and forfeiture because the purpose of the transportation thereof from Indiana to Michigan was not for sale. The question thus presented was settled adversely to claimant by the Supreme Court in the case of *Hipolite Egg Co.* v. *United States*, 220 U.S. 45, and is not now an open one. In that case the decisions of the lower courts, upon which claimant relies, were mentioned and briefly discussed, but not approved; indeed, the result reached was a distinct disapproval. The prohibition of the statute is directed against the transportation in interstate commerce of misbranded and adulterated articles of food alike. Some of the later cases directly in point are the following: *United States* v. *12 Crates of Frozen Eggs*, 208 Fed. Rep. 950; 215 Fed. Rep. 584 and 585; *Philadelphia Pickling Co.* v. *United States*, 202 Fed. Rep. 150; *United States* v. *9 Barrels of Butter*, 241 Fed. Rep. 499; *United States* v. *2 Barrels of Desiccated Eggs*, 125 Fed. Rep. 302; *United States* v. *300 Cans of Frozen Eggs*, 189 Fed. Rep., 351; *Weigle* v. *Curtice Bros Co.*, 248 U.S. 285–287; *Weeks* v. *United States*, 245 U.S. 618–622. Since the Hipolite case, above cited, there have been no decisions to the contrary.

The motion to strike claimant's answer from the files and for a decree of condemnation will be granted.

UNITED STATES v. W. B. WOOD MANUFACTURING CO.

(District Court, E.D. Missouri, May 12, 1921)

N.J. No. 10371

Information in 14 counts alleging violation of section 2 of the Food and Drug Act. Jury trial. Directed verdict for defendant on four counts. Verdict of guilty on ten counts.[11]

During the progress of the trial, upon objection by counsel for the defendant to the Government's offer to introduce in evidence certified copies of certain regulations under the Food and Drugs Act, the court ruled as follows:

FARIS, *District Judge.* I think the question is a fairly simple one, gentlemen. You must bear in mind that you are offering this not as the law of the case but as a part of the evidence in the case. It is evidentiary, almost conclusively so, upon the testimony already adduced, of the guilt of the defendant, if I allow it to come in. This board, or the various officers mentioned in the statute, in making these regulations that fix certain arbitrary rules, or prescribe certain

[11]Affirmed, *W. B. Wood Manufacturing Co.* v. *United States*, p. 1098, *post.*

arbitrary colors that shall enter into arbitary things; that shall enter into as constituent parts, as the various parts of colors for food purposes. If they can do that, that, of course, ends this case.

I do not gather from the statute that Congress meant to confer upon these gentlemen so thoroughgoing a power. There might be some serious question in it as to its constitutionality, as to the right to delegate the power to the legislature. Congress can perhaps say what constituent elements shall go into divers colors that are to be used in component parts of foods and drinks, but I seriously question whether they can give that power to anybody else. There may be, really, some question as to the right of Congress to do it arbitrarily.

Now, the only case that you have called my attention to does not treat the matter as one of fact, and you are urging the court to treat it as one of fact, to treat the matter as evidentiary, to consider the finding of these gentlemen and their regulations and prescriptions as being evidence.

Naturally, as I said a while ago, in the nature of most cases, it would be conclusive evidence, it would absolutely settle the case; it would settle this case, beyond any question. But, Judge Orr, in the case you called my attention to, I repeat, did not use it as evidentiary matter at all. He used it as a question of law. He adopted the finding and regulations of those gentlemen as the view which the court itself took of the meaning of that statute, because he said, "We refer to the rules adopted not as controlling this court by way of construing the act but as being a reasonable construction which the court might adopt if it sees proper, and perhaps is the construction that is being placed by the rule which is provided for in the act itself."

That is clear, that so far as Judge Orr used that, in the only case you call my attention to, he used that as being persuasive to the court of the law in the case, and not as being evidence. You are offering this as evidence.

I have no doubt (and this conforms with the view already held by the court) that Congress has not given these gentlemen the power to establish evidence of guilt in these cases.

I sustain the objection.

After further submission of evidence and arguments by counsel the following charge was delivered to the jury by the court:

FARIS, *District Judge.* Gentlemen of the jury: Now, at the close of the evidence and of the arguments of counsel on both sides, to which the jury has listened and to which the jury has paid attention in a most commendable way, it becomes the duty of the court to give you in charge the law which ought to govern you in your deliberations upon your verdict.

This is a duty which falls upon the court. It is the court's duty to declare the law and it is the duty of the jurors, under their oaths of office, to abide by the law as the court shall declare it to them. Touching the evidence, however, and the credibility of the witnesses, the rule is wholly different. You as jurors are the sole judges of the credibility of the witnesses and of the weight and value to be accorded to their testimony.

In reaching a conclusion as to the weight and value that you ought to give to the testimony of any witness, you are warranted in taking into consideration the manner and appearance of the witness upon the witness stand, his manner of testifying, the probability or improbability of the testimony that he gives, his disclosed relations to, or feelings for, the two parties to the litigation. Taking into consideration these several facts, it is your privilege to accord to each and every witness such weight and value as you may deem his testimony entitled to.

If you shall find that any witness has willfully sworn falsely as to any material fact involved in the controversy, it is your privilege to believe or disbelieve the whole or any part of such witness's testimony. By "material fact" is meant any fact which tends to prove or disprove the guilt or innocence of the defendant.

This case, gentlemen, notwithstanding it is a prosecution by the Government of the United States, or by the United States of America, against the defendant, a corporation, is, nevertheless, a criminal proceeding; it has been brought by a criminal information. It is, therefore, to be considered by you, and dealt with by the court, according to the rules which hedge about criminal trials. In this connection, I charge you that the information in this case is nothing but a mere formal charge. It is no evidence whatever of the guilt of the defendant. It has no probative value; it is merely a part of the legal machinery, or, rather, the legal procedure, by which the defendant is brought to answer before a jury of the country. You are, therefore, not to accord to the fact that there has been an information filed any credence or weight whatever.

The charge here as contained in the information is in 14 counts, 14 separate and distinct counts. Each of those 14 represents an alleged violation of the law. Seven of these violations occur with regard to adulteration, and seven of them occur with regard to misbranding of the identical shipments; in other words, there are seven shipments alone involved. Touching those seven shipments two separate alleged violations of the law are charged: One is that a given shipment—take the one contained in the first count, for example—was adulterated; the other is, that that identical shipment (the one in the first count) was misbranded. The same thing is true of all the remaining counts.

In this connection, I would as well say to you now, that in my view, for reasons that I need not now take up your time to call your attention to, your verdict and finding ought to be on counts 5 and 6, 13 and 14, for the defendant. I think the Government has not made out sufficient facts by the evidence adduced, to permit those four counts to go to you. Therefore, the court charges you, as a matter of law, that your finding on those four counts ought to be for the defendant. The other ten counts I am going to submit to you, as to whether your finding shall be for plaintiff, that is, the Government, or for the defendant.

The information, which is of great length, was read to you. I shall not at this time, and on this day of the week, take up your time with again reading it. I shall simply say as to the first count and as to the second count, which are types of all the rest, what they substantially charge.

The first count, substantially and in plain and ordinary language, charges that a shipment of certain colors made by defendant to the Robeson Soda Water Co., in the city of Lumberton, State of North Carolina, was adulterated.

Now, you need not trouble yourselves about whether the shipment was made; whether it was an interstate shipment, and whether the defendant is a corporation. Those three facts have been admitted, so you need not bother yourselves about them. You can devote your attention to the other questions. To repeat, I say, it is charged that a certain shipment of red color was adulterated within the meaning of the act of Congress which I shall presently call your attention to, in that Ponceau 6R, Fast Red A, Bordeaux B, sodium chlorid, sodium sulphate, and arsenic had been mixed and packed with this color so as to lower and reduce and injuriously affect its quality and strength; and that it was also adulterated in that Ponceau 6R, Fast Red A, and Bordeaux B, sodium chlorid (or common salt), sodium sulphate, and arsenic had been substituted in part for the red color which the article purported to be.

Touching that point in this, as well as all the other charges, I shall have something further to say.

It has been also charged that an added, a poisonous and deleterious, ingredient, to wit, arsenic, had been added. That charge occurs in all of the seven counts. You need pay no attention to it, because there is no proof in the case that arsenic, in the quantities which the proof shows were contained in these colors, is, in fact, poisonous, hurtful, or injurious to health. That point goes out of the case and you need not trouble yourselves further about it.

Substantially, then, that is the charge in the first count, third count, fifth count, seventh count, ninth count, eleventh count, and thirteenth count; in the odd-numbered counts. The fifth one however, of those odd-numbered counts, and the thirteenth of those odd-numbered counts I have already told you to disregard and find thereon for the defendant.

Now, the even-numbered counts deal with the same identical shipments that the odd-numbered counts deal with, and charge, in simple language or, rather, the charge when reduced to simple language means, that that color so shipped was misbranded within the meaning of the act of Congress, in that the statement "Red Color" borne on the label was false and misleading for the reason that the statement that it was red color and consisted wholly of red color was false, because it did not consist altogether of red color, but did consist in part of Ponceau 6R, Fast Red A, Bordeaux B, sodium chlorid, sodium sulphate, and arsenic.

It is also charged that it was so labeled so as to deceive and mislead the purchaser into the belief that it did consist wholly of red color, when, in truth and in fact, it was a combination of red color with these other things which I have mentioned.

The charges as to the other eight counts which I am permitting to go to you are similar to the charges in the two counts that I have just read to you. I read those two as types, and explained those two as types of the other eight.

Now, the statute, gentlemen, which is involved in this case is an act of Congress, which provides:

That the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this Act is hereby prohibited; and any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this Act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded foods or drugs, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor, and for such offense be fined not exceeding two hundred dollars for the first offense.

There are additional punishments for second offenses, but those are not involved here.

Some of this statute is not pertinent to this case. I think you will, however, be able readily to pick out those parts which are pertinent.

It is further provided by this act of Congress:

That for the purposes of this Act an article shall be deemed to be adulterated:

In the case of food:

First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

Second. If any substance has been substituted wholly or in part for the article.

And another proviso which is in the information, but which is not now in this case, is that which has reference to an added poisonous ingredient. I have taken that from you so you need not trouble yourselves, I repeat, about that.

So the two questions, then, gentlemen, upon this statute, so far as pertains to the odd-numbered counts, are, whether there has been mixed and packed with these colors any substance which has reduced or served to reduce or lower or injuriously affect the quality or strength of that color; and, second, if any substance has been substituted wholly or in part for that color.

Now, on the second count, the statute provides as to misbranding (and you will already know that the statute which I first read to you forbade misbranding) that:

The term "misbranded", as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, * * *.

That for the purposes of this act an article shall also be deemed to be misbranded:

In the case of food:

First. If it be an imitation of or offered for sale under the distinctive name of, another article.

Second. If it be labeled or branded so as to deceive or mislead the purchaser, * * *.

Those, I think, are the statutes, gentlemen, which are involved in this case upon the charges which I have read. Of course, the purpose of this act of Congress was to prevent deceit and false pretenses in

the sale of food or drugs, and to protect the customer or buyer in his right to receive what he orders, what he buys, and what he desires to receive. It was also for the prevention of fraud and deception to the end that I have mentioned; that is, so that the purchaser should get the thing that he had a right to suppose he was getting.

Taking the first count (and what I shall say applies to all the odd-numbered counts that I am permitting to go to you), if you shall find and believe that the can of red color shipped to the Robeson Soda Water Co. by the defendant in this case, when shipped, or delivered for shipment, contained Ponceau 6R, Fast Red A, Bordeaux B, sodium chlorid, sodium sulphate, and arsenic, and that the effect of these articles was to adulterate it; that is, that they were adulterants, and that being adulterants, the effect of them was to lower and reduce and injuriously affect the quality and strength of that color, you will be warranted in finding the defendant guilty. If you find the converse of that, you ought to find the defendant not guilty; or, if you shall find that this red color was adulterated in that Ponceau 6R, Fast Red A, Bordeaux B, sodium chlorid, sodium sulphate, and arsenic, or any of them, had been substituted in part for red color, which the article purported to be, then, other things being equal, you ought to find the defendant guilty. If you shall find the converse of that, you will find the defendant not guilty.

Upon the second count and upon all the even-numbered counts which I am permitting to go to you, if you shall find that a can of red color was shipped to the Robeson Soda Water Co., at Lumberton, N.C. (and those things are admitted), and that the can or container in which this red color was contained bore the words "Red Color," but, in truth and in fact, this article did not consist entirely of red color, but did consist in part of Ponceau 6R, Fast Red A, and Bordeaux B, sodium chlorid, sodium sulphate, and arsenic, and that those things were not on the brand (and, of course, there is no question about that, that they were not on there), and that the effect of the putting into his can that color, and failing to designate on that can these several things which I have enumerated, was to deceive and mislead the purchaser into the belief that the contents of this can was wholly a red color, then you ought to find the defendant guilty. If you shall find the converse of that, you ought to find the defendant not guilty.

These are types of all of the counts. What I have said as to the two of them (because there are only two questions) applies to all of them. I cannot take up your time with going over all of them.

What I have said as [to] the presence of Bordeaux B, Fast Red A, and Ponceau 6R in the several articles in which it is charged these things were used, so far as counts 1, 2, and 3 are concerned, you cannot consider them as adulterants under these counts; and the fact that they were used in making the article described in count 4 cannot be considered as tending to prove that these articles were misbranded as charged in that count; and the same thing is true as to the use of the word "Orange" in counts 11 and 12.

I say this to you particularly, you will see, as to count 1, which mentions a red color, because Bordeaux B, Fast Red A, and Ponceau 6R are all red colors, but, of course, this does not include sodium sul-

phate, sodium chlorid, or arsenic, if you find those things were in those colors.

Now, gentlemen, I charge you as a matter of law that, in order to find the defendant guilty of the alleged adulteration, or of the alleged misbranding, it is not incumbent on the Government to show that the defendant in this case consciously or willfully put this substance, or these substances, into these colors (if you find they were in there) with the intent to deceive the purchaser with respect to them, but if you shall find that they were in there, and that they were an adulteration within the statute and the law which I declare to you; and upon the question of misbranding, if you shall find that the effect of the label on the cans, when read by a person of ordinary intelligence, creates, or created, a false impression regarding the character and contents of this can, you may find that the can was misbranded. If you find, as I said a while ago, that these things were adulterants, then you may also find that it was adulterated.

The statute provides a way here by which the defendant in the case could have escaped liability; it did not pursue that way and, of course, other things being equal, in finding these other facts, it cannot escape liability on the sole ground in this case that it bought this stuff in New York in bulk, I take it, had it shipped here, put it in cans, or put its own label on those cans and sent it out to be sold to all and sundry who might desire to purchase it. So that question need not be considered by you. You need not consider the intent nor, in other words, if it was consciously done. The law penalizes carelessness and negligence and inattention in these cases, because, as I said a while ago, the intent of the law was to protect the public, and if a man were to be permitted to say that he did not know that he was putting up carbolic acid as glucose, it would be the end of the law.

This is a criminal case, gentlemen, and the burden of proof is upon the Government to make out its case beyond a reasonable doubt. This burden the Government assumes in the beginning and bears throughout the case. The defendant is presumed to be innocent, and this presumption attends and protects the defendant throughout the trial, until it is met and overcome by evidence which proves the guilt of defendant beyond a reasonable doubt. This presumption is raised by defendant's plea of not guilty in this case, so unless you find that the Government has made out the guilt of defendant beyond a reasonable doubt you ought to find the defendant not guilty.

A reasonable doubt is a doubt which has a reason for its basis, which arises from the consideration of all the evidence in the case. It is not, however, a mere possibility of the defendant's innocence.

Some evidence has come into the case from expert witnesses; in fact, a large part of the evidence came from expert witnesses. Touching this sort of evidence I charge you that it is competent for chemists, and other gentlemen who are learned in that art, to give their expert opinion relative to matters within the scope and range and learning of that art, but such expert opinions are not binding upon you and are to be received by you as advisory only. Generally speaking, you are to consider the expert witnesses by the same general rules that you consider other witnesses, and to weigh their credibility by those rules; but touching the expert opinions which they

give you are, I repeat, to consider them as advisory only, and you are permitted to consider them in the light of human experience. In determining their weight and value, and in reaching a conclusion as to their probative effect, it is your privilege to accept or reject such evidence in whole or in part, according as you may believe or disbelieve it, when you have applied to it the test that I have mentioned.

Now, gentlemen, the questions before you have been greatly shortened by the candid admissions of the defendant in this case, that the shipments mentioned in the information were made as described therein; that it is a corporation; that the samples analyzed by the witness, Jablonski, and offered in evidence, were parts of and made from the identical shipments charged in the information, and that these shipments were shipped and sold by the defendant with the knowledge on its part, that the colors were intended as components of food. Of course, nobody claims that these colors have any food value; they are merely colors, but they are, within the meaning of the statute, components of food, and so far as that is concerned are to be regarded as to their effect on the things that they go into, just as if they were food.

Coming down to a little bit of the evidence, in order that I may help you (charging you, however, to bear in mind that you, and not the court, are the sole judges of the evidence and the credibility of the witnesses, and any comment that I may make is not binding on you, you are to disregard it if it does not agree with your views), I might say that the Government in this case has offered proof as to the contents of these seven shipments and there has been no countervailing proof about that matter. The witness, Jablonski, testified as to what were the component elements of Bordeaux B, Ponceau 6R, Fast Red A, sodium sulphate, sodium chloride, arsenic, and so on. He told you not only what were the component parts of all these cans, but he told you the percentages thereof. Those percentages varied largely. They ran, I believe, in salt from perhaps eleven and a fraction to perhaps sixty-three and a fraction. If I should mistake them your better recollections will control and govern. Of course, if you shall believe as to the sodium sulphate and the sodium chloride, that it was present in these colors (and I do not think you can believe anything else, because the uncontradicted proof shows it; no proof has been offered here as to any different analysis than that testified by Jablonski); if you shall find, I repeat, that common salt and sodium sulphate are usually and generally present in substantially, or about, the quantities shown in the evidence, when these colors are manufactured in the usual and ordinary way that reasonably competent men manufacture them, when using reasonable care and skill, then I charge you that the presence of salt does not create either an adulteration or misbranding within the purview of the charge here, and of the statute. But, if you should find the converse of this, that in this sort of manufacture the quantities shown by the uncontradicted evidence ought not appear, then you may consider that an adulteration; in other words, if the party who made these colors made them with reasonable care and skill, and in the reasonably approved method then existing, and this salt got in there in the process of manufacture, then the defendant ought to be found

not guilty. Of course, there is proof here that the defendant did not put any salt, as such, in these colors; that it was in there when he got the colors; that he took nothing from it and added nothing to it. He merely took it out of bulk, put it into cans, and put his labels on those cans and shipped it. But if it was there in forbidden quantities, as I have tried to describe that to you, then the fact that the defendant did not put it there would not protect the defendant.

I do not think of anything else, gentlemen, except the formal charge.

Mr. WHEELER. In regard to punishment, the jury has nothing to do with that.

The COURT. I will cover that.

Mr. WHEELER. Secondly, the jury can acquit or convict on any count, or all counts.

The COURT. Very well.

Mr. Cullen, have you anything to say?

Mr. CULLEN. We desire to except to that part of Your Honor's charge which submits to the jury the question whether or not the presence of arsenic constitutes an adulteration, or an element of misbranding.

The COURT. I will charge the jury upon that, that the presence of arsenic did not amount to an adulteration unless you should find the same thing with regard to arsenic that I have charged touching sodium chlorid and sodium sulphate, because arsenic might be there. You will use the same test in deciding as to whether it was there or not, that has already been testified to in an uncontradicted way, by the witness, Jablonski, and you will consider whether it was a usual and ordinary, and I might say, a necessary, result of the manufacture.

Is that all, gentlemen?

Mr. CULLEN. That is all.

The COURT. Now, gentlemen, with regard to your verdict, I have caused to be prepared for you a blank form of verdict. If you find the defendant guilty on the counts that I have let go to you, one of your number will sign this as it stands, as foreman. If you find defendant not guilty you will add the word "not" in the form that I have prepared for you. You may find defendant guilty on any one, two, or three, or more counts, and not guilty upon the others. You may find defendant not guilty upon all, or you may find defendant guilty upon all counts, according as you may find the facts to be. Your verdict, of course, must be unanimous. You have nothing to do with fixing the punishment. You merely find defendant guilty or not guilty, and so say by your verdict, and the court fixes the punishment.

I shall let you return a sealed verdict. When you have agreed upon a verdict you may enclose it in an envelop and hand it to the clerk, and on Monday morning at 10 o'clock you will return and I shall open the verdict and it will be read.

The jury then retired and after due deliberation returned a verdict of guilty, on May 16, 1921, on counts 1, 2, 3, 4, 7, 8, 9, 10, 11, and 12. As will appear from the above-quoted charge to the jury, the court directed a verdict for the defendant with respect to counts 5 and 6, involving the product invoiced as "Amaranth," and counts 13 and 14, involving the product invoiced and labeled as Caramella."

UNITED STATES v. 36 BOTTLES OF CRAB ORCHARD MINERAL WATER

(District Court, S.D. Ohio, May 17, 1921)

N.J. No. 10172

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict in favor of the United States. Motion for a new trial denied.

The following charge was delivered to the jury:

PECK, *District Judge.* This is an action, gentlemen of the jury, brought by the Government of the United States for the purpose of effecting the seizure and condemnation of 36 bottles, more or less, of Crab Orchard concentrated mineral water. It is brought under what is known as the Pure Food and Drugs Law. The pertinent parts of the law are that if a package or label shall contain or bear any statement regarding the curvative or therapeutic effect of a drug, the contents of the package, which statement is false and fraudulent in any particular, then the package is misbranded. And if, being misbranded, it is transported in interstate commerce for the purpose of sale, the Government of the United States may proceed against it. It may be seized and confiscated and condemned, either to be destroyed or sold, the proceeds to be turned into the Treasury of the United States, as the court may order, unless the owners, the claimants, give bond and pay the costs—give bond that they will not dispose of it contrary to law; that is to say, upon giving bond it may be retaken by the owners, to be disposed of under a proper label. The purpose of the act is to insure the truthful and proper labeling of drugs; it is to prevent the false or fraudulent labeling of drugs; it is to protect the public against being misled as to the curative properties of drugs and substances that are offered for sale. The action is not an action to prevent the future sale of Crab Orchard water, either in its natural state or concentrated; the Government proceeds upon the theory that this package of Crab Orchard water is a misbranded package. It is not claimed for the Government that this Crab Orchard water shall not be sold under a proper branding, but what the Government claims is that it is now being sold and disposed of to the public under an improper branding.

Now, the essential elements of the pleading which the Government has filed, which in this form of action is called a libel, are that this water, these packages of water, were transported in interstate commerce. That is admitted by the answer of the defendants. That they were transported within this district and are held for sale—that is admitted by the defendants. That they were misbranded in the particulars set forth in the libel—this is denied by the defendants. And the burden of proof is upon the Government of the United States to establish—to show, I should say, rather than establish—to show by clear and convincing evidence, by a preponderance of the evidence which is clear and convincing, that this branding is false and fraudulent in some one or more of the statements contained upon the label. It is not necessary that the Government show,

to entitle it to a verdict, that all of these statements are false and fraudulent. It is only necessary that the Government show that some one or more of these statements is false and fraudulent. Thus, if the libel be true, in all respects except as to typhoid fever, for instance, but false and fraudulent as to typhoid fever, then the package is misbranded. To be truthfully branded there must be no false and fraudulent statement contained thereon. If false and fraudulent in any particular with regard to any one statement thereon made, or any one disease thereon stated, it is misbranded.

The statements of which the Government particularly complains are as follows:

The World's Greatest Remedy For The Following Ailments In Their Most Chronic Forms: Rheumatism, Constipation, Kidney Diseases, Liver Complaints, Dyspepsia, Biliousness, Sick and Nervous Headache, Scrofula, Malarial Fever, Hay Fever, Typhoid Fever, Lumbago, Sleeplessness, Vertigo, Piles, Skin Disorders, Indigestion, Jaundice, Flatulency, Female Complaint, Neuralgia, Colds, La Grippe, Palpitation of the Heart, Disordered Nerves, Dysentery, Gout, Bilious Colic, Stomach and Bowel Troubles, Loss of Appetite, Catarrh in All Forms, Gall Stones, Dropsy, Bladder Troubles And All Diseases Arising From a Disordered Liver, Kidneys, Stomach and Impure Blood. A Mild Aperient Tonic And A Perfect System Regulator. Sold only by Authorized Agents.

Now, I say to you that if any one of those statements are false and fraudulent the product is misbranded.

I say to you that the burden of proof is upon the Government of the United States to establish by a preponderance of the evidence which is clear and convincing that one or more of those statements is false and fraudulent. It is not enough, gentlemen of the jury, for the Government to show that one of those statements is in fact untrue. There are differences between scientific men; there are differences between medical men as to the therapeutic effect of medicines. That is well known to all. What the Government must show is that one or more of these statements is false and fraudulent. By false is meant untrue in fact; by fraudulent is meant a statement which the makers knew to be untrue when it was made, or a statement which was made in reckless and wanton disregard of the truth. If one puts out a package of drugs with a statement thereon that it will cure this and that and the other, and that statement is recklessly made, in disregard of the truth, not knowing whether it be in fact truthful or false, it is within the meaning of this act just as much a misbranding as if the maker of the statement knew that it was false. So that I say to you fraudulent means either that the maker of the statement knew the statement to be untrue when he made it, or that he made it in reckless disregard of the truth.

Now, let us apply that to some of these statements upon this carton. We will take typhoid fever, for example. Is is true that this water is a remedy for typhoid fever? If you find that that be true, that is the end of it, so far as typhoid fever is concerned. But assume you find that that is false, that this water is no remedy for typhoid fever, then your next consideration will be whether that statement is fraudulent. Did the makers of that statement, when they placed it upon this carton and placed this carton upon the market, know that statement to be false? Or was that statement made in reckless disregard of the truth; that is to say, was it made wantonly and recklessly, with a wanton and reckless disregard as to

whether it was true or not? When these cartons are placed upon the market with these statements upon them and offered to the public, it is just as though the manufacturer were standing there in person and had this package in his hand and said orally to the prospective purchaser, "I offer to sell you this. This is a remedy for typhoid fever," and as though the other parted with his money upon the faith of that statement. Now, if the statement was true, or the maker of the statement believed it to be true, obviously it would not be false and fraudulent; but if the statement was untrue, and the maker knew it to be untrue, or, being untrue, he made it in reckless and wanton disregard of whether it was true or false, then obviously that statement would be a fraudulent statement.

Gentlemen of the jury, in construing the language upon this carton you are to interpret it as the ordinary man, the purchaser of ordinary intelligence, would interpret it. That is, "The World's Greatest Remedy For The Following Ailments In Their Most Chronic Forms"—then follows the diseases—in considering what those words mean you are to take those words just as the ordinarily intelligent purchaser would understand them if he were to go into a drug store or other store and were about to buy this carton, it having been placed in his hand for examination.

You are the sole judges of the evidence, gentlemen of the jury, and you are likewise the sole judges of the credibility of the witnesses. You will consider their affiliation with the case, their interest in its outcome, their connection with either one party or the other party, any bias or prejudice that they may have shown upon the witness stand. You will consider all facts relating to or bearing upon the credibility of the witnesses. The greater number of witnesses is not necessarily the true test as to where the preponderance lies. The question is, what is the convincing force and effect of what the witnesses say to you?

Now, there has been necessarily in this case offered that which is known as opinion evidence. If one were to testify to you "The contents of this bottle came from the Crab Orchard Springs," that would be evidence as to a fact, something that is capable of definite ascertainment; but if one were to say to you from the witness stand, "The contents of this bottle, in my judgment, based upon my learning and experience, are of no value in the cure of rheumatism or typhoid fever or gall stones, or any other diseases", that would be an expression of opinion. Opinion evidence is not binding upon you, but it is to be given consideration, as other evidence. The value of opinion evidence evidently depends upon, first, the truth and honesty of the witnesses, whether or not it is the true and honest opinion of the man who states it to you. Of course, if it is not his true and honest opinion, it is of no value. Secondly, it depends upon the amount that he knows about the subject that he speaks of, his intelligence, his opportunity for observation, his study, his research, the soundness of his judgment; all of those things will be taken into consideration by you in determining what effect you will give to the opinion of a witness who has testified as to his opinion.

So, gentlemen of the jury, you will take in consideration all of the evidence carefully of both the plaintiff and defendant, that is to say, both the Government and the respondents, and if you find from the

evidence that this carton contains statements of which the Government complains in the libel which are both false and fraudulent, it is your duty to find a verdict for the plaintiff, the Government of the United States. If, on the other hand, you do not find that the statements are shown by the evidence—that the statements, or some of them, are shown by the evidence to be false and fraudulent, then it is your duty to find a verdict for the defendants.

Gentlemen of the jury, you will now take the case, retire and deliberate upon your verdict, and when you have reached it, report it to the court.

UNITED STATES v. ALBAN

(District Court, S.D. New York, Nov. 3, 1921)

N.J. No. 10046

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

The jury was charged as follows:

Van Fleet, *District Judge.* Gentlemen, the law under which this prosecution is brought is the act known as the Federal Food and Drugs Act of June 30, 1906.

As far as it is pertinent to this case it provides that it shall be unlawful for any person to manufacture within any territory or the District of Columbia any article of food or drug which is adulterated or misbranded within the meaning of this act; and provides that any person who shall violate any provision of this act shall be guilty of misdemeanor, and fixes the punishment.

It further provides that the introduction within any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia of any article of food or drugs which is adulterated or misbranded within the meaning of this act is hereby prohibited, a violation of which is made an offense under the act.

It further provides that, for the purposes of this act, an article shall be deemed to be adulterated, in the case of food:

First: If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

Second: If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

And, then, it provides something which is not claimed in this case, that it is also against the act to put in any poisonous or any deleterious ingredient which may render any such article injurious to health.

The claim here is that the article of food is adulterated, and for the purposes of this act, an article shall be deemed to be misbranded in the case of food:

First: If it be an imitation of, or offered for sale under the name of, another article.

Second: If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so, or if

the contents of the package as originally put up shall have been removed in whole or in part, and other contents shall have been placed in such package, or if it fails to bear the statement on the label of the quantity or proportions of any mixture or deleterious substance mixed therein.

Now, the information which has been filed by the district attorney against this defendant contains two counts, the first of which charges that heretofore, to wit, on the 28th day of July in the year one thousand nine hundred and twenty, at the Southern District of New York, and within the jurisdiction of this court, John A. Alban, trading as John A. Alban & Co., Inc., at the City of New York, State of New York, did ship and deliver for shipment from the City of New York, State of New York, to the City of Lowell, State of Massachusetts, consigned to Klerhos Dimitrakoulakus, certain packages, to wit, a number of cans, each can containing an article of food, which said cans were labeled, marked, and branded as follows, to wit; and then, it gives the legend upon the brand, which is precisely in accord with the exhibit that was put in before you, and which I need not repeat, because it is presented to you for your examination; that said article of food, shipped as aforesaid, was then and there adulterated in that a substance, to wit, cottonseed oil, had been mixed and packed with the article so as to lower and reduce and injuriously affect its quality and strength. Said article was further adulterated in that a substance, to wit, cottonseed oil, had been substituted in part for pure olive oil, which the article purported to be; against the peace and dignity, and so forth, of the United States.

The second count alleges that on the same date, and within this district, and within the jurisdiction of this court, John A. Alban, trading as John A. Alban & Co., Inc., at the City of New York, State of New York, did ship and deliver for shipment from the City of New York, State of New York, to the City of Lowell, State of Massachusetts, consigned to the same individual named in the first count, certain packages, to wit, and then describing them precisely as at first, marked and branded, as more fully described in the first count of this information, and which said description of the first count is, by reference, hereby incorporated in this count, which said article, shipped as aforesaid was misbranded in that the statements, to wit, "Prodotti Italiana", "Pure Olive Oil", "Lucca", and "Italia", together with the design and device of woman draped in Italian flag holding Italian shield, borne on the can containing the article, regarding the article and the ingredients and substances contained therein, were false and misleading in this, that they represented that said article was pure olive oil, that said article was a foreign product, to wit, an olive oil produced in the Kingdom of Italy, whereas, in truth and in fact, said article was not pure olive oil but was a mixture composed in part of cottonseed oil; said article was not a foreign product, to wit, olive oil produced in the Kingdom of Italy, but was a domestic product, to wit, an article produced in the United States of America. Said article was further misbranded in that it was a mixture composed in part of cottonseed oil prepared in imitation of pure olive oil and was offered for sale and sold under the distinctive name of another article, to wit, pure olive

oil. Said article was further misbranded in that it was labeled as aforesaid so as to deceive and mislead the purchaser into the belief that it was pure olive oil and that it was a foreign product, to wit, olive oil produced in the Kingdom of Italy; whereas, in truth and in fact, it was not pure olive oil but was a mixture composed in part of cottonseed oil; said article was not a foreign product, to wit, an olive oil produced in the Kingdom of Italy, but was a domestic product, to wit, an article produced in the United States of America.

And it is alleged that said article was further misbranded in that the label aforesaid purported said article to be a foreign product when not so, against the peace of the United States, and the dignity of the United States.

Now, the defendant has interposed a plea of not guilty to that information, and it being a criminal charge, that of a misdemeanor, his plea puts in issue the averments upon which the Government asks a verdict.

Of course, the rule in criminal cases is one which you well understand. The burden of a plea of not guilty casts upon the Government the necessity of showing by what the law terms a proof beyond a reasonable doubt as to the guilt of the defendant before he can be convicted.

Now, the term reasonable doubt can hardly be defined to you in any clearer manner than those very terms import. It means that the guilt of the defendant must be shown by proof that leaves no reasonable doubt upon the mind of the jurors. There is nothing technical about it at all. It means a substantial doubt, a doubt which would cause a juror to hesitate in an important transaction in his own life. It means that state of the case which satisfies you to a moral certainty of the truth of the charge.

Of course, unless it does this, it is not sufficient upon which to pass a conviction in the case, but it does not mean anything but what it says. It does not mean anything but a reasonable doubt. A reasonable doubt in the sense in which it is used in the law must be a doubt arising upon the evidence in the case, or from a lack of it, and not be the subject matter of mere surmise or conjecture, or some fanciful idea of the jury that greater proof might have been offered.

If the proof in the case is such that it satisfies the minds of the jurors as practical, everyday business men to an extent which would induce them to act upon it if it related to an important affair of their own, then the law deems it proved beyond reasonable doubt, which justifies them in passing upon it, a conviction in a criminal case, and you are not permitted to go outside of the evidence, conjecture something upon which to hang or base a doubt, but you are confined, as I say, to a consideration of it.

Now, the law, as it has been said, does not make the intent with which the thing is done an ingredient. It is like many other statutory offenses. It denounces the act, and it places upon the individual committing the act the necessity of knowing that he is not violating that statute.

In this instance, whether the defendant knew that the article that he was shipping, which he admits having shipped, was not what it was reputed to be by the labels upon the cans, whether he knew that or not, would be no protection against this prosecution, or against

his guilt, because the law has denounced the act of shipping in interstate commerce, a misbranded or adulterated article of food.

It is like, precisely like, the proposition that it will not avail a man charged with crime to say that he did not know that such was the law, because it is axiomatic that ignorance of the law does not excuse, and that is because under a Government of laws such as ours, we are all bound, as far as we are all bound as citizens, to know what the law is, at our peril.

You cannot go out and take the life of a man, and say that you did not know it was a crime to do so. The law will not tolerate that. No one can be convicted of crime under such a system, and so with this statutory offense, the matter of intent is not made an ingredient in the offense. Of course, it very frequently arises in cases of this character that the intent can be very easily seen, that of evading the law, but it is not essential that the defendant should have knowledge of the character of thing that he was shipping, if he did, in fact, violate this statute.

Now, that is really the whole question. Was this article, when shipped, of the character that has been testified to by the Government witnesses? Of course, as has been argued by defendant's counsel, if the contents of these cans, or of this particular can which was appropriated and purchased by this officer of the State of Massachusetts, and who subsequently turned its contents over to the Federal authorities, if those contents were changed after it had left the hands of the defendant, if the contents were not obnoxious under the law when it left defendant's hands, and were changed afterwards, of course, the defendant would not be responsible; but, gentlemen, the jury is not permitted to speculate or conjecture as to what might have been done. The question, whether under the evidence, it has to satisfy your minds that this article that was found by the chemist to be adulterated, and found by the chemist to be not what it was reputed to be on the labels at the time it left the defendant's hands, why, of course, this defendant would be guilty.

This law is made for the protection of the public. It is not a law which represents private rights at all. The public, generally speaking, through Congress, has been given the benefit of this protective statute in order that the people shall not have foisted upon them, under misleading labels, and put up in a misleading form, articles of food which are not what they are reputed to be, and which may or may not be deleterious to health, because it makes no difference so far as this particular charge is concerned, that cottonseed oil, the article alleged to have been mixed with the pure olive oil, may not be deleterious. We all know that it is not necessarily so at all, but it is in many respects nutritious, but that does not affect the question at all, if the fact is that this article was shipped as a mixture of olive oil and cottonseed oil without distinctly branding it as such.

It is not an offense under this statute to mix ingredients that are not deleterious to health. It is not an offense under the statute as to that, but you must represent to the public what you are doing in that respect, that is where the public has got to be protected. You go into a place of business and seek to purchase a particular article, and you have handed to you the thing which is represented to be what you want, and you buy it as such, and in fact, it is not such, and you

have been misled into its purchase by a misrepresentation contained in its label. You have been deceived, and you may have been deceived according to the character of the article to your injury by getting something deleterious for that which you sought as nutritious.

Now that is the purpose of the act, to protect the public against that sort of thing.

I think that is all, unless counsel wish to suggest something.

Mr. RISELY: I ask Your Honor to charge the jury that good character alone, in conjunction with other evidence, may raise a reasonable doubt in the minds of the jurors.

The COURT: Well, that is true. It must be taken in a reasonable sense. Good character is no defense to crime at all. Good character, however, is an element which may be laid before a jury, together with all the evidence in the case, from which they will determine the guilt or innocence of the defendant, and it is an ingredient which does go to make in favor of innocence, more or less according to the circumstances, because the law assumes, and it is a perfectly natural reasonable presumption, and you will find that all rules of law that we have to deal with have their origin in reason, in common sense. The law presumes that a man of good character in the trade involved is not as likely to engage in a criminal enterprise, or an enterprise involving an infraction of the law, as a man of bad character. A man shown to have indulged in that sort of thing before—but there is always a point at which bad conduct commences. We are not all born like Richard don't you know, with teeth, and we are not bad at our birth. It is a growth, and there is always a point where we depart from the part of rectitude. If we are guilty of doing so and so, good character, to the extent I have indicated, is a factor to be considered by you in passing upon the defendant's guilt.

Mr. MCCOY: I think the jury would be interested in the penalty attached to this offense.

Mr. RISELY: I object to that, Your Honor.

The COURT: I do not think it is anything that the jury have anything to do with. The jury is entitled to know that it is announced by the statute as a misdemeanor, but the penalty is something within the limitation of the statute.

Mr. MCCOY: The statute specifically limits the penalty for a first offender. This defendant was a first offender.

The COURT: I did not notice that, but it would not make any difference, Mr. District Attorney. It is not a thing with which the jurors are concerned, and I cannot imagine that the jury will permit themselves to be influenced to find a man guilty because there was a light punishment, but not guilty if it was a heavy punishment. It is something with which they have nothing to do. It is not a matter of evidence, and, therefore, it is not for their consideration. Is there anything else that counsel wish?

Mr. RISELY: That is all.

Mr. MCCOY: That is all.

The COURT: Now, gentlemen, you will take this case. It is a very simple one upon the evidence. Disabuse your mind of any consideration excepting that which arises from a consideration of the evidence from the stand, and do not indulge in any conjecture as to what the

fact might have been, because the facts upon which a man's cause must rest are those that are produced actually in court, and must not be the subject matter of speculation in the minds of the jury. It does not make any difference with you at all what the consequences of [to] the defendant will be. If you are not satisfied of his guilt beyond a reasonable doubt as I have intimated, it is your duty to find him not guilty. If you are satisfied that it is equally imperative, it is your duty to find him guilty.

UNITED STATES v. ONE POUND CAN COAL-TAR COLOR

(District Court, E.D. Illinois, Nov. 10, 1921)

N.J. No. 12652

Libel under section 10 of the Food and Drugs Act. Trial before the court. Judgment in favor of the United States.[12]

English, *District Judge*. This suit was instituted by the Government by filing a libel charging that the particular can of coal-tar color which is libeled was shipped or transported in interstate commerce and that it remained unsold and in the original package as shipped at the time it was seized by the officers of the Government.

It further charges that the color contained in this can was packed with or had mixed with it salt, sodium chloride, and sodium sulphate, so as to lower and reduce and injuriously affect the quality and strength of the coloring matter contained in the can. It also charges that the sodium chloride and sodium sulphate had been substituted wholly or in part for the coloring matter and that the label was not correct according to the composition of the contents of the can. It also charges that this can of coal-tar color contained an added poisonous and deleterious ingredient, arsenic, which rendered it injurious or may have rendered it injurious to health. The libel further alleges that the statement or label borne on the can was false and misleading so as to deceive and mislead the purchaser or one seeking to buy it for use.

This in effect states the entire charge or charges contained in the libel. This libel is based upon the statute of the United States commonly known as the food and drugs statute, and the particular section of the statute covering the questions raised and disputed in the libel are sections 8723 and 8724 of the General Statutes of the United States.

It is shown by testimony and admitted by counsel that this particular can was put upon the market and offered for sale and purchased by the purchaser in this case for the purpose of using it in his confectionery for the coloring of ice cream, soda water, lemonades, and candy and cakes, etc; therefore, it comes under the first division referred to, which reads as follows as pertaining to coal-tar or other coloring matters for confectionery purposes:

> If it contain * * * poisonous color * * * or other ingredient deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound or narcotic drug.

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[12]Affirmed, *W. B. Wood Mfg. Co.* v. *United States*, p. 1070, *post*.

As to foodstuffs, the same section of the statute provides:

First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

These two quotations are the ones that affect the questions relative to the deterioration and also the adding of a poisonous or deleterious substance so as to make a compound that may be injurious to health. The deleterious feature in this substance appeals more strongly to the court than any other feature in the libel and upon that question I have given more thought and more attention and investigation.

The Government introduced the parties who know how this substance is prepared or how it may be prepared, this coloring matter, and gave the court some technical information along that line and in addition introduced Dr. Boos, one of the noted specialists, both as a physician and as a chemist and a man of research, as to the feature of the alleged poisonous character of the substance found in this can. Dr. Boos appealed to the court most strongly from a practical and technical point of view, more so than any of the witnesses offered on behalf of the respondent upon this question, for the reason that the physicians who were called by the respondent testified from their observation as practicing physicians called in to administer to a patient in cases of emergency.

I find by consulting some of the few most noted of the writers on this subject that I have been able to find, that poisonous substances of the kind here charged in this libel, to wit, arsenic, is administered as of and out of necessity in cases of emergency, as perhaps all poisonous drugs and narcotics are, for the purpose of obtaining immediate results, and unless immediate results are had the one administering this poison draws the conclusion that there has been no effect produced at all upon the patient, but the same writers conclude that the necessary elements to be consumed by the human body contain all the various substances and poisons that would necessarily at some time or other, unless otherwise overcome, impair the vitality of the patient. The weight of opinion of these authorities appears to be that the human body already contains substantially all of the poisons of various kinds that our present state of longevity will permit and that anything of a poisonous character added to it becomes more or less deleterious to health or in effect tends to destroy or decrease the vitality of the human body. This evidently is the feature that Dr. Boos was discussing in his testimony, and we find [that] the definition given to the term deleterious not a new word. It is an old word and is taken in its ordinary meaning. I think Congress understood what it was passing upon, and that is the understanding this court has in passing upon the word deleterious. It may not be deleterious to the extent that its effect would be apparent immediately upon the one taking this substance into the system. The term deleterious means to hurt or damage, and anything that is deleterious is harmful and destroying. It is taken from the Latin word *delere*, which means to destroy; that is where we get the word deleterious—from the word destroy. A substance, therefore, that is deleterious has a tendency to destroy; if it is poisonous, it is harmful if permitted to be taken into the human body and while it is often administered by those called to relieve the sick in distress for the purpose of receiving immediate effect, such use is permitted only in emergency; otherwise

Congress wouldn't deal with that feature of deleterious substances that might be utilized in coloring matter in foodstuffs. Dr. Boos says this may be deleterious, not that it will have immediate effect, but that the tendency is that it will and may have, added to the other poisons in the system of the same character, and have effect upon the human body whereby it would decrease longevity.

There is no reason why at this time of our great mental and physical development we need to add to our system unnecessarily more poisons than we already necessarily possess. The very air that we breathe is shown to be charged with a noxious poison known as arsenic; ofttimes the water we drink is charged with the same kind of a poison. Various other things that are necessary to be taken into the human body to sustain life are charged with similar poisons.

This particular article about which Congress has legislated is that character of poison or character of confection or foodstuffs that are in the category pure and simple of luxuries. Congress might have had the power to have said that these confections or foodstuffs should possess absolutely no arsenic; it is shown in the evidence here that this particular color could have had extracted from it practically all of the poisonous substance contained therein that has been permitted by the department in putting out its regulations. It seems to me the department has allowed just about the maximum that should be permitted. It requires the poisonous substance to be reduced to the minimum amount that is practicable, but the amount contained in this particular can of preparation exceeded by far the amount the Government chemists have decided was best for the human system, and this they call permissible. It is true, as contended by counsel for the respondent, that the requirements put out by the Department of Agriculture upon this question are not the law, but they are a mighty good index for the court in passing upon these technical questions, especially so when they are of the importance and assume the dangerous magnitude that this particular preparation could reach if permitted to go unmolested.

I am satisfied that the contention in the libel that this has in it stuff added that is deleterious, and that it is injurious or may be injurious to health when taken in the form of confections or foodstuffs, is well founded. It is not important and it is not really any of the court's business how that stuff came in there. It is argued by counsel both as to the charge of poisons contained in this preparation and the salt as well that they were necessarily used in the manufacture of this particular can of color and that, therefore, it has not been added. Now that might be true and yet this law is violated in the preparation of this particular can of color. Upon the question of the charge that this paint or coloring matter contains salt that destroys the effect or lessens the power or the efficiency of the coloring matter, it is argued by counsel for the respondent that this salt that is alleged to have been added or packed with the coloring matter was utilized for the purpose of precipitating the coloring matter that was in the liquid, so as it could be separated; that is, by putting salt into the liquid in which this coloring matter was formed or contained, brought about by a mixture of certain acids, this salt caused this coloring matter to go to the bottom of the vessel in which the liquid was found and then was separated and the salt remained in the color.

As I recall the evidence given by men who testified upon the necessity of the use of salt, 30 percent was about the maximum amount that any of them were willing to admit was necessary to the proper precipitation of the coloring matter in this liquid. The record in this case shows that there was salt to an amount of 43 percent, which is something like 12 or 13 percent in excess of the necessary amount. Now the court is not adopting the rule that 30 percent salt would not be a violation of this law, but 30 percent being the largest amount necessary to bring about the precipitation and being 12 or 13 percent less than the amount of salt found in this particular can, necessarily leads to the conclusion that there was more salt in it than was reasonably necessary and therefore that much was added to it, and the only logical conclusion is that it destroys or lessens the efficiency or the power of this color to produce its effect when mixed with other liquids.

The demonstrations that were made before the court would teach that if we didn't already know it. Salt might be necessary to an extent, and salt as coloring matter to an extent is tolerated by the Government department, but that simply is for the purpose of permitting these men to engage in business, and it is not a guaranty, it is not a violation of the law. We do have to have a standard to determine just how much or how little salt may be added to this same coloring matter and how much higher quality of coloring matter can be produced without any salt whatever; testimony shows simply by the cooling or freezing process when it is frozen or the temperature is lowered, coloring matter goes to the bottom of the container and is more easily separated and there is no salt necessary in cases of that sort.

The opinion of the court is that the brand or label upon this particular can was not such a branding as would advise the public or those seeking to purchase it as is required by law as to what its contents might be. The wording of this particular brand seems to be rather technical in a way and designed for the purpose of evading the spirit of this law as to branding of color. There is nothing in the law that prescribes just what the wording of the brands must be, but the spirit of the law is that goods when permitted to go on the market must be branded in a way that will not be misleading. The particular brand in this case was: "Warranted Complies with all requirements Quality Color." As to "all requirements," it was argued very strenuously that such requirements meant the requirements of the statute of the United States. Maybe it did; nevertheless that might be misleading because, as the court has indicated, it is a false brand. If it is the law of the United States, the requirements that are to be met by this brand, then this can of composition is misbranded, because it is not what it purports to be as set forth upon the brand. It appears from the evidence here that the purchaser generally knew or understood that the requirements meant the requirements of the department and not the requirements by the statute. They were buying it according to the requirements put forth in the circulars of the department.

Therefore, the opinion of the court is:

(1) That the can of coal-tar color libeled in this case passed in interstate commerce and remained within the jurisdiction of this court unsold and in the original and unbroken package.

(2) That sodium chloride and sodium sulphate had been mixed and packed with the coloring matter in said can so as to lower and reduce and injuriously affect its quality and strength.

(3) That sodium chloride and sodium sulphate had been substituted wholly or in part for quality color, which the label on the can purported the article to be.

(4) That the can of coal-tar color libeled contained an added poisonous or deleterious ingredient, to wit, arsenic, which may render said article injurious to health.

(5) That the statement borne on the label of the can, to wit, "Warranted Complies with all requirements Quality Color", is false and misleading and labeled so as to deceive and mislead the purchaser.

The judgment of the court is that this can is liable to seizure, and the order of court is that it be seized, condemned, and confiscated in accordance with the provisions of section 10 of the Food and Drugs Act.

UNITED STATES v. 9 CASES OF SPARKLING WHITE SEAL

(District Court, E.D. Pennsylvania, Nov. 15, 1921)

N.J. No. 11,712

Two libels under section 10 of the Food and Drugs Act. Jury trial. Verdict in favor of the United States. Motion for a new trial denied.[13]

THOMPSON, *District Judge* (charge to jury). Members of the jury: This proceeding is brought by the United States for the seizure and forfeiture of nine cases of Sparkling White Seal. The proceeding is brought under what is known as the Pure Food and Drugs Act. That act was passed about fifteen years ago, and had for its purpose the prevention of transportation in interstate commerce, going from State to State, of articles of foods and drugs that were adulterated or misbranded. In this case we are not concerned with drugs, we are not concerned with adulteration, but we are merely concerned with the alleged misbranding of an article which comes under the class of foods; that is to say, under this act articles fit for use as drinks are included as foods under the terms of the act.

The law provides that if any misbranded articles are being transported in interstate commerce, from one State to another, they may be seized, and the district attorney on behalf of the Government brings a proceeding to forfeit those articles. That is how this suit began.

The particular paragraph of the act under which the Government is proceeding in this case is the one which provides that an article shall be deemed misbranded, in the case of food,

> If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular.

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[13] Affirmed, *Duffy-Mott Co.* v. *United States*, p. 1078, *post*.

So that in considering this case you are to consider whether the package or its label bears any statement, design, or device regarding the contents of the bottle, which are false or misleading.

The test of the question as to whether a statement is misleading, or whether a design or device is misleading, is as to whether it would deceive a person of ordinary intelligence in purchasing the package.

The Government contends in this case that because the package was marked "Sparkling White Seal", it was misleading to the ordinary purchaser in that he would think that he was buying White Seal champagne, and it is contended that not only the statement itself is to be taken into consideration, but the manner in which the product is put up and bottled and the manner of the dress of the bottle, which counsel on both sides have referred to.

On the question of the shape of the bottle, or a sort of cork or wiring with which the bottle is prepared, a bottler has a perfect right to use any shape bottle which suits his fancy, and he has a perfect right to use any sort of cork and wiring for that bottle. So that those things in themselves intrinsically have nothing to do with this case. It is only in the relation that they bear to the effect on the public of whatever is contained on the label or the design or the device regarding the contents. A cork is not a device regarding the contents; neither is a wire; neither is the shape of the bottle. It is only when what is actually contained on the label itself or when any device or design on the label regarding the contents are so associated with the shape of the bottle or manner in which it is put up that they can be taken into consideration.

The label on the bottle calls this "Sparkling White Seal." The owner or the bottler of the beverage has a perfect right, ordinarily, to use any name that suits his fancy for the beverage which he is selling to the public. He can call it "Sparkling White Seal" or he can call it "Coca-Cola" or he may call it whatever name suits his fancy so far as the purpose of this act is concerned, unless the name on the label is such as to mislead the public into thinking that it is something else than it is. So that is the point of view from which it is the duty of the jurors to consider the evidence in this case.

There has been considerable evidence here on the part of men who are wholesale distributors and retailers as to whether or not the words, "Sparkling White Seal," put on a bottle fixed up as this bottle is, would mislead a person into thinking that it was champagne. There seems to be no dispute in the case that a dealer would necessarily not be deceived or misled into the belief that a bottle containing the words, "Sparkling White Seal," is champagne. If he did he would know, of course, that the man who was selling it to him had no right to sell him "Sparkling Champagne" or "White Seal Champagne," and I think it is generally conceded in the case that dealers who have their eyes open would not be deceived at all. So that the only question for you to determine is whether a consumer would be deceived into thinking that the contents of this bottle was champagne. It is a question for the jurors to consider as a question that might be put up to them or put up to people whom you know are ordinarily intelligent. Would they be misled by the words, "Sparkling White Seal," into thinking that they were getting champagne? That is the point of view from which the jury will have to determine this case.

Take into consideration the fact that there is such a product as White Seal champagne; that incidently it has been unlawful to sell that, except under orders of a physician, since February 20, 1920; and that the article in this case, as I recall the evidence—the fact is for you to determine—first came out under this label since that time. It is for you to consider, therefore, whether the statement, "Sparkling White Seal", is sufficient in connection with the shape of the bottle, the style of the cork, the wrapping, the tin foil, and so on, taken in connection with everything else that is on the bottle, to lead anyone of ordinary intelligence to think that he was getting champagne when he asked for Sparkling White Seal. A man may call his beverage "sparkling" if it is sparkling. That is no fraud on the public. He may call it White Seal and adopt that as his name for the article if that suits his fancy, and if he happens to infringe on someone else's trade-mark, that is a matter between him and the party having the trade-mark, a matter with which we are not concerned in this case insofar as it will affect the public who are buying the article.

If the jury believe that the use of the words, "Sparkling White Seal", taken in connection with the way the bottle is put up, is a misleading statement, and taken in connection with everything else that is contained on the label, the jury believe that the public generally would be deceived into thinking that they were buying champagne when in fact they were getting carbonated apple juice, with some capsicum in it, then the Government has made out its case.

A statement may be misleading in many respects. It may be misleading by what it says. It may be misleading by what it fails to say. Under the charge in this case, you must find, if you find in favor of the Government, that it was misleading in the sense that it would be mistaken for champagne. The fact that it does not show it is apple juice, or it does not show that it has capsicum in it, or that it does not show that it is carbonated,—those are matters of no consideration at all unless they deceive a person into thinking that it is what the Government says that its label in this case would deceive a person into thinking it was. In other words, the Government has stood on the charge of similarity in labels. The jury must find not that they might think it was some other kind of apple juice, or they might think it was some other kind of beverage, but they must think it was champagne. If the public is not deceived into thinking it is champagne, then the Government has failed to make out a case.

The burden is on the Government in this case to satisfy the jury by a preponderance of the evidence that the charge against this particular article is made out. If the Government has failed to convince you that the public generally would be misled, then your verdict should be for the defendant. If the Government has produced sufficient evidence from which you believe that the ordinary purchaser would be misled into supposing that he was buying champagne when in fact he was getting this other article, then your verdict should be for the Government.

The defendant has offered in evidence other bottles containing apple juice cider and other things of the same shape. So that it is apparent, that evidence being uncontradicted, that the same shape

of bottle has been used for other things than champagne for a considerable time. Therefore, if you find from the evidence that it would be a mere mistake of the purchaser, supposing he was getting one sort of apple juice when he was getting another, he would not be misled within the pleadings in this case. The Government has got to make out its case as it has alleged it.

The district attorney has asked me to charge you on certain points in the case. The first point is declined.

The second point reads as follows:

2. You may consider whether the words, "White Seal," is [are] sufficiently known in connection with White Seal champagne as to be misleading when used in connection with an article of the style and general make-up and labeling of this article.

That point is affirmed.

The third point is declined.

4. If you find that the package containing the article or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular your verdict must be for the Government.

That point is affirmed.

The fifth point is declined. This is not a trade-mark case.

The defendant has asked me to charge you on certain points.

1. There is no claim by the Government that the contents of the bottles, which the the subject matter of this suit, are in any way injurious to public health. The only complaint against the said bottles is that they are misbranded, in that the public is deceived into the belief that the contents are champagne.

That point is affirmed.

If you find that there is no misbranding of the contents, then your verdict should be for the defendant.

That is part of the same point, and it is affirmed.

The second point is declined. I am declining these points because they contain a long recital of the contention of counsel for the defendant, which, in my opinion, is no part of the charge.

The third point is declined.

4. It has not been shown by the Government that these bottles have been sold as containing champagne, but even were this so, it might be an offense upon the part of the vendor who misrepresented the goods, but unless the bottles themselves are branded in such a way as to deceive the public, the fact that someone misrepresented their contents would have no effect upon the situation, and if you find that there was no misbranding, then your verdict should be for the defendant.

That point is affirmed.

The fifth point is declined.

6. There is no provision under the laws of the United States which in any way seeks to prevent the use by vendors of a trade name or title upon the packages containing the goods which they sell, and I charge you that so far as the words, "Sparkling White Seal," are concerned, that was a perfectly legal phrase to be used upon the bottles which are the subject of this suit, provided you find that the use of this phrase was not a statement, design, or device, regarding the article contained in the bottles or the ingredients or substances contained therein, which was false and misleading, and that this branding of this name is of such a character as to deceive or mislead the purchaser into believing that he or she was purchasing champagne. If you find, therefore, the use of this phrase or the branding of the bottle shown was not of such a character as to deceive or mislead purchasers, then your verdict should be for the defendants.

That point is affirmed.

7. The Government does not claim that anyone was deceived in the purchase of this product by supposing that they were obtaining champagne excepting those who were thus participating in a sale which would have been illegal if it had been champagne. I charge you, therefore, that the Food and Drugs Act was not enacted to protect those engaged in violating the law. If you find that none others were so deceived, your verdict should be for the defendant.

After reading that point, I conclude to decline it. Parties purchasing champagne under a physician's prescription are entitled to protection.

8. By the Service and Regulatory Announcement 366 in S.R.A., Chem. 26, issued December 30, 1920, by the United States Government, the following appears as a statement of the decision of the Government in reference to the use of the word "sparkling": "As a result of prohibition legislation conditions have now changed to such an extent that the use of the term 'sparkling' on fruit juices, which are unfermented, is no longer regarded as deception or misleading." As the plaintiffs in this case, therefore, do not claim that the use of the word "sparkling" on fruit juices of the character contained in the bottles which are the subject of this suit is illegal, and if you find that the use of that word is the basis for the claim that these bottles are calculated to deceive or mislead the public, your verdict should be for the defendant.

That point is affirmed. It only applies in case you find that the sole charge of misbranding is based on the use of the word "sparkling."

9. The Government is bound to convince you by a fair preponderance of evidence that the markings on these bottles which are the subject of the suit are of such a character as to deceive and mislead purchasers thereof into a belief that they are buying champagne, and if the Government has failed to so convince you, then your verdict should be for the defendants. In a case of this character, the burden is on the United States to satisfy you that the branding is of such a character as will deceive the public.

That point is affirmed.

The tenth point is declined.

The plaintiff's first point, which was declined by the court, reads as follows:

1. You may consider whether the style of dress and general make-up of this bottle containing this article, without any word or words plainly descriptive of the article, is misleading.

The plaintiff's third point, which was declined by the court, reads as follows:

3. I charge you that the purpose of a label is to truthfully advise the purchaser of its contents. This is the purpose of the label or should be.

The plaintiff's fifth point, which was declined by the court, reads as follows:

5. A trade mark is not by itself such property as can be transferred, and the right to use it cannot be assigned except as incidental to the transfer of the business or property in connection with which it has been used. A transfer of the right to use it in connection with a different article, or one of a different manufacture, would result in deceiving the public as to the article or its origin, which it is the sole legitimate purpose of a trade mark to present.

Defendant's second point, which was declined by the court, reads as follows:

2. It is necessary that the Government should establish to your satisfaction that the bottles which are the subject of this suit are branded in such a way

as to deceive the purchasers of the same, in that they are induced to believe that the contents of the bottles consist of champagne. It is contended by the defendants that no such deceit can possibly arise by reason of the fact that there is no mark or indication upon the bottles that the same contain champagne, and that there is no champagne in existence which has been sold under the name of "Sparkling White Seal"; there is or was a champagne known by the name of "White Seal" but the word "sparkling" was not attached to the same, and the bottle of this champagne which has been offered in evidence does not bear either labels or marks which in any way resemble the bottles which are the subject of this suit. It is necessary for you to find that these bottles about which complaint is made are marked and dressed in such a way as would deceive the public into believing that they were buying champagne, and unless you can find that the marking and dressing of the bottles is of such a character as would so deceive the public, your verdict should be for the defendants.

Defendant's third point, which was declined by the court, reads as follows:

3. It is contended by the defendants that no purchaser could be deceived by the marking or dressing of the bottles which are the subject of this suit by a belief that he or she was purchasing champagne. Since the prohibition law went into effect it is illegal or criminal for anyone to sell champagne excepting under the orders of a physician and, as the vendors and purchasers of drinks at the present time are presumed to be innocent of any intent to break the laws of their country, it is contended by the defendants that there is a presumption which applies to both vendor and purchaser of drinks that neither of them will violate the law and that this presumption enters into the question of deceit as regards these bottles, since no person can be accused without evidence of intending to violate the law by the purchase of an unlawful drink, and if you find this to be the condition you may presume that neither the vendors or the purchasers of these bottles could be deceived into believing that they were purchasing champagne, and if you so find, your verdict should be for the defendants.

Defendant's fifth point, which was declined by the court, reads as follows:

5. It is further contended that those who are familiar with champagne could not by any possibility be deceived into purchasing the contents of those bottles as champagne, since there is no name upon them which refers to the contents as being champagne and the bottles themselves are marked and dressed in a manner entirely different from any bottles containing champagne which have been produced by the Government. It is contended that those who do not use champagne could not be deceived for they would not purchase these goods as champagne, and those who are familiar with champagne would not purchase the goods because they would be certain from their experience that they were not getting champagne in a bottle marked and dressed as these bottles are.

Defendant's seventh point, which was declined by the court, reads as follows:

7. The Government does not claim that anyone was deceived in the purchase of this product by supposing that they were obtaining champagne excepting those who were thus participating in a sale which would have been illegal if it had been champagne. I charge you, therefore, that the Food and Drugs Act was not enacted to protect those engaged in violating the law. If you find that none others were so deceived your verdict should be for the defendant.

Defendant's tenth point, which was refused by the court, reads as follows:

10. Under all the evidence in this case, your verdict should be for the defendant.

The COURT. I will say to the jury in this case that your verdict must either be for the plaintiff or for the defendant. There will be no damages of any sort. It will be merely a verdict for the plaintiff or for the defendant.

UNITED STATES v. 65 BARRELS OF VINEGAR

(District Court, E.D. Wisconsin, Dec. 8, 1921)

N.J. No. 11326

Libel under section 10 of the Food and Drugs Act. Trial before the court. Decree in favor of the United States.

The United States attorney filed a libel praying seizure and condemnation of 65 barrels of vinegar, alleging that the article had been shipped and transported from the State of New York into the State of Wisconsin, and remained unsold in the original unbroken packages, and that it was adulterated and misbranded, in violation of the Food and Drugs Act.

Adulteration of the article was alleged in the libel as amended for the reason that the said article was made from evaporated or dried apple products and had been mixed and packed with and substituted wholly or in part for cider vinegar, which the said article purported to be.

Misbranding was alleged in substance for the reason that the labels upon the casks or barrels containing the article bore the following statements regarding the said article, "Apple Cider Vinegar Made From Selected Apples * * * Guaranteed To Comply With All Pure Food Laws," which statements were false and misleading, and deceived and misled the purchaser, in that they created the impression that the said article was pure cider vinegar, whereas, in truth and in fact, it was not pure cider vinegar but was vinegar made from evaporated and dried apple products. Misbranding was alleged for the further reason that the article was an imitation of and was offered for sale under the distinctive name of cider vinegar.

On December 7, 1921, the case came on for trial before the court on an agreed stipulation of facts between the Government and the claimant. After the submission of evidence and arguments by counsel, the court on December 8, 1921, handed down the following decision:

GEIGER, *District Judge.* I may say preliminarily that the jurisdiction exercised by the Federal Government under the Pure Food Act, of course, arises out of the grant of power to Congress to regulate interstate commerce, and it may be that in the enforcement of the act the Federal courts need not go to the extent that the State sovereignties go in enforcing or interpreting pure food laws, but I have always felt that the law, after all, was one, notwithstanding the basis of the power, which aimed at just what the title discloses. It certainly has something to do with pure foods and correct labeling. The facts in this case, so far as they are relevant, are, in my judgment, not open to serious controversy. As I intimated during the discussion, and I say this freely, I was impressed, upon the conclusion of the opening statements made by counsel for the respective parties, with the idea that if the facts were stipulated as subsequently disclosed, it was a very nice question whether the case could not have been disposed of upon the stipulation, plus matters which are within judicial cognizance. Now, I do not mean by that that the case could

have been disposed of because the particular judge thought he knew something about the art pertaining to cider and vinegar, because, if that were true in some cases, it would not be claimed here. But, in the enforcement of this law, there comes a time when, in administering executively or judicially that part of it dealing with labels, with branding, with the holding out of goods, some executive or judicial officer must exercise the power of definition; and that brings with it the query: To what may recourse be had as executive or judicial aid, administrative aid, in the exercise of that power of definition? Now, passing from that to the means afforded in this case for the answer, I can only say that the means were right at hand here through the lips and tongues of those who could speak, in virtue of their experience, to that subject.

The Government challenges the right of the claimant and respondent to use in interstate commerce upon the product made, as it says it is made, the label, "Apple Cider Vinegar", and that of course brings with it the query: What is vinegar, what is cider vinegar, what is apple cider vinegar? And notwithstanding all that is said here—and that was urged rather earnestly—respecting the attitude of the executive and the court to countenance growth commercially, and all that sort of thing, the testimony in this case, it seems to me, affords the very strongest support to the notion that this case, to quite an extent, could have been disposed of by taking into consideration the matters as matters of judicial cognizance. Nobody will doubt that in the progress of the arts, as they enter into manufacturing and commerce, things are done which are at variance with the manner in which they were originally done. It may be conceded that a method has been developed for making cider, which, being put out as "apple cider" successfully fools. Now, coming directly to this matter of definition, how did the idea of apple cider vinegar ever arise? There must be a reason for what has rather conclusively appeared in this case, that it is universally regarded as a mighty good name for something. Men in manufacturing and commerce can, upon their choice, select names which will be representative of ingredients, or which will be purely arbitrary names—trade names. But this is true, the term "apple cider vinegar" grew out of habits of people in making vinegar. It was a homely designation of processes and products made originally and to some extent probably still made in a homely way, but in a way—and this is the point—that gave to the people making it and getting it an absolutely satisfactory consciousness as to the merit of what they had made and made in the way that they made it. That is why people ask for "apple cider vinegar." They have that consciousness. That is why jobbers are anxious to sell what they believe may truthfully be called "apple cider vinegar." That is why manufacturers are glad and anxious to put as apple cider vinegar the things they put out. Now, is the law and its tribunal mistaken in exercising this power of definition, especially when it is fortified in the manner that it has been in this case, in saying that is the legal definition of apple cider vinegar? That is what this case comes down to. And I have felt throughout the case that sight should not be lost of a very good test to which subject any situation of labeling, any situation of holding out something to be something, and that test is this—why object to a full disclosure of the facts—is

there any doubt, whether we take the term "apple cider vinegar" or the more restricted term "apple cider", the one referring, of course, to the one thing and the other to the other, that these initially and accurately reflect a conception on the part of the public respecting the identity of the thing, its identity being in mind not disconnectedly from the manner in which it was made? Is there any doubt at all but that, if the facts were stated in connection with the two articles, the public would act upon their native conception not only as to what a thing is but certainly upon their conception as to what they want? And as I indicated this morning, this law and no pure food law, so far as it deals with labeling is concerned, is expected to endow judicial or executive officials with the necessity of trying to extract and explain as to why the public act that way. The fact is to be found from their attitude, from their conduct, from their conception, as the court may well glean it from the testimony of witnesses.

Now, to carry that a little bit further, take the testimony of men who have come here into court, representatives of brokerage interests in Chicago, representatives of large wholesale grocery interests in Chicago and Milwaukee, and without the slightest hesitation, without equivocation, without an attempt at the slightest limitation upon the meaning of the word, they aim to speak out of their comprehensive observation and experience upon this vital matter as to what is meant by the term "apple cider vinegar", men who would be interested very much, if they could, to have the product which is here in court square up with that definition. Most of them undoubtedly have handled this sort of a product, labeled in this way—maybe all of them have some in stock now—and yet they come here with the idea that the court may thereby be enabled to discharge the function committed to its charge, the duty committed to it of determining whether this is a true label; and of course they approach it from the angle suggested by the question: What does the public understand by those terms? And as I said a moment ago, without any hesitation they all say, "Why, it means cider vinegar made from apple cider", comprehending the native juices of the fresh apple. And I shall not forego the opportunity to refer to the single witness who stood out in rather bold relief against that entire concurrence on the part of the Government's testimony. That is the witness, Mr. Somebody (McCord) from Des Moines, Iowa, a manufacturer. The same question being put to him, he seemed to have a perfectly clear appreciation of the possibilities of dividing his responsibility between the two views. He seemed to think at first that the question might be answered from the manufacturer's standpoint, and I assume that he wanted to answer it his way there. He suggested that it depended on whether it was to be answered from the jobber's or from the consumer's standpoint and finally said that there seemed to be no particular conception as to the meaning. That answer was afterwards changed, and when the court interrogated him upon the more limited question as to his conception of the meaning of the term "apple cider", why, he was content to leave the stand saying that in his own mind and in the minds of the people of Iowa, one was just as good as the other, that they had never seen fit to make any distinction. Now, with due respect to that witness, he appreciated the ground that he,

as a manufacturer, was on. It cuts no figure that, as he says, both are permitted in Iowa. It cuts no figure in this case that the various representatives of the Department of Agriculture have gone first one way and then another way, if that is true, or have made all sorts of tracks on this proposition. That is not relevant to the question that is here before us, the very narrow question respecting the truth of this label.

Now, it would be rather odd if, upon the testimony as it is here presented, the court should incline to or adopt the conclusion that because there is a suggestion here of chemical identity, that because there is a taking of apples which have been dried or dehydrated and subsequently water is added and some sort of a mixture is withdrawn, that that after all, because it is apple juice, is cider in the sense in which this entire trade uses that term. It is a question of the interpretation of the statute respecting truth of labels, which advances, as it did in this case, to the question of determining, as a matter of law, what is true and what is not true in point of definition. Now, grant that the claimant here is making a good vinegar, for some reason or other there is not a willingness that the public should be told, in the same detail in which for ages the public has had a conception of the facts respecting apple cider vinegar—the public should not be told in that same detail the facts respecting this particular so-called "apple cider vinegar." Now, of course manufacturers know, every representative of the great jobbing interests that was here on the stand knows, and every retail grocer knows that as between the two possibilities, assuming that the one kind is to compete against the other, disclosure is forbidden. Assuming that the two are to be put up together, it would not do to tell the public: "Why, you have got the old-fashioned notion about apples and apple cider; we have a new scheme here now whereby the water is withdrawn and the dehydrated apples and chops and leavings are passed into catacombs and allowed to remain in the mummified of [or] somnolescent state until withdrawn, whereupon we are going to get something that is just as good." It would not do to tell it. That answers the question in this case; and the law aims not that there must be that degree of disclosure, but that the disclosure or claim on a label, whatever it be, be truthful. The law does not say you must tell all about this thing. So far as this case is concerned the law does say: "You cannot use a label which leads the public to think that there is something here which has not been done and is not here." And that is the function of this court in this case to declare, and I do so declare, that this shipment of vinegar was misbranded within the meaning of the law. I indicated that upon the issue of adulteration the court is not required to find adulteration—I don't think it is supported by the evidence here—and that count will be dismissed, and upon the other count there will be a decree in the ordinary form of condemnation.

On December 26, 1922, the court having found that the allegations as to the misbranding of the product were true and correct but that the allegations as to the adulteration were unsupported, judgment was entered declaring the product to be misbranded and ordering its condemnation and forfeiture.

UNITED STATES v. GOLDEN & CO.

(Police Court, District of Columbia, Jan. 12, 1922)

N.J. No. 10395

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

The jury was charged as follows:

HARDISON, *Judge.* Gentlemen of the jury: If you believe from this evidence to the exclusion of a reasonable doubt that the defendant, Golden & Co., on the 18th day of January, 1921, within the District of Columbia, did sell to one Robert W. Thompson a certain article of food, to wit, oysters, which said article of food was adulterated, in that a substance, to wit, water, had been mixed and packed with the article so as to lower and reduce and injuriously affect its quality, you should find the defendant guilty as charged. Unless you so believe, you should find the defendant not guilty. The defendant is presumed to be innocent until proven guilty to the exclusion of doubt, and that presumption of innocence accompanies him throughout the trial until overcome by proof satisfactory to you that he is guilty. A reasonable doubt, gentlemen, is a doubt that would influence an ordinary prudent man in some action, and a reasonable doubt is nothing but a doubt, and a reasonable doubt does not allow you to go out and conjecture any more than the law requires you to convict the defendant without evidence that satisfies you of his guilt.

The first proposition to be established by the Government before it can expect a verdict at your hands is that a sale has been made by Golden & Co. The law is that when a man or a corporation does something through another it is responsible for what is done by its agent. If the defendant had an authorized agent out selling this product and he did sell it, it would be its act. The sale by the agent would be the sale by the company.

Now, it is alleged that this commodity was adulterated, and it is alleged here in the information that it was adulterated in several ways. I will read the information. [The court here read the information.] The gist of the offense is, gentlemen, the adulteration of the article, the selling after it had been adulterated, and if it was adulterated in any one of these ways, that would be adulteration. The act here with reference to adulteration provides that adulteration shall consist, first, if a given substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality and strength. That constitutes adulteration. It is not necessary for any individual oyster to be excepted. Each individual oyster might have all of its qualities and properties and virtues in it, although a great quantity of water had been put in a can, a container of oysters; but [if] after taking the given quantity of oysters water had been added to that bulk so as to dilute or make a greater quantity out of it and then sold for a greater quantity, that oyster or those oysters have been adulterated, and that constitutes adulteration. Or if you find that these were adulterated by the

addition of any substance that would lower, reduce, or injuriously affect its quality or strength, that would constitute adulteration; or if any substance had been substituted wholly or in part for the article, that would constitute adulteration. Third: If any valuable constituent of the article had been wholly extracted or partly extracted. Fourth: If they had been colored or mixed with something that would color them. Of course, there is no evidence here tending to show any adulteration in that fourth manner, nor is there any evidence here showing adulteration in the third manner, because there is no contention here on the part of the Government, or any proof, to show that any particular oyster was injured or any properties or qualities had been extracted from it.

The theory of the Government and the proof is that there was an abnormally large quantity of water, a quantity materially in excess of what is ordinary in the run of the business; that is, the packing of oysters in the trade, in this section. It is that an abnormal quantity of liquid existed in this commodity. If that is true then that would constitute adulteration. It would not be anything more than right, I think, to make an allowance for a slight variation because you could not expect every can of oysters to have exactly the same quantity of liquid. You might make some allowance for a slight variation there.

Now, it is not necessary here for the Government to establish its case to show that Golden & Co. had—that Golden & Co. put this water in these oysters. It is not necessary if any water was put in. It is not necessary to show that Golden & Co. had any knowledge that water was put in if any water was put in. Because this law, whether wisely or not—it is not within our province to determine—has required that when a dealer furnishes food products to the public it is up to him to know what they contain and he cannot hide behind ignorance, he cannot say "I did not know" the stuff was adulterated. He must know. And it is immaterial whether he put the water in, if any was put in. It is immaterial whether the company put it in or whether the company was a party to it or not, or whether the company knew it had been done, if it had in fact been done. Any excessive quantity of water, if it had been packed in these oysters, whether Golden & Co. had any knowledge of it or not, and they sold them in that condition, why then that would constitute the offense that is prescribed in this law.

So the case in its last analysis comes down to the proposition whether or not when these oysters were packed, an excessive quantity over and above what was in the run of the business, in the trade here in this section, was put in these oysters at that time. If that was done, whether Golden & Co. knew of it or not, if they handled an oyster in that condition, in which that had been done, then they would be guilty under this law.

I do not know that I could be of any assistance in reviewing the testimony. You heard it and paid careful attention to it. You heard the testimony here of the Government's witness as to the conduct of the employees and as to the taking of the samples. Of course, it is immaterial how big a bulk of oysters was taken, whether a can of oysters containing a gallon, or not, if an excessive amount of water was found in the sample. It is immaterial whether that

was found at the bottom or the top of the can; if an excessive amount of water was in the can either at the top or bottom, that would constitute an adulteration of the oysters.

The question to consider is whether or not when the agent took the sample he got a fair sample of it. It might be if there was any more than a normal quantity of water, more than 6 percent, that greater part was at the top of the can, for it has been shown by demonstration that the water comes to the top of the can. It might be that the sample was taken off the top and when the water had settled there, and that perhaps would not be truly representative of the quantity of liquid in the can, whereas if it had been stirred up before it would not show that excessive quantity. So it is proper for you to consider that in your deliberations. I do not mean to intimate by that that the proof shows that the agent was negligent in taking the sample. I simply mean to call attention to the fact in determining if he got a fair and representative sample, as fair a sample as this can could supply.

It is not necessary for me to say that this defendant stands here like any other defendant. The fact that it is a corporation and handles food products does not put it in a position from any one else, and you ought not to be influenced by the high cost of living or any other consideration. This thing of adulterating food is, of course, a thing that ought not to go on, and wherever guilt is shown you should not hesitate to bring in a verdict of guilt, but still you ought not to be carried away by any hue and cry about the high cost of living, or a large corporation being engaged in the business, or anything like that. But you must go to the actual question, and the question to be determined is, Has this defendant committed this offense? If you are satisfied that he has, you must bring in a verdict against him, but you must be satisfied beyond all reasonable doubt. You should not let the high cost of living influence you. You ought to simply follow the straight edge of reason and logic in this case and decide the case on the evidence and the facts.

UNITED STATES v. 430 CASES OF CANNED SALMON

(District Court, E.D. South Carolina Mar. 3, 1922)

N.J. No. 10499

Libel under section 10 of the Food and Drugs Act. Trial before the court. Decree in favor of the United States.

The United States attorney filed a libel for the seizure and condemnation of 430 cases of canned salmon, alleging that the article had been shipped and transported from the State of Alabama into the State of South Carolina, and remained in the original unbroken packages, and that it was adulterated in that it consisted partly or wholly of a filthy, decomposed, and putrid animal substance.

SMITH, *District Judge.* It appears from the testimony that these 430 cases of salmon consisted of salmon packed apparently prior to the year 1918. It was originally purchased by the United States

Government for army use and stored in a warehouse in the city of Brooklyn and after the signing of the armistice was either sold or turned back to the packers and thereupon passed into commercial shipment. This especial shipment was shipped to Eufaula, Ala. There some question appears to have been made about its condition by the Government, and it was shipped back to the city of Charleston, where, when seized, it was stored apparently under some understanding that it was to be reconditioned. At any rate, it was shipped from Eufaula to the city of Charleston.

According to the testimony for the Government, upon examination of the samples taken from this shipment or lot, after careful examination, twelve percent (12%) of the cans examined were found to be bad, and of the remainder twenty-five or thirty percent (25% or 30%) were found, in the opinion of those examiners, to be stale and questionable. According to the testimony of the claimant, they had a commercial test in the shape of an examination of this lot of salmon in the city of Charleston by three salmon brokers, who found it practically (so far as the number of cans examined by them were concerned) to be in sound and good condition.

In many respects, the examination of the brokers is upon the same method of procedure as the examination by the experts, the principal test being that of smell. The brokers in this case, however, do not any of them assume, so far as chemical or bacteriological matters are concerned, to be experts in making this examination.

Under the order of this court, upon the application of counsel for the claimant, an order was made that samples were to be selected from the cases of not less than one from every forty-three (43) cases, or ten (10) cans in all, to be examined by a chemical expert to be agreed upon in behalf of the Government and the claimant, who should report the result of the examination to the court. This has been done and the 10 cans delivered to the Parker laboratory, and the report of the laboratory upon the examination is that the 10 cans submitted to that laboratory were in good condition and showed no indication of bulging, corrosion, or pitting; that there were no imperfections in the sealing of the cans; that when opened there was no indication of escaping gas or unpleasant odor; that the contents were firm, of good taste and odor, and in good condition; that there was no indication of any substance being mixed or packed to reduce or lower or seriously affect the quality or strength of the contents; nor was there any evidence that the 10 cans examined contained any added poisonous or other deleterious ingredient which might render the article injurious to health; that the contents of the cans were examined microscopically and bacteriologically and found to contain no bacteria nor molds which would tend to bring about decomposition nor organisms resulting from decomposition; that the contents of the cans were sterile, showing that the fish was properly packed and sealed and that there was no decomposition; that the contents of the 10 cans were well packed, of sound quality, and free from adulteration and contamination.

Upon considering the whole testimony, it appears that the number of cans examined from the whole lot on behalf of the United States Department of Agriculture, under the Food and Drugs Act, exceeded

very substantially the proportion of cans examined otherwise—and it also would appear from the testimony that the examination given on behalf of the Department was of a more extended and careful character than that given otherwise. Although it would appear that there is in this entire shipment a very large proportion of cans which from the testimony would appear to be entirely free from any objection on the ground of decomposition or unfit for human food, yet, taking the testimony as a whole it appears to the court and is found as a conclusion of fact that there is an excessive percentage of the shipment which does fall and properly falls under that exception. Although the greater proportion of it may be good, yet in view of the chance of disaster that may result from human use under the risks of such percentage, it would not seem safe to allow it to be dealt in, as an article of human food. It is no doubt correct that in most cases the very odor, upon opening the can, would bring home to the knowledge of any consumer or would-be consumer, the knowledge that the contents of the can were not fit for human use. That, however, depends in a large measure upon the intelligence of the consumer and upon the susceptibility of his organs of smell; and the casualties that might result in case the consumer fails to be properly advised of the danger of its consumption are such, in the opinion of the court, which would not render it proper to be allowed to be used for human consumption.

It is therefore ordered, adjudged, and decreed,

That this lot of cases of salmon so seized does consist in part of a filthy, decomposed, or putrid animal substance to such a percentage in excess of reasonable and salutary requirements as to constitute the shipment misbranded [adulterated] within the prohibition of the act of Congress. * * *.

UNITED STATES v. 1,974 CASES OF CANNED SALMON

(District Court, W.D. Washington, May 20, 1922)

N.J. No. 11442

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict directed in favor of the claimant.[14]

The United States attorney filed a libel praying the seizure and condemnation of 1,974 cases of canned salmon, alleging that the article had been shipped and transported from the Territory of Alaska into the State of Washington and remained in the original unbroken packages, and that it was adulterated, in violation of the Food and Drugs Act, for the reason that it consisted wholly or in part of a filthy, decomposed, and putrid animal substance.

CUSHMAN, *District Judge.* There is little that occurs to me to add to what is said in the opinion of this court in the other case (N.J. 10512).[15] As to the meaning of the statutory words, I find

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[14] Judgment reversed and cause remanded, *A. O. Andersen & Co.* v. *United States,* p. 1053, *post.* Retrial, *United States* v *1,974 Cases of Canned Salmon,* p. 1108, *post.*

[15] *United States* v. *1,459 Cases of Canned Salmon,* p. 995, *ante.*

nothing in this case or in the argument to change my view expressed therein.

I am convinced that under the showing made here there would be nothing to warrant the court in inferring or acting on the assumption that there was anything in doubt regarding the fairness of the samples taken, about which testimony has been given in this case, but, even so, I see no application either of the candy case, or the sirup case, or the oyster case to this. In the matter of candy, and in the matter of the sirup, and in the matter of the oysters, there was a reasonable presumption of a fact or something in the nature of an issue of fact to submit to the jury. The jury might reasonably conclude that the oysters' feeding ground where the oysters had been gathered, being, as I understand that case, the same feeding ground, that each oyster fed on substantially the same product, and in the samples of the oysters taken each of them showed some varying amount of impurity—the jury would certainly be justified in concluding that all the other oysters, not sampled and not tested, would likewise contain a certain amount of impurity and render them unfit for food under this law. So, in the case of the sirup, where it was labeled " Maple " sirup, the cupidity of the manufacturer having induced him to label as maple sirup certain portions of a shipment that were not in fact maple sirup, the jury would be warranted in applying what they knew about human nature—the doctrine " if false in one false in all "—that if the seller of the maple sirup was cheating and deceiving the public in the cans that were sampled, they would be justified in concluding that in the other cans so labeled but not sampled he was likewise cheating and defrauding the public by misbranding those. I am not entirely clear about the candy case, but I take it that comes under the same rule.

Under the Government's own theory, the salmon were rotten before they were put in the cans. The individual fish, in being caught and transported to the cannery and held awaiting canning in the cannery, are subjected to different conditions—one fish is kept out of water longer than another before it is canned.

I am convinced that the rule that obtains, that is adopted by the Department, has grown out of the inconvenience and impractical nature of the problem of sampling each can. The expense of cutting open the cans and recanning the pure fish is so out of all proportion to the value of the product after it is canned that it becomes impracticable to do so. You cannot test all the cans without destroying all the product tested and, therefore, they have adopted this rule, but it does not change the meaning of the language in the statute.

I still adhere to the view that the " article " of the statute is a single can of salmon just as much so as if you had a herd of cattle, a part of which were tubercular and the rest were not; a single head of stock would be the article; we would not conclude that the entire herd of cattle were to be destroyed because 10 percent or 20 percent of them were tubercular. There you have means of testing the individual animal, but the great inconvenience that arises by reason of the nature of a can of salmon in testing it by any means known has brought about this attempt to fix a standard.

I am impressed with the proposition that the housewife or cook would be able to protect the consumer against impurities of the nature

described in the testimony here. The reason I am convinced of that is that there does not appear to be any substantial or any striking difference between the percentages given by those men who are experienced in examining salmon, who do not resort to chemical tests, and those witnesses who have resorted to chemical tests. The men who are used to examine salmon simply relying on their eyes and their noses, have discarded and found impure practically the same percentage of salmon that those chemically testing it have done; I am not sure but what they have rejected on an average more than those who have chemically tested the salmon.

I do not say that the department, after investigation, where the product was in bulk, where you could treat the bulk as the article, might not reasonably adopt a standard, because there are more or less impurities in all food—it is a common expression that "everyone has to eat his peck of dirt sometime"—and they would be justified in resorting to percentages, but I do not conceive that if you take a number of articles of which you may find 10 percent or 20 percent of the articles impure, that they are justified in condemning or asking the court to condemn the remaining articles that are not impure.

The exigencies of the case, the danger to the public if the impure article is poisonous, might justify the banning of the entire number of articles and give reason and plausibility to a ruling that that was the intent of Congress. I conclude it does not warrant the court in concluding in the absence of positive language leaving no room for doubt, that it was the intent to destroy 1,600 cases of good salmon out of a total of 2,000 cases. So the motion for a directed verdict will be granted. The clerk will prepare the form and the bailiff call the jury in.

UNITED STATES v. 154 SACKS OF OATS

(District Court, W.D. Virginia, Oct. 20, 1922, Dec. 15, 1923)

283 Fed. 985; 294 Fed. 340; N.J.No. 12070

Proceeding for forfeiture by the United States against 154 sacks of oats. Forfeiture ordered.

McDowell, *District Judge.* This is a proceeding for forfeiture of a shipment of sample grade oats, made by the claimants in interstate commerce. The information charges that the oats had been adulterated (1) in that a substance had been mixed with them so as to reduce and injuriously affect their quality; (2) in that wild oats, weed seeds, chaff, and dust were mixed therewith in such manner as that the inferiority of the mixture was concealed; and (3) that the said oats had been misbranded.

The order establishing official grain standards for oats under the Grain Standards Act (see Service and Regulatory Announcements No. 46) contains, inter alia:

Section 1. *Oats.*—Oats shall be any grain which consists of cultivated oats, and not more than twenty-five per centum of foreign material, other grains and wild oats, either singly or in any combination.

By section 13 oats are graded and designated as No. 1, No. 2, No. 3, No. 4, and sample grade. Among other requirements grade No. 1 must contain not less than 98 percent of sound cultivated oats; grade No. 2 not less than 95 percent; No. 3 not less than 90 percent; No. 4 not less than 80 percent. Sample grade " shall be oats which do not come within the requirements of any of the grades from No. 1 to No. 4, inclusive, or which have any commercially objectionable foreign odor, or are sour, heating, hot, infested with live weevils or other insects injurious to stored grain, or are otherwise of distinctive low quality."

The facts have been stipulated, and in the stipulation appears the following:

(10) It is agreed that the article in question contains 77 percent of cultivated oats and 23 percent of material other than cultivated oats. This 23 percent consists of wild oats, other grains, and foreign material, the foreign material consisting of weed seeds, chaff, and dust. A certain percentage of this 23 percent was added by the claimants, the material added being wild oats. It is further agreed that there were present in the wild oats so added a certain percentage of other grains and foreign material, consisting of weed seeds, chaff, and dust, the quantity of said other grains and foreign material being no greater than that found in the average commercial shipment of wild oats.

Generally, oats contain some foreign material as they come naturally from the field, and in the case of sample grade under the Grain Standards Act this amount may be as large as 25 percent. The proportion of foreign material in the wild oats which was added by the claimant in this case was not greater than the proportion of foreign material in the cultivated oats with which they were mixed and the proportion of foreign material, viz, weed seeds, chaff, and dust was not greater in the mixture than the proportion thereof in either of the ingredients.

(11) It is agreed that, based upon the pleadings in this case and the foregoing stipulation of fact, the following question of law is submitted to the court for determination:

Does the shipment in interstate commerce as sample grade oats of an article prepared by the claimant as set forth in No. 10 hereof constitute a violation of the Federal Food and Drugs Act, when such article has been previously graded as sample grade oats by a duly authorized inspector of the Bureau of Markets of the United States Department of Agriculture and sold as sample grade oats, a grade of the official grain standards for oats promulgated by the Secretary of Agriculture under the Grain Standards Act?

The Grain Standards Act of August 11, 1916, c. 313 (39 Stats. 446, 482), does not seem to me to show an intent to repeal, alter, or modify the Food and Drugs Act of June 30, 1906, c. 3915 (36 Stats. 768), in any respect; nor an intent to authorize the Secretary of Agriculture so to do. But, if I am wrong in this respect, it seems too clear for argument that the Secretary of Agriculture in promulgating the standards for oats has not undertaken to modify the Food and Drugs Act in the slightest degree. Section 14 of the Service and Regulatory Announcements, No. 46, reads:

Nothing herein shall be construed as authorizing the adulteration of oats by the addition of water, by the admixture of clippings or hulls, decomposed salvage oats, other grains, or any other foreign material, or otherwise, in violation of the Food and Drugs Act of June 30, 1906.

In the ingenious brief for the claimants the foregoing is characterized as a mere expression of opinion on a question of law on the part of the Secretary of Agriculture. It seems to me to be a very clear and explicit statement of the intent of the regulations. In other words, fearful that someone might fall into the error of

thinking that the regulations were intended to modify the Food and Drugs Act, the Secretary expressly and definitely declares that such is not the intent of the regulations. Statements of intent and opinions as to legal effect, respectively, might conceivably be so expressed as to resemble each other, but in this case there is, I think, no room for confusion.

But, quite aside from anything that has been said, the regulations cannot fairly be read as modifying the Food and Drugs Act. Throughout the regulations there is no thought of authorizing such a thing as adulteration of oats. The regulations are drawn in recognition of the fact that some crops of oats, as harvested, contain greater proportions of foreign matter than others. While it is true (section 1) that oats containing more than 25 percent of foreign matter cannot legally be graded as oats at all, there is nothing in the regulations that can fairly be construed as authorizing anyone to adulterate oats. It is also true that oats, as they come in their natural condition from the thresher, are graded as sample oats, whether they contain 21 or 25 percent of foreign material. But this fact would not authorize anyone to add 4 percent of weed seeds to oats that contained in their natural state only 21 percent of foreign matter. And the reason for so saying is that the Food and Drugs Act forbids such adulteration, and neither the Grain Standards Act nor the regulations repeal or modify the Food and Drugs Act.

Even if the regulations were sufficiently ambiguous to be read literally as authorizing anyone to add wild oats and weed seeds to oats, any other fairly possible construction would properly be adopted, because of the wretched impolicy of permitting such an act. The fact that it is lawful to ship in interstate commerce oats containing in the natural state as high as 25 percent of weed seeds affords no sufficient reason for contending that it is also lawful to ship oats that have been artificially brought to this extreme state of impurity. This is so because the old law forbids the addition of impurities to foods, and the new law does not, either literally or in intention, repeal the old law.

It is argued that there is of necessity admixture in dealers' elevator bins of different carloads of "sample oats", of varying degrees of impurity. For instance, if a small car of oats containing as the oats came from the thresher 21 percent of foreign matter goes first into the empty bin, and next a small car of oats in like state containing 25 percent of foreign matter goes into the same bin, on drawing out a large carload from such bin the contents of the car will necessarily be an admixture, to some extent, of both the 21 percent and the 25 percent oats. And the infusion of the more impure oats will have been the result of an artificial mixing of the two lots of oats. However, this is not forbidden by the Food and Drugs Act. Both of the first two carloads put into the bin consist of sample grade oats; both are "articles of food." Neither carload is a "substance" within the meaning of section 7 of the Food and Drugs Act. The only clause of section 7 that could even seemingly apply here is:

> * * * An article shall be deemed to be adulterated: * * * In the case of food: If any *substance* has been mixed or packed with *it* so as to reduce or lower or injuriously affect its quality or strength.

But obviously this language does not apply to the case supposed. The car which is 21 percent impure may legally be transported in interstate commerce; the car which is 25 percent impure may also be legally so transported; and no possible reason suggests itself for an intent to forbid the transportation of an admixture of the two, if sold for what it is. The result of a perfect admixture of 1,000 bushels of oats which are 21 percent impure and of 1,000 bushels of oats which are 25 percent impure would be 2,000 bushels of oats which are 23 percent impure. As each of the two ingredients is an article of food, no other "substance" has been mixed with an article of food. The reduction in the quality of one half of the mixture has been accompanied by an exactly corresponding increase of the quality of the other half of the mixture. I can see no reason why any one should purposely make such a mixture, nor do I see why any one should be injured thereby. The difference between such mixture of two articles of food and a mixture of foreign matter (wild oats, weed seeds, chaff, and dust) with food is very clear. The first is harmlessly mixing two articles of food, the other is mixing a substance which is not a food with a food so as to injuriously affect the quality of the food.

In the case at bar the claimants did not mix two lots of sample oats together. They added wild oats, weed seeds, chaff, and dust to one lot of sample oats. In so doing they unquestionably adulterated a food.

It would, of course, be equally an unlawful adulteration to add wild oats, weed seed, chaff, or dust to oats of any higher grade than sample oats, because it would be adding something that is not a food to a food so as to lower its quality.

It seems unnecessary to discuss at any length mixtures of sample grade oats with oats of higher grade. If a large quantity of sample oats were mixed with a small quantity of No. 1 oats, the result would be merely a food of lower grade than No. 1, and either of sample grade or of some grade between No. 1 and sample. There is no reason why this should not be done, and no reason why the mixture should not be transported in interstate commerce, assuming that it be honestly graded and branded for what it really is. Mixing two different grades of food is not mixing "a substance" with a food so as to lower the quality of the food. One of the ingredients (a food) has been lowered and the other (a food) has been correspondingly raised in quality, and no "substance", within the meaning of the Food and Drugs Act, has been mixed with either of the foods.

Counsel for claimant suggest the case of an admixture, purposely made, of oats and corn. If the corn was before the mixing in its natural condition and of a grade to be transported as a food, and if the oats were in their natural condition and of a grade to be transported as a food, and if the admixture resulted in any lawful grade of either corn or oats, I think that transportation of such mixture would not violate the Food and Drugs Act. If the corn were rotten, it would be a "substance" which could not be mixed with oats; but if the corn were of good food quality, it would be a food, and the mixture would also be a food, and no reason suggests itself for saying that the mixture could not be lawfully transported. As each ingredient separately was lawfully transportable, I see no reason

why the mixture of the two ingredients should not also be lawfully transportable, if branded for what it is.

In the Government brief it is said:

> Of the libel and amended libel filed the department intends to stand upon two principal allegations, to wit: That a substance has been substituted in part for the article, and that the article is misbranded, in that it was sold under the name of another article.

No amended information has been filed or offered. I suppose the intention to file such an amendment has been abandoned; but at any rate I shall not act on an unexecuted intention. As the first ground for forfeiture set up in the only information that has ever been filed is, in my opinion, well taken, it is unnecessary that I consider the other two grounds.

An order declaring forfeiture may be taken.

McDowell, *District Judge.* On October 20, 1922, I made an order condemning the so-called oats here in question, and set forth the reason therefor in a published opinion. (See *U.S.* v. *154 Sacks of Oats*, 283 Fed. 985.) That order has, by joint request of counsel, not been executed; and since it was made an amended information has been filed, and also an additional stipulation, executed July 20, 1923, reading as follows:

> It is hereby stipulated between the parties hereto as follows:
> 1. That the questions presented for decision by the court under the amended information herein filed are (a) whether the article is adulterated in that a substance was substituted in part for the article, and (b) misbranded in that the article was sold under the distinctive name of another article.
> 2. That the allegations of the amended information filed herein shall be wholly disregarded, except insofar as they present the questions set out in 1 above.

The result of filing the amended information and this new stipulation is that the Government abandons any possible grounds for forfeiture except the 2 set out in the above-quoted stipulation.

It will be convenient here to set out a part of the first stipulation of facts:

> " (10) It is agreed that the article in question contains 77 percent of cultivated oats and 23 percent of material other than cultivated oats. This 23 percent consists of wild oats, other grains, and foreign material, the foreign material consisting of weed seeds, chaff, and dust. A certain percentage of this 23 percent was added by the claimants, the material added being wild oats. It is further agreed that there were present in the wild oats so added a certain percentage of other grains and foreign material, consisting of weed seeds, chaff and dust, the quantity of said other grains and foreign material being no greater than that found in the average commercial shipment of wild oats.

As so doing may save labor, I shall consider first the charge of misbranding mentioned as (b) in the new stipulation.

In the above-mentioned opinion I assumed that the dry seeds of wild oats cannot be classed as a food within the meaning of the Food and Drugs Act (34 Stat. 768). I doubt if there is any better source of common knowledge than well-known reference books such as are mentioned below.

In volume 19, Encyclopedia Britannica (11th ed.), page 938, it is said that the grain of the wild oat is " small and worthless."

In 17, New National Encyclopedia (1922), page 327, it is said:

> There are a number of species of but little importance, such as wild oats (*Avena fatua*), which is generally considered as a weed, but has become an abundant and valuable wild pasture grass in California * * *.

In 11, Encyclopedia Americana, under the topic "Oats," it is said:

* * * wild oats (*A. fatua*) valued in some places, for example, California, for pasturage, but generally regarded as a noxious weed.

In 9, Nelson's Encyclopedia, page 119, is the following:

Wild oats (*A. fatua*) are usually classed as weeds, but are used as a pasture grass in certain localities, especially California.

In 8, Universal Cyclopedia (1905), page 542, it is said:

The cultivated oat (*Avena sativa*) is an annual * * *. It is supposed to have developed from *Avena fatua* found growing wild in Europe, where it is considered a weed. It is also wild in California, where it is sometimes cut when green and cured for hay.

In Century Dictionary, [under] "Oats," it is said:

The wild oat of Europe (*A. fatua*) is a weed of cultivation in many places; in California, where it abounds, it is extensively utilized as hay.

While the foregoing authorities show that in California volunteer crops of the wild oat plant, while green, are pastured or cut as hay, they also show that the dried wild oat seed cannot be considered as a food. And it may be added that the foregoing quotations further show it is a matter of common knowledge that generally the wild oat plant is regarded as a weed, in the sense that it is highly undesirable vegetation.

It is true that in the first stipulation there is mention of commercial shipments of wild oats. But it does not follow that the seed of the wild oat is ever shipped in commerce except to grain dealers for use as a food adulterant, or by grain dealers after admixture with cultivated oats, as in the case at bar.

While I remain of opinion that it is common knowledge that the seed of the wild oat is not a food, still in discussing the clause of the food act now in question, this fact is of no importance. If it be assumed that the wild oat seed is a food, yet the mixture here sought to be condemned may have been misbranded, because offered for sale under the distinctive name of another article.

How the wild oats, weed seed, and chaff (which the claimants here mixed with the cultivated oats) were obtained by the claimants does not appear. Under the regulations (Service and Regulatory Announcements No. 46) authorized by the Grain Standards Act (39 U.S. Stat. 446, 482) a consignment of cultivated oats containing more than 25 percent of wild oats or other foreign matter cannot legally be graded as oats at all. If such a consignment (having been sold for what it is) be received by a grain dealer, I see no reason why he may not legally winnow out enough of the wild oats and other weed seeds to bring the remainder of the consignment to a sufficient state of purity to be sold as oats of some legal grade. And in time great quantities of such winnowings may be accumulated by grain dealers.

Again, it could be, and I assume it is, a fact that in growing wheat in the West and Northwest a considerable area of some huge wheat field may be so thick with volunteer wild oats that it would be disastrous to the farmer to allow the gatherings from such part of the field to be mixed with the purer wheat from the remainder of the field. To avoid such mixing, the farmer may, and I assume does,

keep the crop on the affected part of the field separate. It may be threshed separately, and the grain (wild oats and a modicum of wheat) thus obtained may be sold for what it is.

But, however obtained by the grain dealer, the question here is as to the right to make a mixture of the winnowings, or of the wheat field offal, with cultivated oats and to offer such mixture for sale under the name of sample grade oats.

As has been shown, the wild oat is a highly undesirable plant in much the greater part of the United States. Grain, containing wild oats and weed seed, although sold to be used as a food for domestic animals, may be used as seed for voluntary planting. Grain, containing wild oats and weed seed, fed to domestic animals may, and sometimes is, along with the manure, involuntarily planted, and there is thus a propagation of undesirable and harmful vegetation.

The mixture of weed seed and wild oats with cultivated oats, as taken from the field, may conveniently and properly be spoken of as a natural mixture. It is natural in the sense that it may be practically unavoidable. A mixture made by purposely and voluntarily mingling winnowings from one lot of oats with another lot of oats, or by voluntarily mingling what I have spoken of as wheat field offal with cultivated oats, may properly be spoken of as an artificial mixture.

Planting a bushel of oats containing naturally 25 percent of impurities and planting another bushel of oats containing artificially 25 percent of the same kind of impurities, may produce exactly the same evil results. But if the artificial and intentional addition of impurities to oats be permitted and practiced, the number of bushels of impure oats in existence will undoubtably be unnecessarily increased. And in equal degree the probability of a propagation of undesirable vegetation will be increased. To unnecessarily increase the production of a weed or a pest, such as wild oats, is unwise and hurtful and could have been within the intent of the statute. And when a dealer purposely makes such an artificial mixture and offers it for sale as sample grade oats, he is using a name, properly applied to a natural product, as the designation of an artificial product.

As, of course, the intent of the food act is the same now that it was when that statute was enacted. Whether or not offering for sale an artificial mixture of cultivated oats and wild oats as sample grade oats, after the food act and before the Grain Standards Act had been enacted, would have been a violation of the clause of the food act now in question may be doubtful; but I assume that it would not have been. However, paradoxical though it may be, so doing can be a violation of that clause now. It seems too plain to require discussion that there is nothing in the Grain Standards Act and nothing in the regulations thereunder which contemplate or authorize shipping a purposed, artificial mixture of cultivated oats and wild oats as sample grade oats, or as oats of any grade. The unbelievable folly involved in authorizing a vast and wholly unnecessary increase in the diffusion of the seed of such a pest as the wild oat is in much the greater part of the United States, is I think a sufficient reason for saying that the regulations refer to and contemplate only what I have called a natural mixture of wild oats and cultivated oats. It follows that the designation "sample grade oats" is authorized as

applied to natural mixtures of certain proportions of wild and cultivated oats, and is not authorized as a designation of an artificial mixture of the same proportions of wild and cultivated oats. And offering for sale such artificial mixtures under a name which is authorized as the designation only of a natural mixture violates the clause in question of the food act for two reasons.

(1) The use of the name "sample grade" will almost inevitably deceive some purchaser, either immediate or remote, as to the manner of production of the mixture. And I conceive that many persons, who would buy the naturally produced mixture which is properly designated as sample grade oats, would refuse to knowingly buy an artificial mixture of the same proportions of wild and cultivated oats. Either a desire to discourage a vicious practice, or a public-spirited desire to avoid the danger of unnecessarily spreading an agricultural pest, or both, would, I am satisfied, prevent many persons from buying the artificial mixture unless deceived into the belief that they were buying the practically unavoidable natural mixture.

I am unable to concede that the case of *95 Barrels, Etc.* v. *U.S.* (289 Fed. 181) militates against the foregoing reasoning. The essence of that ruling is that the act of the manufacturer there in question did not mislead the public to its harm or induce the purchase of a different article from that intended to be purchased. (See 289 Fed. 186.) The act of the claimants in the case at bar is certainly calculated to do both.

(2) Further, I am unable to hold that the only purpose of the particular clause of the food now in question is to prevent deception:

> That for the purposes of this act an article shall also be deemed to be misbranded * * * In the case of food: First. If it be an an imitation of or offered for sale under the distinctive name of another article. Second. If it be labeled or branded so as to deceive or mislead the purchaser * * *.

The wording of this second paragraph does not comport with a theory that the sole and only intent of the first paragraph was to prevent deception of the purchaser. Hence, as the act done by the claimants, even if not deceptive, is one that is impolitic and harmful to the public, and could have been intended to be forbidden, it seems sufficient to say, "Thus is the law written." "Sample grade oats" is the distinctive name of a natural mixture of cultivated oats, and certain impurities. Offering for sale (to the public detriment) a purposed, artificial mixture of cultivated oats and the same impurities is, I think, offering an article for sale under the distinctive name of another article.

The first stipulation shows that the mixture in question was shipped under the name of "sample grade star oats." It is seemingly contended that the addition of the word "star" to the designation of the mixture alters the result. But there is nothing in the record to indicate that the word conveyed to the purchaser knowledge that the mixture was an artificial one. The word has to the uninitiated no such significance, and if it did have some agreed meaning to the purchaser, this fact was peculiarly within the knowledge of the claimants, and should have been proved by them.

In the first stipulation is the following:

> The oats were inspected by a licensed Government inspector at the point of shipment and certified and graded by him as sample grade, and were sample grade.

Counsel for both parties have written me that the last four words of the foregoing stipulation were not intended as an agreement that the designation "sample grade oats" was intended by the regulations to include an artificial and purposed mixture of cultivated and wild oats.

However, the claimants do insist that the fact that an inspector, licensed by the Government, certified the grain in question as sample grade oats, entitled them to a judgment in their favor. I cannot agree to this. It does not appear that the inspector knew that the grain was an artificial mixture. But in any event, I do not see why the principle that the Government is not estopped by the defaults of its agents does not make discussion of this point unnecessary. (See *Utah Power, etc., Co.* v. *U.S.*, 243 U.S. 389, 408–9.)

From what has been said it seems to me to follow that the claimants misbranded an article of food, consisting of an artificial mixture of a food (cultivated oats) and another food, or a food adulterant (wild oat seed), in that they offered for sale the said article under the distinctive name of another article, to wit, a natural mixture of cultivated and wild oats.

It further follows that it is unnecessary to form an opinion in respect to the charge of adulteration by substitution.

An order reciting the fact that by agreement the former order has not been executed and condemning the oats under seizure may be now taken. (Dec. 14, 1923.)

UNITED STATES v. 95 BARRELS, MORE OR LESS, ALLEGED APPLE CIDER VINEGAR

(District Court, N.D. Ohio, Nov. 1, 1922)

N.J. No. 12367

Libel under section 10 of the Food and Drugs Act. Demurrer overruled. Trial before the court on an agreed statement of facts. Decree in favor of the United States.[15a]

WESTENHAVER, *District Judge.* The Government has seized and libeled, and now seeks to condemn 95 barrels of vinegar shipped in interstate commerce, on the ground that this vinegar is adulterated and misbranded. The shipper, Douglas Packing Company, has appeared and claimed the vinegar, and makes defense. A jury trial has been waived in writing, and the case tried to the court on an agreed statement of facts.

None of the material facts is in dispute. The vinegar is labeled:

Excelsior Brand Apple Cider Vinegar Made from Selected Apples Reduced to four per centum. Guaranteed to comply with all Pure Food Laws.

This vinegar is not made from the expressed juice of fresh apples as pure cider vinegar is commonly understood to be made, but is made from evaporated apples. Claimant, it is agreed, selects mature, sound fruit, free from rot and ferment, and dehydrates

[15a] Reversed 95 Barrels, More or Less, Apple Cider Vinegar v. *United States*, p. 1079. *post.* Judgment of Circuit Court of Appeals reversed by Supreme Court, *United States* v. *95 Barrels, More or Less, Alleged Apple Cider Vinegar*, p. 1118, *post.*

same by the most approved processes. In the process of dehydrating small quantities of sulphur fumes are used to prevent rot and fermentation and subsequent discoloration. The principal result of dehydration is the removal of about 80 per cent of the water content of the apples. Whether in dehydration any other constituents of the apple are removed, is not beyond controversy, as in the present state of chemical science no accepted test or method of analysis is known to the parties for determining that problem. In manufacturing vinegar from apples thus evaporated, claimant places in a suitable receptacle a given quantity of evaporated apples, to which is then added an amount of pure water substantially equal to the amount previously removed by evaporation. Pressure is applied at the top of this mass, and a stream of water under sufficient head is introduced at the top through a pipe and is applied until the liquid released through a vent at the bottom has carried off in solution such constituents of the evaporated apples as are soluble in cold water and useful in the manufacture of vinegar. The liquid product thus obtained, it is agreed, is substantially equal in quantity to that which would have been obtained had fresh apples been used. This liquid carries a small and entirely harmless quantity of sulphur dioxide, which is removed later in the process of fining and filtration by the addition of barium carbonate or some other proper chemical agent which by precipitation eliminates the sulphur compound. The liquid, after this treatment, gives, upon chemical analysis, results similar to those obtained by the chemical analysis of apple cider made from fresh apples, except that it contains a trace of barium. No claim is made that this trace of barium renders the product deleterious or injurious to health. The subsequent process of alcoholic and acetic fermentation is the same as that commonly followed in making vinegar from the expressed juice of fresh apples. The vinegar thus made is similar in taste and composition to the vinegar made in the usual way from fresh apples, except that it contains a trace of barium. No claim is made that this trace of barium renders the product deleterious or injurious to health. Claimant uses in making vinegar in this way, the same receptacles, equipment, and process as is used in making cider and vinegar from unevaporated apples. It has been making and selling apple cider and apple cider vinegar thus produced, continuously from a period antedating January 1, 1906. Other cider and vinegar makers have been doing the same. The total amount thus produced and sold has been and is very large. The United States Department of Agriculture has, however, never sanctioned such labeling, and its attitude with respect thereto is evidenced by circulars 13, 17, 19, and 136, and Food Inspection Decision 140. Exhibit samples of cider fermented and unfermented, made from fresh and evaporated apples, and vinegar made from both kinds of cider, have been submitted and were personally examined by me. There are slight differences in appearance and taste, but all have the appearance and taste of cider and vinegar. The foregoing are all the facts material to the determination of this controversy.

The Government claims that the vinegar in question thus manufactured is adulterated in that there is substituted for genuine apple cider vinegar a manufactured product from evaporated apples, in

violation of paragraphs 1 and 2, section 7, Food and Drug[s] Act, June 30, 1906; also that it is misbranded, in that the statements on the label, "Apple cider vinegar made from selected apples and guaranteed to comply with all pure food laws," are false and misleading, in violation of general paragraph, section 8, and paragraphs 2 and 4, section 8 of said act; and also that it is misbranded in that it is labeled in imitation of and offered for sale under the distinctive name of another article, to wit, apple cider vinegar, in violation of paragraph 1, section 8 of said act. Claimant vigorously and earnestly disputes each and all of these contentions.

This case has received the careful consideration which the magnitude of the interests and the importance of the question involved have demanded. My conclusion is in accord with the unreported decision of Judge Geiger of the Eastern District of Wisconsin. In my opinion this vinegar is misbranded, if not adulterated, within the meaning of said act.

Vinegar is a food product, as defined in section 6 of said act. It is probably not adulterated within the meaning of paragraph 1, section 7. Whether it is adulterated within the meaning of paragraph 2, section 7, will not be determined by me. The question of whether it is adulterated within the meaning of that paragraph, turns on whether or not vinegar manufactured by the process above described is a substitution in whole or in part of one article for another; that is, a spurious vinegar for apple cider vinegar. Claimant's contention is that apple cider made by expressing the juice of fresh apples, and its liquid product produced as above described from evaporated apples, are both apple cider, and that the difference resolves itself merely to a controversy over the process by which apple cider and apple cider vinegar are made. However, as I am content to dispose of this case upon the question of misbranding alone, no opinion need or should be expressed upon this aspect of the controversy.

The applicable provisions of the Food and Drug[s] Act with respect to misbranding are section 8, general paragraph, and paragraphs 1 and 2 and 4 of section 8. The general paragraph of section 8 provides:

> The term "misbranded", as used herein, shall apply to all * * * articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular.

Thus it appears that the false or misleading statement which is forbidden applies as much to the food article as to the ingredients or substances of which it is made; hence any statement regarding the article which is false or misleading is within the definition of "misbranding." Paragraph 2 provides that, in case of foods, an article shall be deemed to be misbranded "if it be labeled or branded so as to deceive or mislead the purchaser." Paragraph 4 says it shall be deemed to be misbranded "if the package containing it, or its labels, shall bear any statement, design, or device regarding the ingredients or the substance contained therein, which statement, design, or device shall be false or misleading in any particular." In this paragraph the false or misleading statement applies only to

the ingredients or substance of the article, but the language used emphasizes that the object of the law was to prevent the purchasing public from being misled or deceived in the sale and distribution of food products. Paragraph 1 says an article shall be deemed to be misbranded "if it be an imitation of or offered for sale under the distinctive name of another article." The general purpose, as well as the explicit prohibitions of the law, is to be determined from these statutory provisions.

These provisions have been often considered by the courts. The Food and Drugs Act, although penal in its nature, is not given a strict construction but one which will reasonably tend to accomplish its general object and purposes. *U.S.* v. *Antikamia Co.*, 231 U.S. 654, 665, 666; *Frank* v. *U.S.* (6 C.C.A.), 192 Fed. 866, 869–70. All the words and terms used therein should be given their proper and usual signification and effect. *U.S.* v. *Lexington Mill Co.*, 232 U.S. 399, 409–10. The courts take judicial notice of the usual meaning and definition of familiar words. *Nix* v. *Hedden*, 149 U.S. 304. As regards misbranding, Mr. Justice Day, in *U.S.* v. *Lexington Mill Co.*, *supra*, says:

> The legislation, as against misbranding, intended to make it possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was and not upon misrepresentations as to character and quality.

In *U.S.* v. *Antikamnia Co.*, *supra*, 231 U.S. 654, Mr. Justice McKenna, at page 665, says:

> The purpose of the act is to secure the purity of food and drugs and to inform purchasers of what they are buying. Its provisions are directed to that purpose and must be construed to effect it.

Numerous Circuit Court of Appeals and District Court cases have been decided, declaring the same rules and emphasizing more particularly that the prohibition of misbranding is designed to prevent deceiving or misleading the purchasing public, even though the article sold is in itself equally good or not injurious to health. See *Brina* v. *U.S.* (2 C.C.A.), 179 Fed. 373; *Frank* v. *U.S.* (6 C.C.A.), 192 Fed. 866, 869–70; *U.S.* v. *Tepee Apples* (D.C.), 179 Fed. 985; *U.S.* v. *Scanlon* (D.C.), 180 Fed. 485; *U.S.* v. *10 Barrels of Vinegar* (D.C.), 186 Fed. 399; *U.S.* v. *100 Barrels of Vinegar* (D.C.), 186 Fed. 471. The decisions of State courts under pure food laws of similar character, are to the same effect. See *People* v. *Girard*, 145 N.Y. 105; *People* v. *Niagara Fruit Co.*, 77 N.Y.S. 806, affirmed, 173 N.Y. 629; *People* v. *Douglas Packing Co.*, 194 N.Y.S. 633. Such, in brief outline, are the rules of law applicable to this controversy.

Claimant's label does, in my opinion, tend to mislead and deceive the ordinary purchaser and user of vinegar. Cider is defined by Webster as "the expressed juice of apples." By the word "expressed" is meant expelled or forced out. From time immemorial apple cider has been understood to mean the expressed juice of fresh apples and not of dried apples. Apple vinegar or apple cider vinegar likewise in the popular mind has from time immemorial been understood as meaning vinegar produced from apple cider thus defined. Claimant's label conveys the impression that this vinegar is made from that kind of apple cider and that this apple cider is made in the common and familiar way from fresh or undried apples. The mere fact that the words "apple cider" and "selected apples" are brought

together in the same label, conveys unmistakably this impression and repels any other or different impression. Apple cider is a well-known product. Apples are a well-known fruit. Cider means nothing else to the ordinary mind than the expressed juice of fresh and undried apples. Apples mean nothing else to the ordinary mind than fresh and unevaporated apples. A merchant who advertises and offers apples for sale could not compel a purchaser to accept dried or evaporated apples. The latter are not apples as that word is understood in the trade or by a person of ordinary intelligence, but are a manufactured product, an entirely different article. Nor, in my opinion, could a merchant who offers apple cider for sale, compel a purchaser to accept a liquid made from evaporated apples in the manner above described, even though it does possess substantially the same chemical constituents and has substantially the same taste as the expressed juice of fresh apples. Claimant's label consequently misleads and deceives. It makes a statement with respect to an article of food which conveys the false notion that this article is vinegar made from the expressed juice of fresh apples.

Claimant earnestly contends that its product is vinegar because it conforms to the chemical tests prescribed for vinegar by circulars of the United States Department of Agriculture nos. 13, 17, 19, and 136. It also contends that it is made from apple cider because apple cider is only the juice of apples, and that its process first merely extracts the surplus water, and later restores it, and hence the resulting liquid obtained by pressure is apple juice or apple cider, even if it is not the expressed juice of fresh apples. This being so, it further contends that the Board of Food and Drugs Inspection provided by the Pure Food and Drug[s] Act, have no power under the law to declare, as it did, by Food Inspection Decision 140, that vinegar made from dried or evaporated apples is not entitled to be called vinegar without further designation. It may be admitted that this board has no power to add to or take from the law. It does not, however, follow that the claimant's label is true and does not tend to mislead or deceive, or that what the Government is complaining of is not misbranding but a process of making apple cider and apple cider vinegar. Claimant's argument overlooks certain material and controlling considerations. One is that apple cider as defined in the dictionaries and as commonly and popularly understood, is the expressed juice of fresh apples, and that apple vinegar is commonly and popularly understood to be produced by the alcoholic and acetic fermentation of that kind of cider. Another is that the law was designed to prevent the ordinary purchaser from being deceived and misled as to what he is buying, and that therefore the test of misbranding is the effect of the label or statement upon the ordinary purchaser. A statement that an article is apple cider vinegar made from selected apples, can convey no other idea to such a person in the present state of common knowledge than that the vinegar is made from the expressed juice of fresh apples and not by the manipulation of dried or evaporated apples. If it does, and the ordinary purchaser is or may be thereby misled or deceived, it is no answer to say that he gets a vinegar which is equally good. The object of the law is to let the purchaser know just what he is buying and to let him decide whether he wants it or not. One may not take advantage of his prejudices or

want of information to sell him something different from what he thinks he is buying.

Several authorities have been cited which, while involving facts somewhat different, tend to support my conclusion. Claimant's label was under consideration recently in *People* v. *Douglas Packing Co.*, 194 N.Y.S. 633. The decision was upon demurrer and is not a final adjudication of any point in controversy, but the reasoning of the opinion impresses me as sound. The New York statute defines cider vinegar and apple vinegar as a product made exclusively from the pressed juice of apples, by alcoholic and subsequent acetic fermentation. These terms, it is said, should be taken in their ordinary and familiar meaning. It is further said:

> The statutory definition of "cider vinegar" and "apple vinegar" means by this test vinegar made from apple cider. Even if those terms had been undefined in the statute, they nevertheless would have had in the popular mind a well-defined meaning, in that apple cider is known in every household, and cider vinegar is known to be made from it, though the chemical processes by which the one becomes the other are generally unknown. Other vinegars may be perfectly harmless, chemically undistinguishable, it may be, but calculated to deceive, if marketed under a false label. The popular notion of cider vinegar and the ordinary and obvious meaning attached to the words, exclude the notion of making this common article of domestic use from cider pressed from dried apples. The statute is designed to enable consumers to get what they believe they are getting under the labels "cider vinegar" and "apple vinegar."

In *U.S.* v. *100 cases of Tepee Apples*, McPherson, District Judge, held that canned Arkansas apples and blackberries were misbranded because the label on the cans gave Michigan cities as the place of manufacture, thereby conveying the misleading impression that the apples and blackberries were Michigan fruit. It was contended that Michigan apples and blackberries were superior in quality to the Arkansas fruit, but this consideration was disregarded as immaterial, Judge McPherson saying:

> The other purpose (of the law) was to enable a purchaser to obtain what he called for and was willing to pay for. And under this latter view, it is immaterial whether Michigan fruits are better than those grown in Arkansas. A purchaser of canned goods may prefer Michigan fruits. He may believe them to be better than Arkansas fruits. He has the right to call for them, and when he pays or is debited for them, he has the right to have Michigan fruits. The purchaser has the right to determine for himself which he will buy and which he will receive and which he will eat. The vendor cannot determine that for the purchaser. He, of course, can make his arguments, but they should be fair and honest arguments.

In *Brina* v. *U.S.* (2 C.C.A.), 179 Fed. 373, cottonseed oil was labeled in large Italian letters "oil for salad" and in small English letters "cotton salad oil extra quality"; and this was held to be misbranded. The trial judge, without evidence, charged the jury that "as a notorious fact salad oil prima facie means olive oil" and that misbranding resulted, unless evidence was produced to show a different meaning in the trade. This ruling was assigned as error. In the opinion of the Circuit Court of Appeals it is pointed out that salad oil is defined as olive oil in Worcester's, Stormonth's Imperial Encyclopedia, and Century dictionaries, and that no error was committed in thus charging. Compare *U.S.* v. *10 Barrels of Vinegar* (D.C.), 186 Fed. 399; *U.S.* v. *Scanlon*, 180 Fed. 485; *Frank* v. *U.S.* (6 C.C.A.), 192 Fed. 866, 869–70.

Upon authority as well as upon principle, it must be held that the charge of misbranding is sustained. The label does bear statements

regarding the article and the ingredients or substances thereof which are false and misleading, and the vinegar must be held to be offered for sale under the distinctive name of another article as that name is popularly and commonly understood. Judgment of forfeiture and condemnation will be entered.

A. O. ANDERSEN & CO. v. UNITED STATES

(Circuit Court of Appeals, Ninth Circuit Nov. 11, 1922)

284 Fed. 542; N.J. No. 11442

In error to the District Court for the Western District of Washington. Judgment reversed and case remanded.[16]

This is a proceeding by libel under the Pure Food and Drugs Act (34 Stat. 768) for the condemnation of 1,974 cases of canned salmon. The proceeding is based on the following provision of section 7 of the act: That for the purposes of this act an article shall be deemed to be adulterated: * * * In the case of food: * * * Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter. The case was tried before a jury on the demand of the Government, as provided in section 10 of the act.

It appeared from the testimony on the part of the Government that 408 cans were selected at random from 408 of the 1,974 cases on three different occasions, 24 cans in the first lot, 192 cans in the second lot, and 192 cans in the third lot. The chemist who made the analysis of the first lot of 24 cans was not available as a witness and there is no evidence in the record as to their quality or condition. One hundred and forty-four cans of the second lot were first analyzed, and these were found to contain 28 putrid or tainted cans and 18 stale cans. The remaining 48 cans of the second lot were later analyzed and found to contain 8 putrid or tainted cans and 1 stale can. The third lot of 192 cans was also analyzed, and was found to contain 35 putrid or tainted cans and 12 stale cans. A putrid or tainted can is one containing rotten and decayed salmon whose odor is offensive to the smell. A stale can is one plainly disclosing the beginning of decomposition, but not in so advanced a stage as the putrid or tainted one. It thus appeared that nearly one fifth of the product analyzed was putrid or tainted and approximately one fourth either putrid or tainted or stale. It further appeared that the condition of the salmon was apparent on ordinary inspection when exposed, and that decayed salmon is not injurious to health. The claimant offered no testimony, and upon its motion the court directed the jury to return a verdict in its favor. From the judgment on the verdict the plaintiff sued out the present writ of error.

RUDKIN, *District Judge* (after stating the facts as above). The court below directed a verdict in favor of the defendant in error upon the ground that the article of food referred to in the statute is the single or individual can of salmon and not the entire case or lot. If this interpretation of the statute is correct, the Government, of course, failed in its proof, and will of necessity meet the same fate in every other case of this kind unless it is able to prove that each and every part and parcel of the food product is adulterated within the meaning of the law. Is this a correct interpretation of the statute?

The ordinary definition of the word "article" is an extremely comprehensive one. In the primary meaning, as given in the dictionaries, it designates

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[16] Reversing *United States* v. *1,974 Cases of Canned Salmon,* p. 1037, *ante.* Retrial, *United States* v. *1,974 Cases of Canned Salmon,* p. 1108, *post.*

one thing or many, one item of several, a portion of complex whole. The best source, however, to which we should apply to determine the definition of a word used in a statute is the statute itself. (*Junge* v. *Hedden*, 37 Fed. 197; Id., 146 U.S. 233.)

The meaning of the word "article" must therefore be gathered from a consideration of the entire act, and we may add in this connection that the rule of strict construction invoked by the defendant in error has little or no application to statutes designed to promote the public health or public safety. Section 1 of the act prohibits the manufacture within any Territory or the District of Columbia of any article of food or drugs, adulterated or misbranded within the meaning of the act; section 2 prohibits the introduction of any such article into any State or Territory or into the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country; section 6 defines adulteration; and section 10 prescribes the procedure for the condemnation. In all of these sections we are convinced that the word "article" is used in its broad and comprehensive sense, and has reference to the food product, not to the smallest individual container. Any other construction would defeat the entire purpose of the law. If the contention of the defendant in error is sound, it is subject to a fine of not exceeding two hundred dollars for each can of salmon introduced into the State, and to a fine of not exceeding three hundred dollars for each subsequent offense. Against such a claim on the part of the Government or such a construction of the statute, we think the defendant in error would have just and ample grounds for complaint.

The defendant in error seeks to uphold the judgment on other grounds. First, it is urged that decomposition sets in immediately after the death of animals or fish; that a literal construction of the act would exclude from interstate commerce all canned fish and meat products; that for this reason the court must hold that Congress intended to prohibit the introduction into interstate commerce of products containing an unreasonable amount or quantity of decomposed matter only, and that the statute as thus construed is void for uncertainty under the decision in *U.S.* v. *Cohen Grocery Co.*, 255 U.S. 81, and kindred cases. This argument is more specious than sound. Decomposition may begin where life ends, but meat or fish is not decomposed at that early stage. Decomposed means more than the beginning of decomposition; it means a state of decomposition, and the statute must be given a reasonable construction to carry out and effect the legislative policy or intent. Answering as similar contention in *U.S.* v. *Two Hundred Cases of A. T. Catsup*, 211 Fed. 780, the court said:

> It is argued for the claimant that since the presence of bacteria, mold, and yeast in any quantity is evidence of decomposition or the process of decomposition, and there is no fixed standard by which it can be determined when a product has reached such a stage of decomposition as to "consist in whole or in part of filthy, decomposed, or putrid vegetable substance", the Government cannot prevail. I infer from the testimony of the experts that it would be difficult, if not impossible, to fix any arbitrary standard by which the question could be determined, as it depends upon so many contingencies. In any event, no such standard has been fixed, in the absence of which each case must be determined on its own facts, and when it appears as in this case, that the product is so far decomposed as to be unfit for food, it comes within the letter and spirit of the law.

The case answers the further contention on the part of the defendant in error that adulterated salmon is not injurious to health or dangerous to life.

It was also urged that, since there is no proof that the product in question would be injurious to health, a verdict should be ordered in favor of the claimant; but I do not understand that such proof is necessary or required under the provisions of the Food and Drugs Act, on which this proceeding is based.

It appeared from the cross examination of the Government witnesses that they have heretofore suffered canned salmon containing a small percentage of filthy, decomposed, or putrid matter to pass in interstate commerce unchallenged, but there is no room for controversy over percentages under the statute itself, for it excludes all. Of course, where the entire product is not inspected or tested the proof must go far enough to satisfy the court or jury that the adulteration extends to the whole product sought to be condemned. And while a small percentage of adulteration found only in a small percentage of the product might not and would not ordinarily satisfy the court or jury that the whole product is adulterated, yet in a case like this, where the jury might properly infer or find that approximately one-fifth of the entire product was unfit for human consumption and that the adulteration extended to the entire product, no such question can arise.

It is further argued that the court should not destroy 1,600 cases of good salmon because 400 cases of the same lot are found to be adulterated. In answer to this we need only say that destruction does not follow condemnation as a matter of course. Section 10 of the act provides for the restoration of the goods on payment of the costs and the giving of a sufficient bond to the effect that the articles will not be sold or otherwise disposed of contrary to the provisions of the act. Under this provision the defendant in error may, and will doubtless be permitted to, separate the good from the bad, and the burden of so doing should rest upon it, and not upon the Government or the ultimate consumer. If it cannot do this, it is its own misfortune and it must suffer the consequences.

The judgment of the court below is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

UNITED STATES v. 22 BOTTLES OF CRAB ORCHARD CONCENTRATED MINERAL WATER

(District Court, S.D. Ohio, Nov. 28, 1922)

N.J. No. 11784

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict in favor of the United States.[17]

The United States attorney filed a libel praying the seizure and condemnation of 22 bottles of Crab Orchard concentrated mineral

[17] Affirmed, *Goodwin et al.* v. *United States*, p. 1130, *post*. See also *Goodwin et al.* v. *United States*, p. 1107, *post*.

water at Cincinnati, Ohio, consigned by L. H. Goodwin & Co., Crab Orchard, Ky., September 6, 1921, alleging that the article had been transported from the State of Kentucky into the State of Ohio, and charging misbranding in violation of the Food and Drugs Act, as amended. The article was labeled in part:

(Bottle) Beneficial in the Treatment of * * * Rheumatism, Piles, Indigestion, Dyspepsia, Dysentery * * * Headaches, and other Ailments arising from Diseases of the Stomach, Kidneys, Liver and Impure Blood. It is a Remedy * * * to cure or relieve * * * afflicted [of] humanity. * * * possesses the necessary elements for the speedy and permanent restoration to perfect health. It strengthens every fibre of the human system and imparts to the nerves a new force of determined energy. Even the aged find in its [their] healing powers a most reliable remedy for the restoration of failing vitality. * * * At the appearance of indisposition, it proves a most reliable remedy. * * * It is in every way a *health preserver* as well as a *healer*. Where habitually used the physician is a stranger * * *. For the Liver, Kidneys, Rheumatism * * * Dysentery.—One teaspoonful * * * until relieved * * * never should the remedy be entirely discontinued until complete health is restored. * * * It quickly destroys the germs of disease and removes the causes of ailments by purifying the blood and cleansing the entire system of uric acid poisoning and poisonous germs; (carton) Beneficial in Treating * * * Rheumatism Lumbago Loss Of Appetite * * * Headache Vertigo Sleeplessness * * * Bilious Colic Indigestion Dyspepsia Piles Kidney Disease Bladder Trouble Liver Complaint Jaundice Dysentery Catarrh Eczema And All Other Diseases Arising From A Disordered Stomach, Liver * * * And Impure Blood. * * * Tonic And * * * System Regulator.

It was alleged in substance in the libel that the article was misbranded in that the labeling bore the above-quoted statements regarding the curative or therapeutic effect of the said article, which were false and fraudulent in that the article contained no ingredient or combination of ingredients capable of producing the effects claimed, and in that it was insufficient of itself for the successful treatment and cure of the ailments and diseases for which it was prescribed and recommended in said statements.

The case having come on for trial before the court and jury, after the submission of evidence and arguments by counsel the court delivered the following charge to the jury:

PECK, *District Judge*. Gentlemen of the jury: It is now my duty in this, as it is in other cases, to charge you with regard to the law which will govern your deliberations; that is to say, charge you with regard to the law in the case. You are the sole judges of the facts; it is entirely within your province to say what the facts are. It is the duty of the court to declare the law to you, and it is your duty to accept the law as the court declares it and to apply it to the facts as you find them to be, and so reach your verdict and say whether you find that this product is misbranded or is not misbranded; for that is the issue in this case. I say, the issue is whether or not the product is misbranded. The branding consists of all the statements made upon the label and upon the outside of the carton or box in which the bottles are enclosed.

The Government states its case in a paper called a libel, and the libel of the Government charges that this product is misbranded in the following statements: [The court here quoted the foregoing labeling].

Those are the statements which the Government claims constitute the misbranding of this product.

The defendant, or rather, we call the opposite party here the claimant, answers and denies that this product is misbranded. The burden of proof is upon the Government of the United States to prove by a preponderance of evidence which is clear and convincing that this product is misbranded before you can find it misbranded.

In order to prove it misbranded it must be shown that the statements charged as misbranding in the libel, which I have just read to you, are in whole or in some substantial part false and fraudulent. By "false" is meant not true. The term, I think, needs no definition. That which does not square with the truth is false. "Fraudulent" means with deception deliberately practiced with a view of gaining an unfair advantage. If one knowingly makes a false statement for the purpose of gaining an unfair advantage, as an unfair advantage over purchasers—those of the public who may purchase—such false statement is also fraudulent. If one makes a false statement recklessly, that is to say, in reckless disregard of the truth, without taking steps to ascertain whether that which is claimed is true or false, and if the natural effect and consequence will be, if the statement turns out to be false, to take advantage or gain an advantage of the purchaser, then that statement would be a fraudulent statement. If one innocently believing in the truth of what is stated makes a statement concerning that which is contained in the package—not intending to deceive anybody, in good faith and believing in the truth of that which is stated—it cannot be a fraudulent statement even though it turns out to be false in fact. In other words, gentlemen, it comes to this: Was there a false statement made in bad faith or was there not? If false, but made in good faith, the product could not be considered misbranded; if true, the product could not be considered misbranded; but if false and made in bad faith, fraudulently, then the product would be misbranded.

Now I have said this applies to the statements made on the label and on the exterior of the carton, so far as they are set forth in the Government's pleading called the libel, in whole or in part. In other words, if any substantial part of these statements are false and fraudulent or, I should say, if any substantial part of these statements is false and fraudulent, the fact that the remainder may be innocent would not save the package from being misbranded. It is the purpose of the Pure Food and Drugs Act to promote honest dealing between those who sell and those who buy, through the medium of interstate commerce, articles of this kind. It is admitted that these articles were articles that passed through interstate commerce. It is just as though the seller stood face to face with the buyer and said, "I sell you his package. This package contains thus and so. Its qualities are thus and so." These statements are to be treated as though they were made by word of mouth between two people, the purchaser relying and having the right to rely upon what the seller said to him. It is the purpose of the Pure Food and Drugs Act to insist that people deal without fraud in making such statements.

Now the words upon this label and on this carton—I have stated during the course of the trial to you and now briefly repeat—are to be taken in their ordinary sense, as an ordinary purchaser of reasonable intelligence would take them. In judging whether these state-

ments were fraudulent, you may take into consideration all of the surrounding circumstances—everything that had come to the attention and notice of the person who made these statements and put them upon this carton. You may take into consideration the fact, if it be a fact, that under some circumstances and at some times this water had been ordered by a physician to be sold to certain persons; but of course you can only give that such effect as it is reasonably entitled to receive. Having considered all of the surrounding circumstances, you will say to yourselves: Was the maker of this label and this carton justified, that is to say, was the one who put out this product justified in fact in putting these statements on it and putting this product before the public with these statements on it? Was that or was it not an honest act?

You are the sole judges of the credibility of the witnesses, that is to say, the extent to which you will believe the witnesses who have testified before you, and it is your duty to reconcile the conflicting testimony of various witnesses and conflicting statements so far as it may reasonably be done.

Witnesses, those who are supposed to know more than the ordinary person about such subjects, such as chemists and physicians, have been permitted to give their opinions as to various matters. Opinion evidence is not binding upon you, but should be considered in connection with all the other evidence in the case. Should you believe it, you may accept and follow it. By an opinion I mean a statement or a conclusion arrived at by the witness from experience or from knowledge, as distinguished from testimony concerning a direct fact. If I were to say, "That is a stone house across the street that I see", that would be a statement of fact; but were I to say that "My belief is that that house is worth $200,000", that would be merely an opinion as to its value.

Now you are the sole judges of the value of opinion evidence. Of course, an opinion is worthless unless it is the honest opinion of the man who states it. If it is his honest opinion, then its value depends upon how much he knows about the subject concerning which he is testifying. If he is thoroughly experienced, thoroughly grounded in his subject, if his opinion is the result of mature reflection, if he is a man of strong logical intellect, his opinion would be entitled to great value. If, on the other hand, he was incapable of logical thinking, or if he was not well grounded in his subject, not familiar with the facts upon which his conclusion is assumed to be based, then, of course his opinion would be of little or no value; and it is for you to decide what value you will give to the opinion evidence that you have heard.

Now a great deal of the evidence of the witnesses who have testified concerning their own ailments is in the nature of opinion evidence. Those witnesses who testified that they had well-known, easily discernible diseases, or easily told diseases—I will say, such as headache or constipation, or something of that sort—of course there would be very little reason to doubt that they knew what they had. But if one testified that he thought that he had some more obscure disease, more difficult to diagnose, and his diagnosis of what he had depended entirely upon his own opinion and he was unable to make such a diagnosis, his opinion would be of very little value. Those

are matters for you to take into consideration in weighing the testimony of the witnesses.

You may also consider the interest of the witnesses, if they have any, in the outcome of the case—their affiliation with either of the parties, their manner of testifying, their appearance upon the witness stand, whether their testimony was logical or otherwise—these and any or all other subjects touching the credibility of the various witnesses you may take into consideration; and having considered all matters, you will give to the testimony of each and every witness such weight as you find it entitled to receive. That is your province.

And now, gentlemen, if upon a consideration of all the evidence you find that the statements charged in the libel are false and fraudulent in any substantial part, you will find the product to be misbranded. If, on the other hand, you do not find that the statements charged in the libel are false and fraudulent in some substantial particular, then you will find the product to be not misbranded.

UNITED STATES v. ELEVEN PACKAGES OF B. & M. EXTERNAL REMEDY

(District Court, D. New Hampshire, Dec. 19, 1922)

N.J. No. 11671

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict in favor of claimant.

MORRIS, *District Judge* (charge to jury). The action which you have been called to try differs somewhat in form from ordinary criminal or civil actions.

It is an action brought by the United States against 11 packages of a drug labeled "B. & M. External Remedy A New Chemical Compound", seeking the forfeiture and condemnation of the 11 packages on the ground that they were misbranded.

It is brought under the Food and Drugs Act, the original of which was passed by Congress, June 30, 1906.

The original act has been twice amended since its passage, viz, August 23, 1912, and March 3, 1915, so that the act or such parts of the act as are applicable to this case reads substantially as follows: The act provides:

> That the introduction into any State * * * from any other State * * * of any article of food or drugs which is * * * misbranded, within the meaning of this Act, is * * * prohibited; and any person who shall ship or deliver for shipment from any State * * * to any other State * * * any such article so * * * misbranded within the meaning of this Act * * * shall be guilty of a misdemeanor.
>
> That the term "misbranded," as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

That for the purposes of this Act an article shall also be deemed to be misbranded:

In case of drugs:

Third. If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent.

The purposes of that part of the act to which reference is made are succinctly stated in a message transmitted to Congress by President Taft, now Chief Justice Taft, in 1911. He said:

In my opinion the sale of dangerously adulterated drugs, or the sale of drugs under knowingly false claims as to their effects in diseases, constitutes such an evil and warrants me in calling the matter to the attention of the Congress. Fraudulent misrepresentations of the curative value of nostrums not only operate to defraud purchasers, but are a distinct menace to public health. There are none so credulous as sufferers from disease. The need is urgent for legislation which will prevent the raising of false hopes of speedy cures of serious ailments by misstatements of fact as to worthless mixtures on which the sick will rely while their diseases progress unchecked.

As a result of this message, Congress passed an amendment to the original Food and Drugs Act, known as the Sherley Amendment, which amendment I have already read to you, but which I will read again, as it is, perhaps, the essential part of the statute applicable to the Government's claims in this action, and it is part of the law which I desire to impress on your minds. The part of the amendment to which I refer reads as follows:

That for the purposes of this Act an article shall also be deemed to be misbranded:

In case of drugs:

Third. If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent.

The libel or complaint in this case was filed October 14, 1919.

It sets forth, in substance, that on or about September 5, 1919, there was shipped from Boston, Mass., to Concord, N.H., 11 packages which contained a drug designed and intended to be used in the cure, prevention, and mitigation of the diseases of man, bearing statements regarding its curative and therapeutic effects; and the bottles containing said drug were labeled in part: "B. & M. External Remedy A New Chemical Compound."

The libel further alleges that a chemical analysis of a sample of the same drug showed that the product contained in said 11 packages consisted of an emulsion made up essentially of oil of turpentine, ammonia, albumen, formaldehyde, salicylic acid, and other ingredients derived from plant sources, including aconite.

The Government further alleges that said packages were labeled, marked, and branded, as follows:

B. & M. External Remedy For Tuberculosis, Pneumonia, Laryngitis, Bronchitis, Pleurisy, La Grippe, Asthma, Hay Fever, Coughs, Colds, Catarrh, Rheumatism, Lumbago, Neuralgia, Neuritis, Peritonitis, Neurasthenia, Locomotor Ataxia, Varicose Veins, Blood Poisoning, Autointoxication, * * * Sprains, Scalds, Burns, * * * Swellings, Stiff Joints. * * * B. & M. External Remedy, applied to the skin, goes directly to the seat of the trouble * * *. Eradicates Tubercle Bacilli from the Lungs, Glands or Joints. Arrests the work of Pneumonia or La Grippe germs in a few hours. Gives immediate relief in rheumatic fever and puts the patient on his feet within a week or ten days. * * * B. & M. Is a sovereign remedy for Colds and Coughs. It destroys the germs and

prevents the further development of Throat and Lung Troubles. A bottle within easy reach is a perfect safeguard against pneumonia. * * * Will relieve Headache in a few moments.

The label further sets forth the words contained on the bottles and the language of a circular contained in said packages giving directions for the use of the drug in cases of the first onset of influenza and a portion of the language of a booklet also sent within said packages. It is alleged that the labels on the bottles and the wording of the booklet mentions the use of the B. & M. External Remedy in connection with the same diseases already enumerated. The Government further alleges that when shipped as aforesaid, said bottles and cartons were misbranded within the meaning of the Food and Drugs Act, and that the circulars and booklets contained false and fraudulent statements regarding the therapeutic and curative effects of said drug.

After service of the process, the National Remedy Co., a corporation, organized under the laws of Massachusetts, by its treasurer, Frank E. Rollins, appeared as claimant of said 11 packages of drugs and filed an answer in which it admitted that it was the manufacturer and consignor of the 11 packages of B. & M. External Remedy, and that it alone was responsible for any and all representations made upon said packages or contained therein as to the curative and therapeutic effects of said remedy. It further denied the allegations in the Government's petition and prayed that said packages might be delivered to it. This answer was filed November 8, 1919.

For a violation of this statute the law provides two remedies. Section 2 of the act declares that any person who ships any misbranded article in violation of the law in interstate commerce shall be punished upon conviction for the first offense by a fine. That, you will observe, is a prosecution against the individual. Section 10 of the same act declares that when such misbranded food or drugs is shipped in interstate commerce in violation of law, the Government may proceed directly against the article shipped, and not require any process against the individual or manufacturers.

The case which we now have is brought under section 10 of the act. There is no criminal prosecution whatever involved in this proceeding. Neither the National Remedy Co. nor its officers or agents are being proceeded against criminally, and no fine or imprisonment is attached to this proceeding. This is a proceeding against the property itself.

You will notice that the case is entitled "*United States* v. *Eleven Packages B. & M. External Remedy, A New Chemical Compound*", but, as already indicated, the National Remedy Co. has filed as claimant of the property which the Government is seeking to condemn.

This action, therefore, is resolved into an adversary proceeding between the United States, on the one side, and the National Remedy Co., claimant, on the other side, in which the subject matter in dispute is the 11 packages of B. & M. External Remedy.

If those packages are found to be misbranded within the meaning of the Food and Drugs Act, then the Government prevails, and the packages should be destroyed or otherwise disposed of in accordance with law.

If the packages are found not to be misbranded in accordance with the act referred to, then the claimant has prevailed, and the packages will be returned to the National Remedy Co.

The procedure in a case of this kind after a claimant has appeared is to have a trial of the question as to whether the article is misbranded. If it is misbranded, the subsequent proceedings depend upon whether it is injurious to health or not. If it is, it will be destroyed by order of the court. But usually, if misbranded only, where the property is not injurious to health, the law provides that it may be turned over to the claimant upon his paying the cost of suit and upon his giving bonds that he will not sell or dispose of it in violation of any law of the State or of the United States.

In this particular case, if the drug is found to be misbranded, it might be turned over to the claimant, National Remedy Co., upon its giving a proper bond, and it would have to change its advertising matter to accord with the truth when the goods might be sold without violating any statute. The question for you to try is whether or not these goods are in any way misbranded.

The National Remedy Co. is a corporation and as such can only act through its officers and agents. The acts of such officers and agents performed within the scope of their authority are the acts of the corporation. The knowledge of such officers and agents is the knowledge of the corporation and binding on the corporation.

The Government having made the charge that the packages are misbranded, the law casts upon it the burden of proving the charge by a balance of probabilities.

If the evidence is so evenly balanced that you cannot determine whether the Government's charges are true or not, then it has failed to sustain the burden of proof which the law casts upon it, and your verdict should be for the claimant.

Under the act of Congress already read to you, there are three certain essential facts that must be proved before the Government is entitled to a verdict. They are: (1) That the 11 packages of drugs were shipped from Massachusetts to New Hampshire, i.e., that it was an interstate shipment; (2) that the bottles, labels, circulars, or booklets accompanying the shipment contained false representations as to the curative or therapeutic effects of the drug; (3) that the representations were fraudulently made with the intent of deceiving the public or prospective purchasers.

We will consider these three essential facts that must be proven in their order.

The first is as to the interstate character of the shipment. Congress has authority under the Constitution to pass laws regulating interstate commerce. The Food and Drugs Act falls within this class. The shipment of the 11 packages of drugs from Massachusetts to Concord, N.H., was interstate commerce. It was the interstate shipment within the meaning of the first part of the Food and Drugs Act which I have already read to you, which prohibits (to use the language of the act)

> the introduction into any State * * * from any other State * * * of any article of food or drugs which is adulterated or misbranded.

I do not understand that the interstate character of the shipment of the 11 packages of drugs is controverted, so you will have no difficulty with that question.

The packages were shipped from some place in Massachusetts across the State line into New Hampshire. You may, therefore, consider the first essential fact in the Government's case as established.

The second essential question is one of more difficulty. Did the labels on the bottles, or the circulars, cartons, or booklets, accompanying the shipment, contain false statements regarding the curative or therapeutic effects of the drug?

On this point there is much conflict of testimony. When the evidence is conflicting, it is peculiarly the province of the jury to weigh it carefully and determine what is the truth. So in this case, it is for you to carefully consider all the evidence in the case and say whether or not any or all of the statements made accompanying the shipment as to the curative or therapeutic effects of the drug were false or whether they are true. If they were false, it makes no difference whether the statements were printed on the labels on the bottles, on the cartons or containers in which the bottles were shipped, or in circulars, pamphlets, or booklets accompanying the shipment. The statements are equally within the meaning of the act so long as they accompany the shipments and are intended for perusal by prospective purchasers of the drug.

The claimant does not deny but that Government exhibits 1, 2, 3, 4, 5, being the bottle and label, booklet, circular, and carton that contained the bottles and literature, were part of the shipment, and in its answer, it admits responsibility for such statements as are contained therein. You will have these exhibits with you for the purpose of examination when you retire to your jury room.

The statute contains the words "curative or therapeutic effects." The word "curative" is defined in Webster's dictionary as "relating to, or employed in, the cure of diseases." "Therapeutic" is defined as "of, or pertaining to, the healing art."

The latter term, as used in medicine, borders a litle more on the realm of experimentation or discovery than the word "curative." But as used in this statute, "therapeutic effect" is the effect that might with reason be expected to be produced upon the human system by any given drug. If a drug is represented to have a curative effect, while it might not always cure, it must be a drug that either does cure, or such as is generally recognized and employed in the effort to cure a certain disease or certain diseases. If it is represented as a cure for certain diseases, when it will not, and is not recognized as a specific, or a remedy for such diseases, then the representation is false, and if printed on the bottles, circulars, or other literature accompanying an interstate shipment of the medicine or drug, then it is misbranded within the meaning of the statute.

To explain a little more fully my meaning, a man might easily justify advertising the curative effects of a drug which was generally recognized as beneficial in the cure of specified diseases, but if a man puts onto the market a drug which is not so recognized by skilled practitioners, he should be held to a high degree of care in his efforts to ascertain the curative effects of the drug that no mistake be made, because he may be trifling with human life. He must use great care in his advertising matter, and know, or honestly believe, that his

representations are true and are so worded as not to deceive the public.

So in this case, if you believe from the evidence that any of the statements as to the curative or therapeutic effects of the B. & M. Remedy, contained in its accompanying literature of which the Government complains in its libel, are false, or if you find that they are only partly true and are so artfully worded as to convey a meaning which is false, and you find that they are so worded for the purpose of deceiving the public, then the statements are false and fraudulent, and your verdict should be for the Government.

In order to maintain its action, it is not necessary that the Government should show by a balance of proof or that you should find that all of the statements contained in these exhibits are untrue or false. If you find that any of the material and essential statements in the exhibits are false and misleading and are likely to deceive the public or prospective purchasers, then, in that respect, the Government has maintained its case. The statement so made is false within the meaning of the statute. As to whether it is also fraudulent, the third essential fact which the Government must prove, I will explain later.

A number of medical men have testified to the nature and symptoms of various diseases. Most of these diseases are so well understood by those not skilled in medicine as to be easily recognizable. Take, for instance, whooping cough. A mother knows only too well when her child is afflicted with that disease; but, on the other hand, the symptoms of scarlet fever, in its incipient stages, is [are] not so easily recognizable. In the advertising matter accompanying the shipment numerous diseases are mentioned. You will understand those diseases as a layman would understand them from a reading of the carton or booklet, and when witnesses not learned in medicine have used the name of a disease in their testimony, you will understand such disease in accordance with the generally accepted meaning, without attempting to apply the technical medical term which might be given it by one learned in medicine.

So also, all the language used by the claimant is to be given the meaning ordinarily conveyed by it to those to whom it is addressed. In the present case, take for illustration the printed matter on the outside of the yellow carton (exhibit no. 5), it is fair to say that it was placed there in bold type by the claimant with the double object in view of advertising the drug and informing the public, and particularly persons who are unfortunate sufferers from any of the diseases mentioned, of the curative or alleviating effects of the drug upon these diseases. The same may be said of the booklet and other printed matter that accompanied the shipment; or to state the proposition more concretely, the printed matter on the carton and in the literature accompanying the shipment was intended to inform prospective purchasers of the drug of its curative or therapeutic effects.

That was the purpose for which it was intended. As I have said, the language used is to be given its ordinary meaning. The question with reference to each statement is: What would an ordinarily intelligent person suffering from one of the maladies and desirous of being cured of it, or at least desirous of being relieved of some of his suffering from it, understand from reading the printed matter? If

there is any of the language in the exhibits that is open to doubt or question as to the meaning it would convey, it is a question of fact for you to determine.

Some of the language used is not open to such doubt. Take, for instance, the language on the yellow carton which says that the drug "Eradicates, Tubercle Bacilli from Lungs, Glands or Joints." Can there be any doubt as to its meaning? It appears in evidence, undisputed, that tuberculosis, or consumption as it is more commonly known among laymen, is caused by the tubercle bacilli. Tuberculosis is known to be one of the most fatal of the diseases incident to humanity. It is also recognized as one of the most difficult to deal with. The statement on the carton is that the B. & M. External Remedy eradicates the tubercle bacilli from lungs, glands, or joints. To eradicate is to blot out, destroy, or relieve the affected parts from the bacilli. If the active bacilli are eradicated the disease is cured and ultimate recovery of the patient is practically assured if he has in his system sufficient recuperative power to mend the injury caused by the ravages of the disease.

There can be no doubt but that the language on the carton with respect to the action of the drug upon the bacilli that causes tuberculosis is intended to inform the public that the drug has a curative effect upon that disease. I have taken this as an illustration. Not all of the language used with respect to the great variety of diseases is equally positive. Some of it may be susceptible of doubt as to what meaning it would convey to the public. In each instance where the language is open to doubt it is for you to say what meaning it conveys.

I think perhaps, that I have sufficiently explained and illustrated the meaning of the word "false" as used in the statute and its application to the instant case. As already said, whether any or all of the statements in the exhibits are false is clearly a question of fact for you to determine. The Government has introduced the testimony of several physicians who have explained to you in detail, and some with great minuteness, the characteristics of some of the diseases mentioned in the exhibit, particularly tuberculosis, pneumonia, locomotor ataxia, and neuritis. They have testified to the recognized treatment among medical men for those several diseases. They have described to you the effect of drugs as used with reference to them. They have also testified to the effect upon the human system of the different substances entering into the composition of the B. & M. External Remedy, and some of them have told you that by no possibility could those drugs, either singly or in a mechanical mixture or chemical compound with the other substances entering into the composition of the B. & M. External Remedy, have the curative or therapeutic effects upon some of the diseases described in the literature. They say that this is the generally recognized opinion of the medical profession.

Some of the physicians who have qualified as experts, perhaps all, have been asked to give their individual opinions as to the efficacy of the preparation and its effect as a curative upon certain of the diseases. They have testified that in their opinion it would not be efficacious. The personal opinion of those physicians would not, standing alone, be sufficient evidence upon which you could find a

verdict or reach a conclusion that the descriptive matter in the circular is false, as it is recognized that there is oftentimes a difference in opinion even among skilled medical men. If the individual opinion of one weighed against the individual opinion of another equally skilled, it could not be said that there was such a balance of probabilities as to permit the jury to determine the question in issue one way or the other. But when the individual opinions of the witnesses is in accord with the generally recognized opinion of medical men skilled in the profession, such opinions may be considered in connection with other evidence. They are an aliquot part of the crystalized opinion of medical men.

As I have already indicated, the important questions in this case arise in connection with the words of the statute, "false and fraudulent." If the question as to whether a statement or a representation is true or not is a matter of opinion so that reasonable men might differ upon that opinion, some men might think one way and some men might think another, then such representation cannot for the purpose of this case be said to be false or fraudulent. A verdict for the Government cannot stand upon a question of opinion between different schools of medicine or upon differing opinion between skilled medical men. In order to be entitled to a verdict the Government must convince you that the statements made in the literature accompanying the shipments are false, and that the drug will not have the curative and therapeutic effects ascribed to it, and not only that the statements are false, but, as I will presently explain, they are fraudulent.

To meet the evidence introduced by the Government, the claimant has called a number of witnesses who have testified that they have been cured by the use of B. & M. External Remedy of diseases from which they have suffered. Claimant has introduced a practicing physician who has testified that he has used B. & M. External Remedy in his practice in certain diseases with beneficial results to his patients.

You have been urged in argument of counsel to find from the evidence of these witnesses that the statements made with respect to the effect of the drug upon the several diseases are true.

The testimony of the Government witnesses including the experts contradicted by the testimony of the witness on behalf of the claimant who have given testimony to the truth of the representations, forms an issue of fact for your determination. You will weigh all the evidence carefully on both sides, considering it with reference to the representations made, and say whether any or all of them are true or false. If you find they are true, then the Government has failed to establish its case, and your verdict must be for the claimant.

If you find that the statements are false and misleading in any material particular, with respect to any one or more of the diseases mentioned in the exhibits, then you will come to your third question, which is: Were the representations fraudulently made with the intent or purpose of deceiving the public or prospective purchasers?

Again calling your attention to the language of the statute and particularly to the words used, "false and fraudulent", it is essential that the Government prove, not only that the statements were untrue, but that they are fraudulent. A statement may be false but not

fraudulent. To illustrate, if a man sells another a horse that is infected with an incurable disease that has not so developed as to be observable, innocently representing to the purchaser that the horse is sound, the statement is false, but it was innocently made, believing it to be true; therefore it was not fraudulent.

The phrase "false and fraudulent" must be taken with its accepted legal meaning and thus it must be found, if the Government is to prevail, that the statements, or some of them, contained in the packages, were put there to accompany the goods with actual intent to deceive—an intent which may be derived from the facts and circumstances but which must be established.

In determining whether or not the representations are fraudulent any or all of them, you should first carefully study the representations themselves, so as to form a correct understanding of the meaning they convey to the public or more particularly to prospective purchasers of the drug.

You will then determine whether this is the meaning intended to be conveyed by the claimant, as the claimant assumes responsibility for the representations made. Going further, you should consider the relation of the claimant to the public. The B. & M. External Remedy being a proprietary medicine, it is proper for you to take into consideration the financial interest the claimant had in so advertising its goods as to increase its sales. Has the desire for financial gain caused the claimant to make extravagant statements as to the curative and therapeutic effects of the remedy, and if such statements are extravagant and grossly exaggerated were they so intended to be, or were the statements made with an honest purpose of informing the public that a remedy had been discovered that was beneficial in a large variety of diseases?

If the claimant honestly believed the statements complained of to be true, the verdict must be for the claimant, and the question is not what a physician or chemist would believe, but it is a question of what the National Remedy Co., acting through its officers and agents did believe.

No law prohibits a man from making any medicine he wants to and selling it to the people if he tells the truth about it.

Anybody in this country has the right to buy any medicine that he wants to buy if he knows what it is and what it is good for.

You are not bound by the theory with regard to diseases advanced by the expert witnesses who have testified. The testimony of experts is to be considered the same as other testimony in the case, for just what it is worth in determining wherein the truth lies. So far as this statute is concerned, a person who honestly believes in another theory with regard to these diseases and ailments and their treatment is entitled to set forth his views in connection with a remedy advertised by him for their treatment; but he must entertain an honest belief that he is right.

A verdict for the Government cannot properly rest upon claims of fraudulent statements when such claims are based upon mere matters of opinion upon debatable subjects.

A verdict for the Government must stand not upon a question of opinion but upon a finding that the remedy is worthless for the uses or some of the uses claimed for it by the National Remedy Co.; or

that the representations or some of the representations as to its curative and therapeutic effects contained in the adverising matter are so grossly exaggerated as to be false and were made with the intent and purpose of deceiving the public. It must be demonstrated that the statements are false and made with a purpose and intent of deceiving the public.

It is for you to determine from all the evidence in the case whether these statements or any of them are false or fraudulent. If you believe that the drug is so absolutely worthless, for example, for tuberculosis, infantile paralysis, locomotor ataxia, or any of the diseases mentioned upon which it is represented to have a curative or therapeutic effect, that the claimant must have known it, then you would be justified in finding that the statement with reference to such disease or diseases is both false and fraudulent.

You should take into consideration the fact that when any individual or company puts out a drug intended for use by persons so credulous as those who are suffering from disease, such individual or company is assuming a great responsibility and extreme caution should be exercised in informing them of the curative or alleviating properties of the drug. Great and lasting injury to the health of individuals may result if misstatements are made as to its curative effects by inducing its use in the incipient stages of diseases upon which it has no effect, which if taken in time, might by proper treatment be cured. Knowing and realizing this as every owner of a proprietary medicine must, if he is a person of intelligence, it is for you to say whether or not he would not, before advertising his medicine, first ascertain just what its curative and therapeutic effect is upon the diseases for which he recommends it.

As bearing upon the knowledge and state of mind of Mr. Rollins who is practically the owner of the National Remedy Co., claimant, you should consider his intelligence and training and say whether or not he did know, when he put out the statements contained in the exhibits, what the curative effects of the B. & M. External Remedy would be upon such diseases as tuberculosis, pneumonia, infantile paralysis, locomotor ataxia, sarcoma, and other diseases specifically mentioned.

These considerations have a bearing upon the question whether or not the statements accompanying the shipments were exaggerated or untrue and were put out with the actual intent to deceive the public.

You should weigh these considerations on one side against the testimony of Mr. Rollins that he entertained an honest belief in the efficacy of his medicine; that his intentions were honest and without intent to deceive. You should take into consideration the evidence bearing upon the efforts he made to ascertain from others what it had done. You should also consider in connection with the claimant's intent the effect he may have actually observed of the use of the remedy upon individuals of his acquaintance. Numerous testimonials have been read, and I must give you a word of caution with respect to them. They are proper for your consideration only as affecting the state of mind and belief of the claimant. They are not to be considered as proof of the effect of the remedy upon the disease mentioned therein. The authors of the testimonials

may have been deceived as to the nature of the disease from which they suffered or as to the effect of the treatment. They may have been on the road to recovery before the remedy was used.

In order to be competent for your consideration that the diseases mentioned in the testimonials have been cured by the use of the B. & M. External Remedy the individuals giving the testimonials would have to be brought into court to testify, subject to cross-examination, so that you might see them and determine for yourselves how much weight should be given the statements they have made. In several instances this has been done. In such instances it is the testimony of the witness and not the language of the testimonial that is competent as bearing upon the truth of the curative and therapeutic effects of the medicine. As I have said, the testimonials are competent only as bearing upon the state of mind of the claimant when he put out the advertising matter with the drug as to whether or not he intended thereby to deceive the public and promote sales.

The shipment of the packages in this case was made September 5, 1919, and in considering the good faith of the claimant in putting out the advertising matter, you should consider only such testimonials as were given prior to the date or the date of the publication of the advertising matter and such facts as were then known to the claimant through its agents, because it is manifest that the claimant's state of mind as reflected in the advertising matter could not be influenced by events happening subsequent to its publication.

There has been introduced in evidence testimony tending to show effective cures of numerous diseases from the use of the remedy since the seizure of these packages by the Government in 1919.

This testimony can have no weight upon the state of mind of the claimant when the literature was published, but it may be considered with reference to the truth or falsity of the statements contained in the advertising matter.

Government Exhibit No. 7 is a circular published by the United States Department of Agriculture, Bureau of Chemistry, intended to inform manufacturers and proprietors of drugs of the Department rulings with reference to that part of the Food and Drugs Act which applies to the misbranding of drugs. This exhibit was admitted for the purpose of showing notice of claimed violation of the act by the claimant. A copy of it was given to the claimant. It is not to be considered by you except for the purpose of showing notice and you will not consider it for any other purpose. It is for the court to construe the law, and you will not consider the printed circular as evidence of any particular construction to be given the statute. I wish to impress on you right in this connection that you are to give the language in the advertising matter its ordinary meaning which it would convey to the public.

You are to be congratulated that the trial of this case is drawing to a close. It has consumed nearly three weeks and necessarily has entailed a large expenditure of money. It is a matter of importance to the claimant and to the Government representing the public. You should give the evidence most careful and thorough consideration that you may arrive at a just and honest conclusion.

You will have with you two verdicts. The first which I happen to pick up reads after entitling the case: "The jury find in favor

of the claimant." If this is the verdict of the jury upon the issues of the case as they have been explained to you, you, Mr. Foreman, will sign that verdict and return it to the court.

The other verdict reads, after entitling the case: "The jury find in favor of the United States." If you find that all or any of the statements complained of are both false and fraudulent, you, Mr. Foreman, will sign that verdict, and in addition to your verdict you will designate in writing such statement or statements as you find to be false and fraudulent so that the claimant may hereafter omit these statements from its advertising matter.

Counsel have agreed that if the verdict is for the Government that this may be done.

The jury will, of course, take up the consideration of the questions involved in this case in a manner that seems most convenient to them; but in hope that it may aid you in your deliberations, the court suggests that you take the booklet and go through it carefully and consider what is said with respect to each disease mentioned, and if you find that any statement is untrue or so exaggerated as to be false, and you find further that such statement or statements are fraudulent within meaning of the terms as I have explained them to you, you will record such statements in connection with your verdict for the Government. If all that is said with reference to any certain disease is found to be both false and fraudulent, you can simply refer to it as such without copying the language. But if you find that some particular sentence or statement is both false and fraudulent, you will then quote it in your verdict. I have only referred to the booklet. In like manner you can go through the list of diseases on the carton and printed on the label on the bottle. In like manner you can consider the influenza circular.

After you have recorded your quotations, you will again sign, Mr. Foreman, at the end of the quotation.

You should weigh all of the competent evidence for and against the claimant upon the question, first, of the truth of the representations in the exhibits accompanying this particular shipment, and, second, upon the claimant's intent to deceive or defraud the public.

These are the two important issues for your determination. When you have reached a just conclusion, you should render your verdict in accordance therewith.

W. B. WOOD MANUFACTURING CO. v. UNITED STATES

(Circuit Court of Appeals, Seventh Circuit, Jan. 2, 1923)

286 Fed. 84; N.J. No. 12652

In error to the District Court for the Eastern District of Illinois. Judgment of condemnation affirmed.[18]

Before Baker, Alschuler, and Evans, Circuit Judges.

Evans, *Circuit Judge.* Judgment was rendered in the district court in favor of the defendant in error, libelant, confiscating certain color-

[18] Affirming *United States* v. *One Pound Can of Coal-Tar Color,* p. 1019, *ante.*

ing material, a product of coal-tar oil, after plaintiff in error had intervened and a trial on the merits had occurred. The issues were very much narrowed by the answer which admitted the manufacture and shipment of the objectionable material. Plaintiff in error denied that that the coloring material was adulterated, denied adding poisonous or other deleterious ingredients injurious to health, and denied any misbranding of the commodity. The controverted issues were resolved in favor of the Government by the trial judge who found:

(1) That the can of coal-tar color libeled in this case passed in interstate commerce and remained within the jurisdiction of this court unsold and in the original and unbroken package.

(2) That sodium chloride and sodium sulphate had been mixed and packed with the coloring matter in said can so as to lower and reduce and injuriously affect its quality and strength.

(3) That sodium chloride and sodium sulphate had been substituted wholly or in part for quality color, which the label on the can purported the article to be.

(4) That the can of coal-tar libeled contained an added poisonous or deleterious ingredient, to wit, arsenic, which may render said article injurious to health.

(5) That the statement borne on the label of the can, to wit, "Warranted comply with all requirements, quality color", is false and misleading and labeled so as to deceive and mislead the purchaser.

The coloring is manufactured for bakers, ice-cream manufacturers, and soft-drink producers, and the Government chemist found it to consist of:

Sodium chloride	39.14%
Sodium sulphate	3.61%
Tartrazine	30.00%
Orange II	16.00%
Arsenic	20 parts per million.
Balance—moisture and heavy metals.	

There are two kinds of color used in food—cochineal, which is rarely used and not here involved, and aniline color, which is the result of chemical combination produced by the mixture of two coal-tar derivatives. In its preparation it is necessary to use sulphanilic acid, which contains more or less arsenic trioxide.

The judgment is predicated on (*a*) the presence of arsenic, (*b*) too much salt, and (*c*) false labeling.

Concerning the presence of the arsenic in the product, plaintiff in error contends that unless the manufacturer adds the ingredient, arsenic, he is not liable under section 7, which provides the test:

Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health.

Because of the word "added", it is urged that the finding should be in favor of plaintiff in error, for at no time was arsenic added to the coloring.

It is further contended that the analysis fails to show arsenic in sufficient amount to render such article injurious to health.

It is established by the evidence that the arsenic in the coloring matter is traced to sulphanilic acid, which was added to the coal-tar derivative, and without this acid there would be no arsenic, or at least none in objectionable quantities. We therefore reject this first contention, for in the manufacture of this food product the manufacturer introduced the sulphanilic acid. In other words, the acid con-

taining the arsenic was added to the coal-tar product and therefore arsenic was "added."

We are not satisfied, however, that arsenic in such quantity as to be injurious to health was present.

The Government recognizes the impossibility of eliminating arsenic entirely. In fact, the testimony shows that the elimination of arsenic would be at most but a matter of degree. The Government certifies color when arsenic is present and when only slightly less than that found in the confiscated product.

The evidence in the case does not present a disputed issue of fact but rather a difference between chemists over the meaning of the words "deleterious ingredient, injurious to health." In recognizing that a small quantity of arsenic is not injurious to health, the Government acknowledges that this term is a relative one. Arsenic is found in infinitesimal quantities in so many articles of food that it has been said that the air we breathe, the water we drink, the smoke and dust we inhale, and all the foods we consume contain arsenic. If the term be an absolute one, then they would all be condemned. The quantity of arsenic found in this coloring material is so infinitesimal that when diluted as it is ordinarily used it would take years to produce "a dose" such as is ordinarily prescribed by physicians, 1/30 grain. In other words, one would be required to drink 150,000 bottles of soda before he would have consumed a quantity of arsenic sufficient to equal the "dose."

It may be true that by further process the amount of this drug may be reduced, but complete elimination is impossible. The Congress has not assumed to define with absolute particularity what is or what is not injurious, and we cannot accept the testimony of the one witness who testified for the Government to the effect that the word "injurious" is an absolute term. Rather do we conclude upon the testimony before us that the arsenic present in the quantity disclosed was not injurious to health.

After mixing the two coal-tar derivatives, to which is added the sulphanilic acid, the manufacturer is confronted with the problem of eliminating the water. This is done either by freezing or by salting, or by both freezing and salting.

As the color is invariably reduced when used, the manufacturer has found the salting method desirable because "up to a certain limit" the addition of salt produces a greater quantity of coloring material. It may be true that the more salt there is added, the less the user will dilute, but otherwise no injury to the product, as such, is occasioned by the presence of salt up to 40 or 50 percent of the gross quantity. The seller gives directions to the purchaser for the dilution, which vary according to the percentage of salt.

To reduce the salt content is expensive, but when it is reduced to a point below 5 percent, it is (other ingredients being satisfactory) properly subject for certification by the Government (F.I.D. No. 77).

The Government contends that shipping this coloring material containing 40 or 50 percent of salt in interstate commerce is a violation of section 7, which reads:

> That for the purposes of this Act an article shall be deemed to be adulterated:
> * * * * * * *

In the case of food:

First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

Second. If any substance has been substituted wholly or in part for the article.

* * * * * * *

Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health.

With this contention we cannot agree, unless, as here, the product is sold under a false label. In other words, we cannot accept the contention of counsel for the Government that the coloring material, weakened (but not injured) by the larger percentage of salt, violates section 7 of the act, so long as it is not labeled or sold as a certified color. In this respect, perhaps, the designation "quality color" is also objectionable and deceptive. In other words, we have presented a case where a food product (coloring material) is made and its lawful sale authorized, which contains an ingredient (salt), which is harmless in itself. The quantity of the ingredient used varies with each manufacturer and the product of each single producer also varies somewhat. Aside from its influence upon the cost of production, the presence of salt has the effect of increasing the quantity of coloring material and, regardless of the percentage used (up to 50 percent at least), it must be very greatly diluted by the user.

Upon these facts we have no hesitancy in saying that the statute does not, nor was it intended to, give the Secretary of Agriculture any authority to fix or establish an arbitrary percent (say 5 percent), beyond which the manufacturer cannot go without violating this section.

While holding that the salt content here shown does not violate section 7 of the act, no support of justification can be found therefrom for the attempt of plaintiff in error to sell its product as a certified coloring material with a salt content less than 5 percent.

The goods as shipped carried a label upon which appeared the following words:

"Warranted. Complies with all requirements. Quality Color. No. 810. Contents yellow."

Section 8 of the Food and Drugs Act reads:

That the term "misbranded," as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article * * * which shall be false or misleading in any particular, * * *.

That for the purposes of this Act an article shall also be deemed to be misbranded: * * *

In the case of food: * * *

Second. If it be labeled or branded so as to deceive or mislead the purchaser, * * *.

Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular * * *.

There are certain regulations or requirements of the Department of Agriculture dealing with the use of food coloring, and the Government contends, and we think justly, that the language quoted, "Warranted. Complies with all requirements", was intended, and

would reasonably tend to convey the belief that the color was warranted to comply with the food inspection decisions of the Department of Agriculture. Our attention has not been called to any other explanation that would give effect to the word "requirements." Inasmuch as the color under consideration did not comply with the requirements of the Department of Agriculture for certification, there was a misstatement, a misbranding of the package, which subjected the article to confiscation.

The judgment is affirmed.

UNITED STATES v. BLAZEK

(District Court, District of North Dakota, Jan. 15, 1923)

N.J. No. 11330

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of acquittal.

The jury was charged as follows:

MILLER, *District Judge*. Gentlemen of the jury: You have now heard all the evidence in the case and the views held and entertained by counsel with reference to the evidence introduced. The case is now ready to go to you, gentlemen of the jury, for your final consideration. If the court has at any time shown any anxiety with reference to the progress of the trial in this case, it has been because the court felt that it might possibly have been shortened up some in the trial, not because the court did not consider the case of any importance. It is an important case because Congress has seen fit to enact a law with reference to pure food. The plain purpose and intention of that law is to protect everyone from being compelled to buy or having imposed upon them impure food, and it is the duty of the prosecuting attorneys for the Government to see that that law, as well as all other laws, are enforced; so that it is important from the standpoint of the Government, whose duty it is to protect the people against impure foods, to enforce that law. It is also an important case from the standpoint of the defendant. The defendant stands charged here with having violated that law, violated a law of the United States, and that in itself is a mighty important thing to the defendant, and by that charge he is not only charged with having violated the law of his own Government but is also charged necessarily with unbusinesslike and unfair and unjust practices, so that it is a case that, so far as importance is concerned, well merits your careful consideration.

The law that the defendant is charged with violating is commonly known as the Pure Food and Drugs Act, passed by Congress on June 30, 1906, and that part of the law that is applicable to this case is a follows:

> That the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated within the meaning of this act,

which is as follows: If it consists in whole or in part of any filthy, decomposed, or putrid animal or vegetable substance so as to be unfit for food.

The information is as follows:

Philip Elliott, assistant attorney for the United States in and for the District of North Dakota, who for the said United States in this behalf prosecutes, in his own proper person comes into court on this 28th day of June, A.D. 1920, and with leave of court first had and obtained, gives the court here to understand and be informed as follows, to wit:

That Charles J. Blazek, trading as Blazek & Novotny, at Pisek, State of North Dakota, did within the Northwestern Division of the Judicial District of North Dakota and within the jurisdiction of this court, on or about the 19th day of July, in the year 1919, then and there in violation of the act of Congress of June 30, 1906, known as the Food and Drugs Act (34 Stat. L., 768), unlawfully ship and deliver for shipment from Pisek, State of North Dakota, to the city of Duluth, State of Minnesota, consigned to Levine Bros. Co., a certain consignment, to wit, a number of cases, each case containing an article of food marked and branded as follows, to wit: "Order of Blazek & Novotny, Pisek, N.Dak." Said article was billed as eggs.

That said article of food when shipped and delivered for shipment as aforesaid was then and there adulterated within the meaning of the said act of Congress in that it consisted in whole or in part of a filthy, putrid, and decomposed animal substance; all of which was and is contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Wherefore said attorney, in behalf of the United States, prays the consideration of the court here in the premises and that due process of law may be awarded against the defendant, in this behalf, to make answer to the United States touching and concerning the premises aforesaid. (Sworn to by Philip Elliott.)

Now, of course, you, gentlemen of the jury, will understand that the fact that this defendant was informed against by the United States district attorney as read to you and that pursuant to that information he has been arrested and brought to trial here is not any evidence of his guilt. It is merely the manner and form by which the Government brings to trial a defendant charged with an offense against the laws of the United States; and you are also told that every presumption of law is with the defendant, the presumption being that he is innocent of the crime charged until the Government has proven him guilty of the offense charged beyond a reasonable doubt. That presumption of innocence remains with the defendant during the trial of the case up to the time, if that time comes, when you, gentlemen of the jury, are satisfied beyond a reasonable doubt of his guilt. When that time comes, if it does come, the presumption no longer remains with him.

Before the Government can ask a conviction of the defendant at your hands, the Government must prove beyond a reasonable doubt each and every material allegation in the information, and you are told that the material allegations in this information, which the Government must prove beyond a reasonable doubt before it can ask a conviction at your hands, are three. The first one is that these particular eight cases of eggs were in fact, at or about the time and place mentioned in the information, delivered for shipment or shipped by this defendant. The second one is that they were delivered for shipment or shipped by him in interstate commerce, that is to say, from one State into another State of the United States; and the third material allegation is that the eggs at the time they

were shipped by the defendant, if they were shipped by him, were adulterated within the meaning of this act, and you are told as a matter of law that if at the time they were shipped by the defendant, if they were shipped by him, they were decomposed to such an extent that they were unfit for food, then they are adulterated within the meaning of this act. With reference to the first material allegation mentioned, namely, that you must find beyond a reasonable doubt that the defendant in fact did ship the eight cases of eggs mentioned in the information, the defendant himself on the stand testified that he did ship these eggs and that they were billed and shipped to Levine, at Duluth, in the State of Minnesota. If that is true, then he did ship the eggs, and they were shipped in interstate commerce. I don't think on those two material allegations you will have any trouble. So that brings the remaining material allegation in that information, which the Government must prove beyond a reasonable doubt, to one single fact, namely—at the time the defendant shipped these eggs, were those eggs at that time decomposed to such an extent that they were unfit for food—and that is the only question. You are told that it isn't necessary under this act that the defendant should know at the time he shipped them that they were decomposed to such an extent as to be unfit for food. Under this law he is supposed to know and in law is held to know whether or not the eggs were in fact adulterated, as I have described. So the question, as I said, narrows down to the single proposition—were the eggs at the time of shipment decomposed within the meaning of that act, as I have described to you? That is to be determined by you from all the evidence introduced in this case and all the surrounding circumstances that have been described to you and that come before you, and before you can convict this defendant of the crime charged in this information you must find beyond a reasonable doubt that at the time that he shipped those eggs and delivered them for shipment that they were rotten and decomposed to such an extent that they were unfit for food.

It has been testified in this case, and this court has permitted it to be shown by the Government, that some 12 days later when the Government's representatives examined and candled certain eggs in Duluth, said to be a part of these particular eight cases, that the particular eggs examined by the Government were at that time decomposed. Now you are told that the only purpose for which that testimony was admitted and the only reason it is competent at all is to permit you to say what bearing that fact, if it was a fact, may have on the question whether they were decomposed at the time they were shipped. In other words, the fact that they were decomposed and adulterated within the meaning of the act 12 days later would not make the defendant guilty. It was admitted for the purpose to let you say what evidence such facts were as bearing on the question whether 12 days before when he shipped them they were decomposed and adulterated within the meaning of the act, and the one further purpose whether or not, and that is for you to say, the particular eggs examined by the Government's agent on the 31st day of July at Duluth were in fact eggs shipped by this defendant, and unless you find that the particular eggs examined by the Government at Duluth on the 31st day of July were the identical eggs,

that is among and were the identical eggs shipped by this defendant, then, of course, there is no evidence in this case whatever to show that the eggs shipped by defendant were decomposed within the meaning of the act. So with such instructions on that part of the case I think you have the issues squarely submitted to you.

Now, I have said that you must find these facts beyond a reasonable doubt, and reasonable doubt is not a mere fanciful or capricious notion that a juror might get from some particular piece of evidence that is introduced. It means an honest doubt from all of the evidence introduced in the case and one that is founded in reason itself—a substantial question must arise in your mind whether or not the defendant is guilty. It is such a doubt that would in the more important affairs of your own life cause you to stop and hesitate and say that you were not certain which was right. If, on the whole evidence in this case, such a question and doubt has arisen in your mind as to whether or not the eggs at the time they were shipped and delivered for shipment by the defendant were in fact decomposed and adulterated within the meaning of the act, or if there is such a doubt in your mind with reference to whether the eggs as examined by the Government's agents in Duluth on the 31st day of July were the same eggs that were shipped by this defendant, then you have a reasonable doubt and you should acquit this defendant. If, on the other hand, after fully considering all of the facts and the circumstances in this case, you can say to yourself that you are morally certain, that you have an abiding faith, that these eggs shipped by the defendant on the 19th day of July, 1919, were at that time decomposed and rotten to the extent that they were unfit for use, then you are convinced beyond a reasonable doubt and your verdict should be guilty.

You are the sole judges of the credibility of the witnesses and the weight that should be given their testimony, and in weighing the testimony you should adopt such reasonable tests and standards with reference to the witnesses and the weight to be given their evidence as reasonable, prudent men would use in searching for truth with reference to their own affairs in life. You have a right, of course, to take into consideration the appearance of a witness, what he testified to, his means of knowledge, apparent candor or lack of candor, and all other circumstances that impress you as being worthy of consideration.

The defendant himself is a competent witness in his own behalf; he has testified in this case, and you should weigh his evidence and apply to his testimony the same rules and standards which you do to other witnesses, bearing in mind, of course, that he is the defendant and has some interest in the case. And if you should find and believe from the evidence that any witness has sworn falsely you may disregard his entire testimony or such parts of it as is not corroborated by other creditable evidence or circumstances surrounding the case that give credibility to it.

Now, gentlemen, I have prepared two forms of verdict in this case: One is "We, the jury, find the defendant guilty" and the other is "We, the jury, find the defendant not guilty."

Are there any exceptions?

DUFFY-MOTT CO. v. UNITED STATES

(Circuit Court of Appeals, Third Circuit, Jan. 15, 1923)

285 Fed. 737; N.J. No. 11712

In error to the District Court for the Eastern District of Pennsylvania. Judgment affirmed.[19]

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

BUFFINGTON, *Circuit Judge.* In the court below it appeared that the Government had seized for forfeiture nine cases of Sparkling White Seal, and that the Duffy-Mott Co. appeared and claimed. Thereupon the alleged cause for forfeiture was tried by a jury and a verdict having been found for the Government and judgment entered thereon, claimant brought this writ of error.

The decisive question is the alleged error of the court in refusing claimant's request for binding instructions. After examination of the issue and proofs, we are of opinion the point was properly refused.

The proceeding was under the Pure Food and Drugs Act which provides:

> an article shall [also] be deemed [to be] misbranded: * * * In the case of food: * * * If the package containing it or its label shall bear any statement, design, or device * * * which statement, design, or device shall be false or misleading in any particular.

The proofs show a well known brand of champagne, called White Seal, was sold in a distinctive bottle, the mouth of which was sealed with a white cap or covering. Such champagne could be sold by a druggist on prescription under legal permit. The claimant put carbonated apple juice, with capsicum added, into bottles, which in form and dress bore semblance to the White Seal champagne, and labeled them "Sparkling White Seal."

Referring to some, but not all of the testimony, one witness, experienced in the champagne trade, testified:

> The appearance of the bottle is misleading. At a distance I would think it was a pint of champagne.

The testimony of another experienced witness was:

> Q. In "design" and "device", can you say whether or not that bottle is misleading?
> A. It appears to me from here a bottle of champagne, as I would understand it.
> Q. Can you say whether or not in its general make-up it is misleading?
> A. In its general make-up it is, to my mind.
> Q. In the trade, would it be generally misleading to the trade, to the consuming trade?
> A. It all depends. It would depend on where the goods were sold. If they were sold in a grocery store I do not think so. If in a drug store, they might.
> Q. But I mean in its make-up without respect to where it was sold?
> A. In the style of the package you mean, in other words?
> Q. Yes.
> A. The style of the package is misleading.
> Q. The style of the package is misleading?
> A. Yes, sir.
> * * * * * * *

[19] Affirming *United States* v. *18 Cases of Sparkling White Seal,* p. 1023, *ante.*

Q. And if you could have read the words "Duffy-Mott" from your seat upon the witness stand, you would not have answered, would you, that it looked like champagne?

A. On the table there it looks like a champagne package, and I might say it looks like a bottle of champagne, unless I looked at the bottle closely and saw the label, then I would know it was not.

The court below rightly summed up the substantial question involved in the case in these words:

If the jury believe that the use of the words, "Sparkling White Seal," taken in connection with the way the bottle is put up, is a misleading statement, and taken in connection with everything else that is contained on the label the jury believes that the public generally would be deceived into thinking that they were buying champagne when in fact they were getting carbonated apple juice, with some capsicum in it, then the Government has made out its case. * * * The jury must find not that they might think it was some other kind of apple juice, or they might think it was some other kind of beverage, but they must think it was champagne. If the puplic is not deceived into thinking it is champagne, then the Government has failed to make out a case.

Under such proofs, manifestly the court would have been in error had it withdrawn the case from the jury.

Finding the mode of submission and charge to the jury were fair and without error, the judgment below is affirmed.

NINETY-FIVE BARRELS, MORE OR LESS, APPLE CIDER VINEGAR v. UNITED STATES

(Circuit Court of Appeals, Sixth Circuit, Apr. 3, 1923)

289 Fed. 181; N.J. No. 12367

In error to the District Court for the Northern District of Ohio. Judgment reversed.[20]

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, *Circuit Judge.* The United States filed a libel in the district court for the seizure and condemnation of 95 barrels of alleged apple cider vinegar, labeled "Excelsior Brand Apple Cider Vinegar made from Selected Apples", charging that this vinegar is both adulterated and misbranded in violation of the Food and Drugs Act of June 30, 1906. The Douglas Packing Company, the manufacturer and owner of this vinegar, intervened and denied that it was either adulterated or misbranded and asked restitution.

A written waiver of trial by jury was filed, and the case was submitted to the court upon an agreed statement of facts. The trial court found that the vinegar was not adulterated, but was misbranded in violation of general paragraph of section 8, and subparagraphs 1, 2, and 4 as to foods of section 8 of the Food and Drugs Act of June 30, 1906, as charged in said libel, and ordered its condemnation and forfeiture as provided by that act.

It appears from the agreed statement of fact that claimant, the Douglas Packing Company, is engaged in the manufacture of apple

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[20] Reversing *United States* v. *95 Barrels, More or Less, Alleged Apple Cider Vinegar*, p. 1047, *ante*. Judgment of Circuit Court of Appeals reversed by Supreme Court, *United States* v. *95 Barrels, More or Less, Alleged Apple Cider Vinegar*, p. 1118, *post*.

cider and apple cider vinegar; that during the apple season, from about September 25 to December 15 of each year, sound, mature, unevaporated apples are used by it in the manufacture of its products, and for the balance of the year evaporated apples of like quality are used.

The principal result of the evaporation process is the removal of 80 per cent of the water contained in the natural fruit. While it is not admitted that there are no other constituents of the apple removed by this process, yet it is admitted, in effect, that if any other constituents are removed by evaporation, the amount thereof is so negligible that the science of chemistry is unable to determine that fact. When the apple season is over and the evaporated apples are used by the claimant, in the manufacture of its products, substantially the same amount of pure water is added to the evaporated apples that was removed by the evaporating process. In all other respects the claimant employs the same receptacles, equipment, and process as in the manufacture from the unevaporated apple.

In the evaporating process small quantities of sulphur fumes are used to prevent rot, fermentation, and decomposition. This is wholly removed therefrom by the addition of barium carbonate, or some other chemical that eliminates itself and the sulphur compound by precipitation. After fining (clarifying) and filtration the cider or liquid obtained from the evaporated apple, upon chemical analysis will give results similar to those obtained by chemical analysis of apple cider made from unevaporated apples, except a trace of barium—in other words, an amount too small to be quantitatively measured. No claim is made that this trace of barium render the product injurious or deleterious to health, and, except for this trace of barium, the vinegar made from this cider or liquid obtained from the evaporated apple is similar in taste and composition to the vinegar made from the cider of the unevaporated apples.

It was evidently the purpose and intent of the Government and the claimant, in subscribing to the agreed statement of facts, to eliminate from consideration all unimportant matters and confine the issues to important basic questions affecting the substantial rights of the parties. These issues must be determined solely upon consideration of the facts admitted, regardless of the possibility that facts might have been established by evidence, at variance therewith and more in harmony with a supposed public opinion upon this subject.

The libel charges that this vinegar is adulterated in violation of paragraphs 1 and 2, under Food, of section 7 of the Food and Drug[s] Act of June 30, 1906, which paragraphs read as follows:

> (1) If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.
>
> (2) If any substance has been substituted wholly or in part for the article.

It is clear that this trace of barium, which is admitted to be neither injurious or deleterious, does not constitute adulteration within the meaning of either of the paragraphs of section 7 of the Food and Drug[s] Act above quoted *United States* v. *Lexington Mill and Elevator Co.*, 232 U.S. 399.

The question whether some other substance has been substituted wholly or in part for the article known as "apple cider vinegar,"

in violation of the second paragraph of this section, will be considered and discussed in connection with the charge of misbranding.

It is insisted, however, upon the part of the Government that the barrels are also labeled "Guaranteed to comply with all Pure Food Laws"; that this means not only the Federal Food and Drug[s] Act, but also the pure food laws of the State where this vinegar is intended to be sold at retail, after is passes beyond the jurisdiction of the Federal authorities. The libel, however, is based solely upon the adulteration and misbranding of this vinegar in violation of the Federal Food and Drug[s] Act. While it is alleged that the vinegar was shipped from Fairport, N.Y., to Fisher Brothers, Cleveland, Ohio, there is no allegation that the vinegar is to be sold in the State of Ohio or that it is adulterated or misbranded in violation of the Ohio statutes, nor is there anything in the agreed statement of facts in reference to its final destination and place of sale at retail.

If, however, it were conceded that this libel could be construed as charging that this vinegar is adulterated or misbranded in violation of the terms and provisions of the Ohio law, the same result must follow. Substantially the same questions are presented under the Ohio statute (sec. 5789 G.C.) in reference to misbranding, as are presented under the Federal Food and Drug[s] Act, which questions will be discussed later in this opinion. Upon the question of adulteration under the Ohio law, no claim is made that this vinegar contains less than 4 percent by weight of absolute acetic acid, nor is a mere trace of barium, which is neither deleterious or injurious to health, a "foreign substance" within the contemplation, intent, or purpose of sec. 5786 of the General Code of Ohio. *United States* v. *Lexington Mill and Elevator Co.*, *supra.*

Section 8 of the Food and Drug[s] Act provides, among other things, that, in a case of foods, an article shall be deemed to be misbranded if it be labeled or branded so as to deceive or mislead the purchaser, or it be an imitation of, or offered for sale under the distinctive name of another article.

The important question in each case is whether the product is the identical thing that this brand indicates. If it is the identical thing indicated by the brand, the method of its manufacture, regardless of the information of the general public upon that subject, is wholly unimportant.

It appears from the agreed statement of facts that the cider from which this vinegar was made was manufactured from apples and from nothing else. The process of its manufacture differed from the usual method only insofar as necessary to preserve the fruit. This was accomplished by the evaporation process above described. When a quantity of water equal to the amount evaporated is added to the evaporated apples and pressed therefrom it combines with and carries the solvent properties of the apples just the same as in the original state, or if not exactly and identically the same, so near as to defy the science of chemistry to discover the difference. This is the full scope and effect of the dehydrating process as appears by the agreed statement of fact.

The conservation of our food products is of some concern to the public, and, perhaps, second in importance only to the demand for

pure and unadulterated food. It is perfectly apparent that the apple season is altogether too short for the economical manufacturing of the crop, during the season, into cider vinegar in sufficient quantities for public consumption. Therefore an efficient and harmless method of preserving the fruit until it can be used for this purpose is in the direct interest of the public, and if this method has accomplished that object without change in the product, it should be encouraged rather than condemned.

If, after cider has been pressed from unevaporated apples, a large amount of the water that is a constituent part thereof, is evaporated therefrom and later an equal amount of water is added thereto, the constituent elements of cider yet remains and it would hardly be contended that vinegar made therefrom would not be apple cider vinegar; yet, so far as the agreed statement of facts discloses, there is substantially no difference between the evaporation of water from the cider and evaporating the water from the apple before the cider is pressed therefrom. The water is not all evaporated, leaving only a hard dried fruit, as may approximately result from sun drying; 20 per cent of the water remains and this continues to be the condensed juice of the fruit ready for restoration by pure water dilution to its original volume. This was the underlying idea of the Allen patent, No. 268972, for a dry mince pie compound, in which it appears that the water was evaporated from the apple for the purpose, as stated by the patentee, " so that I have the cider in my compound without useless water, which may be added when the consumer wishes to use it." *Dougherty* v. *Doyle*, 63 Fed. 475.

It must also be assumed that legislation upon any subject has some definite and substantial object in view, and is not in furtherance of technical purposes or barren idealities. It was declared by the Supreme Court in *U.S.* v. *Lexington Mill and Elevator Co.*, 232 U.S. 399, that the primary purpose of Congress in enacting the Food and Drug[s] Act of 1906 was to prevent injury to the public health by the sale and transportation in interstate commerce of misbranded and adulterated food. That case involved the manufacture of flour by a new process, called the "Alsop process ", and while the charge there was adulteration, by adding to articles of food consumption poisonous and deleterious substances, a much more serious matter than misbranding, yet the court held that in order to condemn a food product upon the ground that it is adulterated, it is incumbent upon the Government to establish the fact that the added substances may render the article injurious to health. This conclusion was reached evidently upon the theory that the legislative intent was to accomplish a substantial and beneficial result to the public and not merely for the purpose of exercising an arbitrary control over private business.

It is undoubtedly true that vinegar not made from apple cider, even though chemically equal to cider vinegar, may not be branded as such. On the other hand, vinegar made from apple cider is not misbranded by reason of its failure to meet the chemical test.

Misbranding is included in the statutory prohibition because it bears some relation to the conservation of the public health and not primarily because a purchaser's whims were to be protected; and, though doubtless the test of misbranding a product is whether it is

true to name, there is no occasion for overstrictness in applying this test in a case where the public health cannot possibly be jeopardized.

In the Standard Encyclopedia, under the caption "Cider", it is said:

> Apples commonly used for making cider are by no means tempting to the palate and are, in fact, unfit for eating raw or ordinary cooking. * * * In the United States it is considered that a certain proportion of decay in fruit improves the flavor.

Keeping in mind the underlying purpose to protect the public health and the admissions in this case that the present article is made wholly from "sound and mature apples, free from rot and ferment," it is clear that condemnation should not be made unless the statute imperatively requires it.

Definitions of cider, which include the method or process of its manufacture, written long before public needs required the conservation of our food products, are not helpful to the determination of the question presented in the instant case. Even these definitions call only for the juice of apples, and do not literally exclude the pressing of apples dehydrated and later hydrated in equivalent proportions. The missing and essential element for the Government's case is found only in the supposed judicial knowledge that the popular definitions have reference only to fresh apples. Such knowledge was declared in the court below, and the judgment based thereon. The danger of reliance on judicial knowledge founded on past impressions is well illustrated by the salad oil cases. The very branding which the court, in *Brina* v. *U. S.*, 179 Fed. 373, said it judicially knew was so untrue as to compel the conclusion of misbranding, two years later was shown to the same court in *VonBremen* v. *U.S.*, 192 Fed. 904, to be so true as to require an instructed verdict for the respondent. In the present case it is conceded that this identical product has been sold and accepted by the trade under this name, in great quantities for many years and without challenge until now. While there is nothing in the agreed statement of facts to show how far this acceptance has been with knowledge, yet the court cannot judicially know that this acceptance was so wholly without knowledge of the facts as to be unimportant.

It is not seriously contended on the part of the Government that the fluid obtained from pressing the evaporated apples, after the water taken therefrom has been restored, is not apple cider. It is suggested that possibly there is some constituent element of the apple removed by the dehydrating process that is never restored thereto. There is no proof of that fact, but there is an admission that even if such constituent element is removed it is so immaterial and inconsequential in quantity, that the science of chemistry cannot disclose it. This brings this case clearly within the doctrine announced in *U.S.* v. *Lexington Mill and Elevator Co.*, *supra*, to the effect that the burden is upon the Government to establish by the evidence, not merely a technical, but a substantial, violation of the Federal Food and Drug[s] Act, which may render the article injurious to health or mislead the public to its prejudice or harm or induce the purchase of a different article than the article desired.

Nor should the fact be overlooked that this is a highly penal statute. The Government in this proceeding is asking the condemna-

tion and forfeiture of 95 barrels of vinegar because it is adulterated and misbranded, and the burden is upon the Government to establish one or both of these alleged facts.

While the Government is practically conceding in the agreed statement of facts, that the liquid obtained from evaporated apples by this method is apple cider, identical in taste, substance, and chemical test with apple cider pressed from the unevaporated apples, except that there may, perhaps, be some constituent element lacking, the quantity, if any, being so small that its absence is not shown by chemical test, and further conceding that the same has been sold upon the market for many years as apple cider, and that vinegar made therefrom has been an article of commerce, at least since January 1, 1906, under the name and brand of apple cider vinegar, and sold in quantities by this one manufacturer alone, aggregating 100,000 barrels a year; nevertheless, it is now insisting that the branding of this product as apple cider vinegar is calculated to deceive and mislead the purchaser into buying an article other than the brand implies.

It may be true that a large part of the purchasing public has no knowledge whatever in reference to the manufacture of cider from evaporated apples, and for that reason might have a distinct prejudice against such a method of manufacture. Undoubtedely the Pure Food and Drug[s] Act contemplates the protection of the public in this regard, but only to the extent that the public shall not be deceived or misled by the brand into buying an imitation of the article or a substitute for the article indicated by the brand. If, however, it is, in truth and in fact, buying the identical article indicated by the brand, manufactured from the same basic elements, and none other, the purpose of the statute is accomplished, and the process of manufacture is of no importance.

A substantial, if not an exact analogy, may be found in the manufacture of maple sirup. The water is partially evaporated from the sap of a maple tree in order to produce maple sirup. If the evaporation process is continued until sufficient of the water is evaporated, the product is maple sugar. If to this sugar there is added as much water as was evaporated therefrom in the process of reducing maple sirup to maple sugar, and the sugar is dissolved and held in solution, the product again becomes maple sirup. It has been held by the pure food department (Circular 136) that maple sirup manufactured in this way may be properly branded "Maple Sirup."

Yet, notwithstanding such sirup responds to the chemical tests, a doubt might be suggested that possibly a constituent element was removed from the maple sirup in the process of reducing it to maple sugar that could not be wholly restored thereto. It is also possible that there might be a popular prejudice against maple sirup manufactured in this way, yet it would hardly be contended that Congress is expending its time in the enactment of laws in furtherance of perpetuating prejudices founded upon mistake and misunderstanding and at war with the conceded facts of the case.

Another illustration may test the soundness of the proposition that there is a misbranding of this vinegar. Cream is a substance which, by the unaided process of nature, rises to the top of milk.

A generation or two ago this would have been the popular definition. The process of its development was well known and required, at the least, some hours of time and favorable conditions. Then it was discovered that the butter fat can be separated from the milk in a few minutes by a centrifugal separator, and that the product is really cream; yet it is at least probable that for some time a substantial part of the public would have refused to buy butter fat in this form unless it had been labeled "cream" and without disclosing the substitution of artificial for natural methods. So the catalog of present-day foods and those that may fairly be developed will disclose frequent instances of great change in methods of manufacture, or treatment, without any resulting necessity of changing the name of the product.

We get no controlling direction from the decided cases. The salad oil cases have been mentioned. In the vinegar case (186 Fed. 399), the product, was in fact distilled vinegar with a dash of apple cider. It was labeled as a blend of cider vinegar and distilled vinegar. From the view that the court took of the meaning of the label, the misbranding was obvious.

In the *Tepee Apple Case*, 179 Fed. 185, the label was considered to mean that the apples were grown in Michigan, and this became a geographical misrepresentation expressly forbidden by the act.

We do not overlook that the New York Supreme Court and the United States District Court for the Eastern District of Wisconsin have held that claimant's vinegar is misbranded. In each case the opinion seems to be based in part upon inferences and testimony not presented by this record and in part upon judicial knowledge that nothing is apple cider unless it is pressed from fresh apples—an inference wholly inconsistent with the facts here conceded.

For the reasons above stated a majority of the court is of the opinion that the judgment of the district court is not sustained by the agreed statement of facts. The judgment is reversed and cause remanded for further proceedings in accordance with this opinion.

UNITED STATES v. JOHN DOBRY MANUFACTURING CO.

(District Court, N.D. Iowa, Apr. 4, 1923)

N.J. No. 12873

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

The following charge was delivered to the jury:

SCOTT, *District Judge*. Gentlemen of the jury: The defendant, John Dobry Mfg. Co., a corporation of this county and State, has been informed against by the United States Government in conformity with the regular practice in that respect, charging the defendant with a violation of an act of Congress known as the "Food and Drugs Act", and in that respect the Government charges that John Dobry Mfg. Co. within the jurisdiction of this court and on or about the 24th of February, 1921, then and there in violation of the act of Congress of

June 30, 1906, known as the "Food and Drugs Act", as amended by the Act of August 23, 1912, did unlawfully ship and deliver for shipment by the United States mail from the city of Cedar Rapids, State of Iowa, to the city of Maywood in the State of Illinois, and consigned to F. Hackman, certain packages containing an article designed and intended to be used in the cure, prevention, and mitigation of diseases of hogs. That is to say, a certain article of drugs bearing statements, designs, and devices regarding its therapeutic and curative effects, and labeled, marked, and branded on said package as follows: "Dobry's Positive Cure for Hog Diseases. The first positive cure for hog cholera and tuberculosis known to the world. Allays fever, destroys lung and intestinal worms, relieves constipation, purifies blood, cures cholera, tuberculosis, thumps, coughs, and scours in hogs and suckling pigs. Prevents cholera, tuberculosis, and other hog diseases. Manufactured by John Dobry Manufacturing Company, Cedar Rapids, Iowa, U. S. A. Dobry's positive cure for hog cholera, tuberculosis, and other hog diseases. Dobry's Positive Hog Cure, 'Worth Its Weight in Gold.' Manufactured from pure medicinal drugs by John Dobry Manufacturing Company, Cedar Rapids, Iowa, U. S. A." Which said article, shipped and delivered for shipment as aforesaid, was then and there misbranded within the meaning of said act of Congress as amended, in that the statements, designs, and devices regarding the therapeutic and curative effects thereof, appearing on the packages as aforesaid, were false and fraudulent in this, that the same were applied to said articles knowingly and in reckless and wanton disregard of their truth or falsity, so as to represent falsely and fraudulently to purchasers thereof, and create in the minds of purchasers thereof the impression and belief that the article was in whole or in part composed of or contained ingredients or medicinal agents effective, among other things, as a treatment, remedy, and cure for hog cholera, tuberculosis, and other hog diseases, and effective as a treatment, remedy, and cure for coughs and scours in hogs and suckling pigs, and effective to destroy lung and intestinal worms, and effective as a preventive of cholera and tuberculosis in hogs, when, in truth and in fact, said article was not, in whole or in part, composed of, and did not contain ingredients or medicinal agents effective as a treatment, remedy, or cure for hog cholera, tuberculosis, or other hog diseases, or effective as a treatment, remedy, or cure for coughs or scours in hogs and suckling pigs, or effective to destroy lung or intestinal worms, or effective as a preventive of cholera or tuberculosis in hogs; all of which was and is contrary to the form of the statute in such case made and provided.

To this charge the defendant has pleaded not guilty, and you are instructed that this plea puts in issue and is a denial of each and every material allegation of the information, and every ingredient composing the facts charged. It places upon the Government the burden of proving each and every material allegation of the information against the defendant beyond all reasonable doubt, and to exclude from your minds all reasonable doubt of the defendant's innocence.

The defendant is presumed to be innocent until he is proved otherwise throughout the entire trail, and until the Government by evidence so strong and convincing has removed from your minds every reasonable doubt of innocence and established with that degree of evidence the defendant's guilt.

A reasonable doubt is a substantial one and not a captious or fanciful one. It is a doubt that naturally arises upon the evidence or from a lack of evidence, and not one that is forced, not one that arises in your minds merely because of some desire to avoid the discharge of duty, or on the mere desire to acquit the defendant.

The act of Congress under which this charge is brought, in substance, provides that the introduction into any State from any other State of any drugs which are misbranded within the meaning of the act is a misdemeanor. It prohibits such introduction, and it provides that any person who shall ship or deliver for shipment from any State to any other State such articles so misbranded shall be guilty of a misdemeanor and subject to a fine named in the act.

The act of Congress further provides that the term "misbranded" shall apply to drugs, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein, [which] shall be false or misleading in any particular; and in case of drugs if its package or label shall bear or contain any statement regarding the curative or therapeutic effect of such article, or any of the ingredients or substances contained therein, which are false or fraudulent.

Now, it is not necessary that the Government shall prove that each and all of the statements contained on the package or on the label are false or fraudulent. If the Government has established by the degree of evidence which I have explained to you any one material statement or representation upon the package or label of the kind defined as misbranded, and has so established it beyond a reasonable doubt, and that the article was introduced by the defendant from one State into another State knowingly and fraudulently, then you should find the defendant guilty. But if the Government has failed to establish to your satisfaction by that degree of proof and beyond a reasonable doubt any one of the charges of misbranding, then you should acquit the defendant.

You will note that one of the statements contained in the printing on the package is that the commodity referred to was a "Positive Cure For Hog Diseases," that it was "The First Positive Cure for Hog Cholera and Tuberculosis known to the world." In that respect you are to give to the word "positive" and to all other words contained in the information such meaning and purpose as the word generally signifies and the thought which it is generally intended to convey. It is not necessary for the Government in a case of this character to prove or establish or even introduce any evidence tending to prove that any particular person has been defrauded. The act of Congress in question prohibits the introduction into one State from another of the article so misbranded; and it is such introduction under the circumstances with the intent named in the statute that constitutes the crime, and not the fact that some one particular person has been deceived. So, if the evidence in this case convinces you beyond all reasonable doubt that on or about the time named in the information the defendant, John Dobry Manufacturing Company, through the agency of the United States mail, introduced into the State of Illinois from the State of Iowa, the articles or drugs referred to in the testimony, and printed as alleged in the information, and if you further find from the evidence beyond all reasonable doubt that the statements referred to in the information with respect to the curative

quality of the contents of the package and their therapeutic qualities were false and known to be false by the defendant, and fraudulently introduced into the other State, then it is your duty under the law and under your oaths to find the defendant guilty. But if the Government has failed to so prove to your satisfaction and beyond a reasonable doubt, it is equally your duty under the law and under your oaths to acquit the defendant.

You are the sole judges of the weight of the evidence and the credibility of the witnesses who have testified before you. You are not bound to take the testimony of any witness as absolutely true, and you should not do so if, for any reason, you are satisfied that the witness is mistaken or that his testimony is untrue or unreliable. In determining the weight and credibility of the testimony, or any part thereof, you may and should consider the relation of the witness to the case and his interest therein, his temperament, bias, or feeling, if any has been shown upon the witness stand, his apparent intelligence and means of knowledge and information. Witnesses who testify upon matters with respect to which they have little means of knowledge or information, such testimony should be received with caution. You should take into consideration their apparent intelligence, their situation, and ability to know the matters with respect to which they have testified, the reasonableness or unreasonableness of their testimony, and give such weight and credit to the testimony of each witness as under all the facts and circumstances in the case as they appear in evidence on the trial you think it entitled to receive.

The Government has asked me to give a particular instruction to the effect that if you believe from the evidence that any one of the therapeutic statements upon the printed matter set out in the Government's information was partly true, but was so artfully worded as to convey a meaning as to its therapeutic properties which was wholly false, and that the printed matter was so worded for the purpose of deceiving the public, then that statement would be false and fraudulent, and you may find a verdict for the Government.

That is the law as an abstract statement, but in giving it to you I wish to qualify it to the effect that you must still find, from the evidence on the whole case, beyond a reasonable doubt, that any false statement as stated in this instruction, if you find that such false statement was made, must have been knowingly made, and must have been made with the intent to defraud.

The court submits you two forms of verdict:

Form of verdict no. 1: "We, the jury, find the defendant guilty as charged in the information."

If you agree upon such verdict, have your foreman sign and return it into court.

Form of verdict no. 2: "We, the jury, find the defendant not guilty as charged in the information."

If you agree upon such verdict, have your foreman sign it and return it into court.

You will take with you the exhibits that have been introduced in evidence and the forms of verdict, and accompany the officer and begin your deliberations.

When you have agreed upon a verdict, return the same into court. You may pass out with the officer.

Mr. REDMOND: The defendant excepts to such portion of the court's charge as might warrant the jury in finding the words "Positive Cure" a misstatement of the therapeutic or medicinal value of the drugs and medicine included in the package. Otherwise than that, Your Honor, I guess I have no exceptions.

NEWTON TEA & SPICE CO. v. UNITED STATES

(Circuit Court of Appeals, Sixth Circuit, Apr. 5, 1923)

288 Fed. 475; N.J. No. 11711

In error to the District Court for the Southern District of Ohio. Judgment affirmed.[21]

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, *Circuit Judge.* Plaintiff in error was proceeded against by information for the violation of the misbranding provisions of the national Food and Drugs Act (Act June 30, 1906, 34 Stat. 768, ch. 3915, secs. 2, 8). The article of food in question is an egg substitute called "Eggno," whose principal ingredients and their relative proportions are commercial (imported) egg albumen and egg yolk, dried and pulverized (aggregating about 15 percent), powdered and evaporated skimmed milk, about 35 percent (as indicated by the Government's proofs, apparently much less by defendant's formula), and tapioca starch, between 40 percent and 50 percent. There were also contained small amounts of powdered sugar, vegetable gum, and salt, with an artificial coal-tar coloring, not alleged to be either injurious or unlawful. The product is not claimed to contain any deleterious ingredients or to be injurious to health. It is sold in packages containing 36 teaspoonfuls. The carton contains the label and statements:

> Newtons Eggno. Artificially Colored To Be Used In Place Of Eggs In Baking And Cooking. 3½ Oz. Net. An Excellent Substitute For Eggs. Eggno is an excellent Substitute for Eggs and is to be used for Baking and Cooking purposes. Splendid for Cookies, Cakes, Muffins, Fried Cakes, Bread Puddings, Gravies. Just the thing for Griddle Cakes, Noodles, etc. Eggno is an article of real merit and is far superior to the usual egg substitutes on the market. Eggno contains the constituents that cause fresh eggs to fill such an important place in every kitchen. Eggno is the result of scientific research, is composed of pure materials, is nutritious and is economical, as one even teaspoonful is to be used in place of each egg called for in recipes requiring eggs. This package contains 36 even teaspoonfuls. Guaranteed to conform to the Pure Food Laws. Directions. Dissolve Eggno in lukewarm water or milk by first making a paste and then adding the balance of the water or milk. Use a teaspoonful for each egg called for in recipes requiring eggs. In baking use a trifle more baking powder than if eggs were used. Eggno does not take the place of baking powder. Prepared and guaranteed by the Newton Tea & Spice Co. 12–14–16–18 East Second St. Cincinnati, Ohio.

The alleged misbranding consists in the following statements concerning the product and the constituents and uses thereof, viz.:

> To Be Used in Place Of Eggs In Baking And Cooking. * * * An Excellent Substitute For Eggs * * * to be used for Baking and Cooking purposes.

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[21] Affirming *United States* v. *Newton Tea & Spice Co.*, p. 950, *ante*.

* * * Eggno contains the constituents that cause fresh eggs to fill such an important place * * * one even teaspoonful is to be used in place of each egg called for in recipes * * * Use a teaspoonful for each egg called for * * *

which statements are alleged to be false and misleading in that the product was not a substitute for eggs and could not be used in place thereof for baking and cooking; further misbranding being charged in that it was so labeled as to deceive and mislead purchasers into the belief, contrary to the fact, that the product was in truth a substitute for eggs and could be used in place thereof for baking and cooking. A motion to quash the information because indefinite and argumentative, and because the court had no jurisdiction, was overruled (275 Fed. 394), as was a demurrer to the information as not stating facts constituting an offense against the Federal laws. There was trial to a jury. A motion to direct verdict for defendant was overruled, and the case submitted, resulting in verdict and judgment for the Government.

The meritorious controversy arises from the opposing contentions of the Government and defendant, respectively, as to the scope of the comparison of the value of eggs and Eggno. The Government contends that such comparison must take into account their respective food values, and presents undisputed evidence that while eggs contain in marked degree not only proteins or tissue-building elements absolutely necessary to growth, but calorific or energy-supplying elements, Eggno contains neither of those elements to more than about one-seventh the extent as do eggs (which is, in effect, about the proportion in which egg constituents enter into the manufactured product); and thus that Eggno signally fails in food value. The Government also introduced testimony to the effect that Eggno was inferior to eggs, in that the latter produced the better baked product, both as respects consistency and taste. Defendant contended that as Eggno was intended only for use in baking and cooking, the question of comparative food value should be entirely disregarded, and that the comparison should be confined to the qualities of binding or settling, or producing desired fluffiness, texture, flavor, and color, and presented evidence sharply conflicting with that of the Government concerning the effectiveness of Eggno as compared with eggs, with respect to appearance and flavor of baked and cooked products.

In overruling the motion to direct verdict for defendant, the trial judge rejected the proposition that, as matter of law, the comparative nutritive values of Eggno and eggs should not be taken into account, and left it to the jury to find as facts whether the statement on the carton that one even teaspoonful is to be used in place of each egg called for in cooking recipes is equivalent to an assertion that one teaspoonful is equal to an egg in such recipe; whether Eggno contains the constituents which cause fresh eggs to fill such an important place in the kitchen; whether Eggno is a substitute for eggs as that language would be understood by the ordinary purchaser; and whether one teaspoonful of Eggno may properly be used in cooking recipes in place of each egg called for. The jury was instructed that if the product in question is in fact well adapted to be used instead of eggs in baking and cooking, and if it is in truth genuinely fit to be used in place of eggs for those purposes, then the label is not false, but that if Eggno was not well fitted to be used as a substitute for eggs in baking and cooking and if it is not genuinely well adapted to be used

in place of eggs, then the label was false. The jury was further instructed that the question is not, on the one hand, whether the product is absolutely worthless, or, on the other hand, whether it is a complete and perfect substitute for eggs in all respects, but that the true question is whether the language of the label complained of in the information is false and misleading to the ordinary purchaser in the respects charged therein.

In our opinion the motion to quash the information was rightly overruled. The statute provides that an article of food shall be deemed to be misbranded "If the package containing it or its label shall bear any statement * * * regarding the ingredients or the substances * * * therein, which statement * * * shall be false or misleading in any particular." We think the information is not subject to criticism as being indefinite and argumentative. The certainty required in the information is only such as will fairly inform the defendant of the offense intended to be alleged, so as to enable it to prepare its defense and so as to make the judgment a complete defense to a second prosecution for the same offense (*United States* v. *Hess*, 124 U.S. 483; *Tyomies Publishing Co.* v. *United States* (C.C.A. 6), 211 Fed. at p. 389; *Bettman* v. *United States* (C.C.A. 6), 224 Fed. 819, 826–7). We think defendant was by the information in question sufficiently informed of the nature of the accusation and was fully protected thereby. It is the general rule that it is enough to describe a statutory offense in the words of the statute; and if in this case defendant was in doubt whether the Government would claim that the product contained the same food value as eggs, or that it lacked leavening or some health-producing quality, it was open to it to apply for such additional information by way of a bill of particulars. (*Dierkes* v. *United States* (C.C.A. 6), 274 Fed. 75, 77, 79, et seq.) No such request was made.

The asserted lack of jurisdiction of the court is based in part upon the proviso to the section above quoted, that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded (in the case of mixtures or compounds known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article), if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced. We think this proviso has no application to a case where, as here, the charge is misbranding, and is directed not against the name, but against the false statements upon the label. (*United States* v. *150 Cases, etc.* (D.C.), 211 Fed. 360; *United States* v. *40 Barrels, etc.* (D.C.), 191 Fed. 431, 440.)

Nor do we see any merit in the proposition that the statement on the label that Eggno is an excellent substitute for eggs and is to be used for baking and cooking purposes is merely one of opinion, and so within the *Johnson Case* (221 U.S. 448, 489), where it was held that a statement on the labels of bottles of medicine that the contents are effective as a cure for cancer is not within the statute, even if misleading, as being false only in its commendatory and prophetic aspect. Such is not the case with the label we are here considering. It not only represents the product as a substitute for eggs—a representation, the effect of which, if it stood by itself, we are not called upon to consider—but it states as facts that the product can be used in place

of eggs for baking and cooking, that it is nutritious, and that it contains the constituents of fresh eggs. Regardless of the claimed literal truth of each one of these assertions, they must be taken in connection with each other and with the further recommendation that one teaspoonful be used in place of one egg, and in connection with the further fact that this label was not intended to be carefully dissected with a dictionary at hand, but rather to produce an impression upon the ordinary purchaser of such an article and, when so taken, it was open to the jury to conclude that these representations were intended to produce the belief that one teaspoonful of the product was substantially equivalent to one egg for all the purposes, including nutrition, involved in the use of eggs in baking and cooking. With that interpretation, of course, these statements pass beyond mere commendation; and in the aspect of the case presented by the contention that verdict for respondent should have been directed, it is not necessary to consider what would have been the effect of the label if any part of it had been omitted.

In our opinion the trial judge did not err in refusing to withdraw from the jury's consideration the question of the comparative nutritive value of Eggno. In view of the statements in the label to which we have just referred, the mere reference to baking and cooking is not, in our opinion, enough to confine the statements of quality to considerations of appearance and flavor. The terms "baking" and "cooking" relate to foods, and eggs are a well-known article of food, not only alone but in combination with other articles of food. Granted that the statement that an article is or may be used as a substitute for another article does not amount to an assertion that it is as good for all purposes as such other article, in our opinion the statements upon the label, considered together, can reasonably mean, and could reasonably have been intended to mean, no less than that in ordinary culinary compounds Eggno would produce the same or similar results as eggs.

It follows from these views that there was no error in the admission of testimony as to the comparative food value of eggs and Eggno. Nor do we think the court erred in refusing defendant's special requests to charge, many of which were expressly based upon the elimination of values from consideration. While each of the rejected requests did not in terms declare such elimination, all, as frankly said by defendant's counsel (we do not use his statements in detail or in his exact words), were designed to convey to the jury defendant's contention that the nutritive value of a whole egg for all purposes was not in issue, and that the evidence already admitted as to the tissue-building and energy-supplying elements of eggs was incompetent.

It is thus not material whether or not in the case of some of the refused requests a sufficient ground of refusal was stated. At least as applied to the facts in this case, we find no error in the instruction that the purpose of the label was to "truthfully advise the purchasers of the contents." We say this in full recognition of the fact that a label may, in the absence of fraud, be entirely void of any statement of content, and be entirely outside the provisions of the act; but in this case defendant undertook to state generally the nature of the contents of the package.

While we have not discussed in detail each argument presented by defendant in favor of its contentions, we have carefully considered them all, with the result that we find no error in the proceedings below.

The judgment of the district court is accordingly affirmed.

UNITED STATES v. SHERER-GILLETT CO.

(District Court, N.D. Illinois, Apr. 9, 1923)

N.J. No. 11450

Information in four counts alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict directed for defendant on two counts. Verdict of guilty on other two counts.

CLIFFE, *District Judge*. Gentlemen of the jury: This is an action brought in which the United States Government is the plaintiff and the Gillett Company here is the defendant and it is brought under the so-called law known as the "Food and Drug [Drugs] Act" of June 30, 1906. This is an act for preventing the manufacture, sale, or transportation of adulterated or misbranded food products, medicines, or liquors and for regulating the traffic therein and for other purposes. It is a law of commerce.

The present prosecution is based on an information which is filed in this court, and this information contains four counts, setting up the offense charged. But I instruct you that you are to disregard counts one and three and are only to consider counts two and four, and counts two and four relate to what is known and designated in the law as misbranding, and it is covered under section 8 of the law that I have referred to. I read to you section 8 which refers to misbranding particularly to that term "misbranding" of section 8 of this law. The term "misbranding" as used herein, as used in this law, shall apply to all drugs or articles of food or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such articles or the ingredients, or the substance contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded. An article shall also be deemed to be misbranded in case of food if it is labeled or branded so as to deceive or mislead the purchaser.

There are several questions that enter into the consideration of this case, and one of which is the question of interstate commerce, that is, that the product in question was shipped from one State to another, and counsel have entered into a stipulation or an agreement, which has been offered in evidence, which admits certain facts in the case.

It is agreed by the respective counsel that these witnesses if placed upon the witness stand would testify to the facts hereinafter set forth; and that this be given the same weight by the court and jury herein as if such witnesses were placed on the witness stand and testified to such facts in open court; and that the facts hereinafter set forth shall by the court and jury and parties hereto be taken to be true and correct; that the Sherer-Gillett Company, a corporation, having a place of business in the city of Chicago, on the 21st day of February in 1919, did knowingly ship and deliver to be shipped by way of the Union Pacific Railroad, being a common carrier, from the city of Chicago to Rawlins, Wyoming, assigned to J. A. Hobbs, an article of food in a package designated and labeled as follows, which you have the samples before you.

Magic Brand Trade Mark Lemon Pie Filling Absolutely Pure and of Good Keeping Qualities * * * contains in concentrated form the same ingredients

used by the housewife in making a Lemon Pie Manufactured By Sherer-Gillett Co. Chicago, Illinois.

The stipulation admits that they did ship and deliver for shipment this article of food in package form as designated, labeled, and branded. And it is before you without rereading the label in regard to orange pie filling; and that it also admits that this product was received at Rawlins, Wyoming, by J. A. Hobbs on or about the 6th day of March, 1919, in the due course of business; and then it also admits that on the 27th day of May, 1919, C. Stanley Greenbaum, a duly and lawfully appointed inspector of the Bureau of Chemistry of the United States Department of Agriculture, purchased from Mr. Hobbs, which he had a right to do, samples of the food aforesaid and, immediately after purchasing, the same was duly sealed and designated with numbers, that have been adduced in evidence here, and delivered by him to the department of chemistry of the said department for analysis, concerning which said witness testified and shall be taken and considered by the court and jury and the parties hereto to be the analysis made by the Bureau. The stipulation is signed by both parties and is admitted in evidence.

As to counts 2 and 4, count 2 charges that on the 21st day of February, 1919, in violation of the act of Congress, June 30, 1906, known as the "Food and Drug [Drugs] Act", this defendant did unlawfully ship and deliver for shipment by way of the Union Pacific Railroad Company, a common carrier, to its assignee in Rawlins, State of Wyoming, a number of packages, each package containing an article designed and intended to be used as an article of food, which said packages were labeled, marked, and branded as already described; that the said articles of food when shipped and delivered for shipment as aforesaid was [were] misbranded in that the statement was made as to the lemon pie filling that it "contains in a concentrated form the same ingredients used by the housewife in making lemon pie"; that the branding on the packages containing the articles, regarding the articles and the ingredients, were false and misleading, and that they represented that the article called lemon pie filling did contain in a concentrated form the same ingredients used by the housewife in making lemon pie, whereas, in truth and in fact, said article was not lemon pie filling which contained in concentrated form, etc., and the same allegation is made as to orange pie filling.

Now in this information, as I said to you, you are to consider counts 2 and 4. I instruct you that the information in this case preferring this charge against the defendant is no evidence whatever of the guilt of the defendant. It is simply an accusation or charge and no juror should suffer himself to be influenced in the slightest degree by the fact that this information has been returned against the defendant.

The court instructs you if you find from the evidence beyond a reasonable doubt that the label is false and misleading in any particular you should find the defendant guilty. It is not necessary for the Government to prove nor for you to find that the label is false or misleading as a whole, it is sufficient for you to find from the evidence that the label is false or misleading in any particular.

You are further instructed that if you find the label is false or misleading in any particular that it is immaterial whether these false statements are placed there consciously or unconsciously, if you find from the evidence that it is there, your verdict should be, guilty.

It is the duty of the jury to receive the law as it is given them by the court. It is the exclusive province of the court to determine what the law is, and the jury have no right to hold the law to be otherwise in any particular than is given to them by the court.

The court instructs you as a matter of law that in considering the case you are not bound to go outside of the evidence to hunt up doubts nor must you entertain a conjectural doubt. The doubt must arise from an impartial investigation of all the evidence in the case, and unless it is such that, were the same experience had in the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause, it is sufficient for you to return a verdict of not guilty.

The court instructs the jury that the fact that certain bakers used certain materials in making up lemon pie and orange does not oblige others to use the same or similar ingredients. The defendant had the right to use any harmless ingredients it desired in making up the orange or lemon pie in question providing in so doing it did not label the product so as to deceive or mislead the purchaser.

UNITED STATES v. 200 CASES, MORE OR LESS, OF CANNED SALMON

(District Court, S.D. Texas, Apr. 5, 1923)

289 Fed. 157; N.J. No. 11860

Libels under section 10 of the Food and Drugs Act. Trial before the court. Decree in favor of the United States.

HUTCHESON, *District Judge*. These two cases are proceedings under separate numbers against two lots of salmon, one originally libeled in Galveston and proceeded against in Galveston under the Galveston number, D.L. 724, later transferred to Houston; the other libeled against in Houston and proceeded against in Houston under D.L. No. 419.

The Government contends for condemnation and forfeiture on the ground (1) that the articles are misbranded; and (2) that they are adulterated, in that they consist wholly or in part of filthy, decomposed, and putrid animal substance, in violation of paragraphs 6 and 7 of the Food and Drugs Act of 1906 (Comp. St., secs. 8723, 8724).

In each of these cases the Seaboard Company appeared as claimant and filed exceptions and answer, and under orders of the court by agreement between the parties from time to time samples of the seized shipments were taken and examined.

Not until the trial had concluded was any point made as to the right of the claimant to appear and claim, and at that time the Government's counsel made the contention that the interest of the claimant was not shown.

This motion, if it ever was meritorious, comes too late (*United States* v. *46 Packages*, 183 Fed. 644).

Each can had on it a pinkish red label showing a picture in relief of a salmon, under it the words, "Select Pink Salmon", by the side of the picture the following, "Keen-Eye Inspection. Fresh Fish. Clean

Canneries." And this was in white lettering. In black letters, to simulate a stamp, was the word "Inspected."

The evidence on the part of the Government was that this product was not Government inspected, and that if the stamp was intended to make the impression of Government inspection, it was false.

The evidence of the Government was also overwhelming that the fish was not fresh fish in the sense of that term as used in the canning trade, that is, fish canned when they had been on the floor not over 48 hours, which was the time limit fixed by the Government witness, and not contradicted, within which fish could be said to be fresh.

The testimony was also overwhelming that the fish, if not putrid or rotten, was a poor, and therefore not a select, pack of pink salmon, for while pink salmon is according to the testimony one of the inferior brands, it varies in quality according to the freshness and general character of the fish put up.

It is therefore clear to me that the articles seized have offended against the misbranding statute, one purpose of which is to protect purchasers from injury from the sale of inferior for superior articles (*Hall-Baker Grain Co.* v. *U.S.*, 198 Fed. 615; *United States* v. *150 Cases*, 211 Fed. 361), and that deception being present and that ground of forfeiture clearly existing, it would, but for the provisions of section 8726 [Comp. St.] (section 10 of the act), authorizing the court to direct the delivery of the articles to the owner, be unnecessary for the court to pass at all upon the question of whether, as to any part of the shipment, the Government has made a case on its second ground.

Upon the issue of whether the product was filthy, decomposed, or putrid, the evidence was in sharp conflict.

I agree with the Government that it is not essential under this subdivision of section 7 to establish that the articles were unfit for food, or deleterious if eaten. It is sufficient if the Government establishes that the article sought to be condemned was composed in whole or in part of decomposed, filthy, or putrid animal substance. That the contents of some of the cans contained in the shipments under seizure were of the character described in the Government's libel, I have no doubt. That a great many of them were not, the Government's own testimony established, for taking the method of testing by sample which the Government itself claims to be fairly correct, they reached the conclusion that something like 18 percent of the seizure was filthy, putrid, and decomposed, leaving 82 percent not within the terms of the second ground of their libel, while the claimant's witnesses testified to having made chemical tests of some of the samples, finding no evidence of decomposition, and also to having experimented by serving some of the contents of the cans as food without harmful result.

It is the claimant's contention that the test applied by the Government of smelling is insufficiently certain to justify condemnation, and that even the percentage of defectives testified to by the Government has not in fact been shown, but they claim further that conceding as much defective fish as the Government's witnesses contended for, that the Government has not made a case for the condemnation of cans not already tested and proved to be bad. That, in short, it is incumbent upon the Government to either prove that they have examined each can and found it defective or that they have established

such regularity of defects as to support the inference that all the cans are defective.

The Government relies for the contrary of this upon the opinion of the Circuit Court of Appeals of the United States, in *U.S.* v. *A. O. Andersen*, an opinion from the Ninth Circuit (284 Fed. 542), in which the circuit court declared that the "article" referred to in the condemnation statute did not mean the single or individual can of salmon, but was used generically as referring to the entire salmon shipment under seizure as one thing, and that if the Government proved that one-fifth of the entire product was unfit for human consumption, it would be competent for the jury to infer from that that the balance was also.

To these conclusions I am not prepared to lend my adherence. I concede the force of the reasoning that in section 8726 [Comp. St.] (section 10 of the act) the language, "any article of food, drug, or liquor," if standing alone, might well have a generic meaning as relating to the character of the shipment, whether salmon or pork or beans or what not, and that it may well be said to be a case of using the word "article" as a singular plural, or a plural singular. However, in the caption of the act the plural is used, and in the body of the act it is provided that "upon the payment of [the] costs, and the execution and delivery of a good and sufficient bond to the effect that such articles shall not be sold," they may be delivered.

Again, in the discussion of similar words in other places in the statute, the Supreme Court has seemed to take a different view from that expressed in the Anderson case. In *Hippolite Egg Co.* v. *United States* (220 U.S. 52), the court treats the "articles" as the contents of packages designed for food and discusses the question of original packages as applied to the original box in which they come shipped, as distinguished from the can or package containing the food itself, and in the discussion makes it clear that they treat the word "article" as the food itself contained in the package designed for delivery to the consumer.

In *Hoke* v. *United States* (227 U.S. 323) the court said, "In the *Hippolite Egg Co. Case* we denominated adulterated articles as 'outlaws of commerce'."

In *McDermott* v. *United States* (228 U.S. 130), the court showed clearly that it considered that the word "article" referred to the adulterated thing itself, rather than the package or case in which it came in shipment.

Again, if the reasoning in the *Andersen Case* is accepted, and the word "article" is to be taken generically, still the conclusion reached in that opinion does not follow, that proof that of the cans examined one fifth were bad and four fifths were good would authorize the jury to find the whole product bad. It might well be as in the oyster case (Notice of Judgment 4922), opinion by Judge Hand, that where only a part of the shipment was examined, and that part ran uniformly bad, the jury would be authorized to find, if that was a fair sample, that it indicated that the whole shipment was bad; but it would not at all follow, but rather the contrary, that if a shipment was examined, and the examination showed as it proceeded that one fifth was bad and four fifths good, that the court could order the whole product condemned.

The case, in short, is not one where the Government has proven a part of it bad as a basis for the inference that all was bad, but one in

which the very proof of the Government establishes that part of it is not bad within the meaning of the statute, and I am inclined to think that if the Government depended for its condemnation upon subdivision 6 of section 7 of the act, in accordance with the general rule of law that the burden is upon the Government to prove its case, the Government would have to be cast in this suit or would have to take the alternative of examining and testing every can of the shipment.

Since, however, the goods are to be condemned for misbranding, the court now makes it known that it is of the opinion that some part of the shipment is bad, and that the goods will not be released under bond to the owner merely for rebranding but only upon condition that the goods be reexamined and reclassed, the good being separated from the bad.

Since it is not known whether any application for the withdrawal of the goods will be made, it is sufficient now to direct that a judgment of condemnation and forfeiture be entered.

W. B. WOOD MANUFACTURING CO. v. UNITED STATES

(Circuit Court of Appeals, Eighth Circuit, Aug. 3, 1923)

292 Fed. 133; N.J. No. 11710

In error to the District Court for the Eastern District of Missouri. Judgment affirmed.[22]

Before STONE and KENYON, Circuit Judges, and TRIEBER, District Judge.

STONE, *Circuit Judge.* From a conviction for adulteration and misbranding of "Red Color," a coloring powder used in food preparations, this writ of error is sued out.

The adulteration, causing misbranding, consisted of excessive quantities of sodium chloride, sodium sulphate, and some other substances which reduced the quality and strength of the powder.

The errors here urged are: (1) Insufficiency of evidence; (2) five rulings upon evidence; and (3) improper comment by the court.

We have carefully examined the evidence and entertain no doubt of its sufficiency to sustain the verdict and conviction.

The first and second objections to the rulings on evidence are to the admission of certain testimony of the witness Jablonski. He was a fully qualified chemical expert who had specialized in coloring substances and compounds. He had chemically examined the precise cans of powder upon which the information was based. The substance of the criticized testimony was that the presence of the named substances in the quantity, or proportion, found by him in the powder would have the effect of lowering and lessening the quality and strength of the powder as a coloring substance. There was testimony in the record of the proportion of these substances present in properly prepared commercial powders. We think the witness was qualified to and properly did testify to the effect of such presence, in the quantities found, upon the powder.

[22] Affirming *United States* v. *W. B. Wood Manufacturing Co.*, p. 1002, *ante*.

The third challenge as to rulings on evidence is to the exclusion of certain testimony of witness Kendall on cross-examination. The substance of these questions was whether it was customary to dilute a certain substance when using it in the manufacture of food colors. This was properly excluded for two reasons: The standard set by the statute is not what is customarily done by manufacturers but what is properly done by them; and this error was clearly invited by an earlier objection by this plaintiff in error, which was sustained, to the same character of evidence when offered by the Government. Error cannot be inserted in a trial by thus alternately blowing hot and cold.

The fourth objection is to the exclusion of certain testimony of witness Heath who was a manufacturer of such colors. The question was: "What percent of colors sold for food contain 10 to 50 percent of salt?" This was objected to and properly excluded as immaterial.

The fifth objection is to exclusion of certain testimony of witness Wood, a manufacturer and jobber in colors. He was asked whether he had ever had any complaints from his customers concerning a certain coloring powder sold by his company. This evidence was clearly immaterial.

The comment by the court, which is claimed to be objectionable, is not set out in the assignment of errors and only a portion thereof can be at all identified, even in the brief. This portion was not objected to nor any exception thereto preserved.

The judgment is affirmed.

UNITED STATES v. 496 CASES OF CANNED SALMON

(District Court, E.D. Missouri, Jan. 16, 1924)

N.J. No. 12056

Libels under section 10 of the Food and Drugs Act. Jury trial. Verdict in favor of the United States.

The United States attorney filed four libels praying the seizure and condemnation of 496 cases of canned salmon, alleging that the article had been shipped and transported from the State of Washington into the State of Missouri, remained in the original unbroken packages, and that the article was adulterated in violation of the Food and Drugs Act, for the reason that it consisted wholly or in part of filthy, decomposed, and putrid animal substance.

The North Pacific Trading & Packing Co., San Francisco, Calif., having appeared as claimant for the property, and the four libels having been consolidated into one action, the case came on for trial before the court and a jury. After the submission of evidence and arguments by counsel the court delivered the following charge to the jury:

FARIS, *District Judge*. Gentlemen of the jury: I shall now endeavor, as best I can, to give you what I deem to be the law of this case. This proceeding is a civil action. It is what is called a libel, that is, the Government, under a statute commonly called, I believe, the Food and Drugs Act, has provided for the seizure of articles of food, and drugs as well, though none of those are in issue here, whenever such

articles of food fail to comply with the provisions of the statute that I have mentioned.

The Government has also made it a criminal offense, a misdemeanor punishable by fine or imprisonment, or both fine and imprisonment, for the transportation across a State line, that is, from one State to another, of articles of food which do not comply with the act that I have mentioned; that, however, is not in this case. There are, as forecast, two methods: One is by prosecuting the shipper and fining him or sending him to jail; the other is by seizing the article which he ships, in a case such as this, called, I repeat, a libel, and of trying out the issues, and should it be determined that the article of food in question by its condition contravenes the law then the Government has the right, by a decree of court, to have that article either condemned or destroyed, or to have it, if I may so express it, rehabilitated under a bond which the claimant in the case is required to give, conditioned that the article be by such rehabilitation put in a condition to conform to the statute.

Now, that is all this case is about. The case may be tried either before the court or by a jury. If it be tried by a jury certain issues are presented to that jury, or a certain issue of fact is presented to that jury. The decree, then, upon the finding of the jury is entered by the court in accordance with the law.

Your duty in this case is simply to pass upon the single question of whether the salmon seized, two different brands, I believe in effect, the Klawack and the Aviation brands, do or do not comply with the provisions of this Pure Food Act in the behalves that I shall presently mention to you.

Questions of the nature of the shipment—that it was shipped by the claimant in the case, that it was shipped in interstate commerce and therefore is brought within the law—are all conceded fairly, honestly, and candidly by the claimant.

The suit, of course, is brought by the United States against the salmon itself. The practice, you will observe, is somewhat peculiar, but the owner of that salmon may come in and become a claimant, that is, a sort of defendant in the case, and ask that it be not condemned, but that it be returned to him, denying any allegations of its unfitness, as alleged by the Government in the libel.

The claimant in this case is the Northern Pacific Trading & Packing Co., a corporation under the laws of California, engaged in business in Prince of Wales Island, in southeastern Alaska.

So, you have the issue here—you have the Government upon the one hand alleging certain things, and the claimant, standing in the shoes of a defendant, having taken the place of the cases of salmon, and becoming, in effect, a defendant.

The statute provides against adulteration, that is, it forbids adulteration of a food; and an article shall be deemed to be adulterated, in the case of food, for a number of reasons, but the pertinent reason here in this case is numbered 6:

> That for the purposes of this Act, an article shall be deemed to be adulterated: * * *. Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal or one that has died otherwise than by slaughter.

Now, that is the statute that is in issue in this case. That statute raises the question that you are called upon to decide, and that question, in its simplest analysis, is whether the salmon in controversy here consists in whole or in part of filthy, decomposed, or putrid animal substance.

You may cut out, of course, the question of filth, except insofar as that word "filthy" throws light upon "decomposed." Bearing in mind that the word "filthy" may modify, or throw light upon the word "decomposed," the question is: What is the meaning of the word "decomposed"? It uses the word "decomposed" as well as the word "putrid." We all know what putrid means. Putrid means absolutely rotten and decayed, but the statute uses also "decomposed." We have to go the dictionary, which is the ordinary source of definition of words used in the English language, in order to find out what "decomposed" means. It is the past participle, I believe, of the verb "decompose." The verb "decompose" means to rot or decay. The past participle, that is, "decomposed," therefore, means in a state of decomposition. "Decomposition," of course, is a noun and means the condition of being decayed, putrid, or rotten. Substantially, that is what it means.

So, if you shall find that the article—and I shall return presently to the word "article" and try, as best I may, to define it for you—was in a filthy, decomposed, or putrid condition, that is, that it was decomposed, that it was in a state of decomposition, you are warranted in finding the issues for the Government and against the claimant.

The great difficulty, gentlemen, as a matter of law, as well as a matter of fact in this case—and this is a difficulty which presents itself to the court as well as to you, gentlemen, as the triers of fact—arises from the situation here presented. In a seizure of four different lots of salmon contained in hundreds of cases, and amounting in all, I believe the evidence shows, to about 72,000 one-pound cans, a part of those cases, mayhap, or a part of the contents of those cases, certainly, is shown by the evidence to be good and a part is shown to be bad, if you find that is the fact. Commenting upon the evidence, there seems to be but little dispute about it, that that was the condition here, since there is but a negligible difference between the experts for the Government upon the one hand and the experts for the claimant upon the other.

You will note that the statute which I read to you contains the word "article" and in that word, and in a correct definition of that word, the trouble in this case, both of law and of fact, lies. I think the meaning of the word "article", that is, as to whether it means a single one-pound can, or whether it means one of these lots of 496 cases or not, must necessarily be found from a construction of the entire statute. I am constrained to conclude, as a matter of law, that the word "article" as used in this statute does have reference to the case or cases seized, and that it does not have reference to a single, individual can. If it had reference to a single, individual can then a man who shipped in interstate commerce 72,000 cans, or a corporation which so shipped them, could, upon conviction, be imprisoned in jail or fined the full amount of the penalties mentioned by the statute, for each single, individual can. There would be great objection, of course, to that. If but 5 percent of 72,000, if 16 percent of 72,000 of

those cases were bad, you would have the peculiar result in the case of having the amount of the penalty multiplied by the number of cans. If you conclude that "article" means "cans" you would have no trouble in the case as to the cans that were actually bad. There is not any doubt that those ought to be thrown out, provided you find that they were decomposed, within the purview of the definition which I have given you.

So, I think, for the purpose of this proceeding, the word "article", as used in the statute, means the lot seized under each of the single counts of this libel. You will recall that there were four separate cases, but these cases have been combined into a single consolidated case, of which the former four separate cases now constitute counts 1, 2, 3, and 4, respectively.

Now, gentlemen, something has been said in the case about there being an issue here as to whether tainted salmon, that is, salmon which was spoiled, or tainted, or decomposed before it was canned, after it has been canned and processed and subjected to heat at 240 degrees Fahrenheit, is hurtful to health. I charge you, as a matter of law, that it does not make any difference in this case. The statute forbids the sale, through interstate commerce, or the transportation in interstate commerce, of an article of food which is decomposed, but it does not say anything about whether that article be hurtful or non-hurtful to health. So, I charge you as a matter of law, that that cuts no figure, even though you should find that it might be perfectly healthful. That is clear, and I went further in reading that statute than is necessary for the point involved here, in order to point that moral, because you will note that that statute forbids the transportation in interstate commerce, for the use of food, of the carcass of an animal that has died otherwise than by slaughter. No one would contend that the death of an animal from a natural cause would make that, when used as food, unhealthful food or food dangerous to health. Going, for the moment, into the realm of literature, we are told by Sir Walter Scott, in a number of his novels, that our Scotch friends, in early times, at least, were addicted to the use of mutton of that sort which they called "braxy" mutton.

So I charge you, as a matter of law, that it makes no difference what your finding shall be as to whether it was healthful or unhealthful. The object of law, as shown by the words used, was to keep away from the consumer things that were filthy, according to our common understanding. Of course, "filthy" and "filth" are relative terms. What might be filth to you might be attar of roses to a Siwash Indian. So the term as used is merely a relative one.

Something has been said here about decomposition. Decomposition begins, of course, in a sense, where life ends, but that is not the sort of decomposition meant in this statute. To a degree, the moment a thing begins to live, in a sense it begins to die, and the moment that life is out, decomposition, to a degree, begins and increases faster and faster to rottenness, decomposition, or decay. It is necessary, therefore, to give a reasonable construction to that word, in order to carry out the intent of this statute.

Now, gentlemen, something has been said in the case about the matter of tolerance. The statute itself provides for no tolerance, and, while the statute provides for the making by the Secretary of Agriculture of certain rules and regulations, these rules and regulations,

the witnesses tell us, have never yet been made by the Secretary of Agriculture. There may be difficulties of a practical nature in the making of them. It might be a matter of unwisdom to make them, because the making of them might invite violation to the full extent of the percent of tolerance permitted, but that is neither here nor there. The statute provides for no tolerance, and none has been provided for by any rule or regulation which the statute seems to give power to the Secretary of Agriculture to make. I think, however, something must be said on that question of tolerance, and I think it is a matter which, when absent statute and when absent regulation—and I have told you that there seems to be none—must be addressed to your sound common sense and idea of justice, in the light of your experience as business men.

I use the word "tolerance", of course, in the sense that it is the usual and ordinary percent of decomposed salmon which would get into a case of salmon, or into a lot of many cases, in the face of the use of ordinary care by those engaged in the business of canning salmon, when such canners are using that degree of care which an ordinarily careful and prudent person would exercise under similar circumstances. I think you ought to be permitted to determine, under the evidence, whether such tolerance, or any tolerance, in this business, ought to be allowed. You ought to do that from the evidence.

The witnesses have gone very broadly here, very minutely here, and at great length here, in many instances, into the matters of catching these fish, bringing them to the canneries, of canning them, and of processing them, and have told you candidly, on both sides, how they are gotten, where they are gotten, how far away they are gotten, and what is the condition of them after 48 hours, after 72 hours, and after 96 hours. So I think it is reasonable to say that occasionally, necessarily a bad salmon, decomposed salmon, salmon forbidden by this law that I have called your attention to here, creeps into these cases and into these shipments, in spite of the canners. I know of no other way by which that percent or degree of tolerance can be figured out except by the use of your sound common sense and ideas of right and justice, in the light of your experience as men and as business men. But one of the witnesses touched upon that question, I say, by way of comment upon the evidence. He said that in his opinion it ought to be about one-half of one percent, as I recall it. Certainly, in my opinion, it would strike a man of ordinary business judgment, common sense, and ideas of justice, that it might be impossible to prevent some bad or decomposed salmon, or forbidden salmon, to get into a lot of many cases. Whether the amount here in these four cases, or four counts of this single case, or in either of those four counts, be greater or less than the percent of tolerance that I have undertaken to define to you, is a question for you, gentlemen. The season, of course, as the evidence shows in the case, is short. It runs from June to September. That, I take it, is due to the fact that the run of salmon is short.

Now, gentlemen, I have undertaken to give you my view of the statute, and I again repeat to you that it is a very difficult statute, because it is a statute that has not up to now been construed very often, and the courts which have seen fit to construe it, unfortunately, have not agreed with each other, and perhaps, in a case or two, have

not agreed with themselves. I have endeavored to give you my views of the law, however, as it strikes me. The duty of doing this is upon me and you are not concerned about it, whether I have given it correctly or not; so long as you follow what I say about it, that ends your duty.

When you come to the evidence, however, you, and not the court, are the sole judges of the credibility of the witnesses and of the weight and value to be given to the testimony of the witnesses. You are warranted in taking into consideration their manner and appearance upon the stand, their manner of testifying, the probability or improbability of the testimony which they gave, and their opportunity to see and observe and profit by, and their ability accurately to relate what they saw, heard, or attempted to relate. You may take into consideration their interest in the case for plaintiff, or for the claimant. Having done this, it is your province to give to their testimony that credibility which you deem it entitled to.

I have commented, in a few places, upon the evidence. You are to accept that comment in the light of the rules that I have given you, that is to say, that you, and not the court, are the sole judges of matters of evidence and of the credibility of witnesses. If you do not agree with what I have said, it is not only your privilege but your duty to follow your own views and cast out of your minds what the court has said, and the opinions given by the court as well, about this evidence.

I have had prepared for you a single form of verdict, because, as I say, there is but one issue to be found by you. Upon that finding by you I am permitted, by the law that I read to you, by the decree I make, either to order the salmon to be condemned or destroyed, or order it to be rehabilitated, if you shall find for the plaintiff. If you find for the claimant upon this single issue then, of course, the salmon seized is to be returned to the claimant. You may, therefore, use this single form of verdict. I have used the words "libelant" and "claimant", so you may strike out either "libelant" or "claimant" and the verdict will be proper.

If your verdict shall be for the plaintiff on the first count (formerly case 6327) you may render this verdict: "We, the jury in the above entitled consolidated cause, find the issues herein joined under count 1 (formerly case 6327) in favor of the libelant." On the other hand, if your finding should be in favor of the claimant, draw your pen through the word "libelant" and it will then be all right. So, also, with the other three counts. There must be a finding upon each of the counts. I have had prepared a verdict accordingly.

Your verdict must be unanimous, gentlemen; each of your number, twelve in all, must concur in any verdict which you shall render.

Now, gentlemen, that is all that occurs to me. If there are any suggestions or objections to the charge I shall be glad to hear them.

Mr. Elvins. I have no suggestions to offer, because I think the court has covered it entirely, but I do, for the purpose of the record, desire to offer an exception to that part of your honor's charge which dealt with tolerance and allowed the jury to determine, from the rule which Your Honor gave them, whether or not that should enter into the case, because the Government is of the opinion that under the statute it would not be a jury question. That is the only exception.

Mr. McPheeters. If the court please, there are just two objections that I would like to make. The first one is to the court's interpretation and ruling on the meaning of the word "article", which the claimant contends means the individual can rather than the case, or the entire lot, and we therefore object to the instruction for that reason. Second: we object to the court's ruling on the question of the fact as to whether or not the salmon was or was not injurious to health. We object on the ground that that question necessarily enters into and is connected with the matter of the reasonableness, or the amount of tolerance. In other words, that things that would be injurious to health should not be tolerated, or the percentage should be very minute, but as to things that are not injurious there might be a wider range of tolerance.

I also think, Your Honor, and I suggest that possibly there may be a little confusion on this question. It occurred to me when the court was dictating the instructions. I got the impression that the jury was authorized to find a seizure of all the salmon if they found that a part, no matter how small, of the salmon was decomposed. I think that was probably cured by the latter part of the charge, but there was some uncertainty in my mind about it.

The Court. Well, if those are objections and exceptions to the charge, you may have them. If they are requests for additional and further charges, they are denied.

UNITED STATES v. 1,600 CASES OF CANNED SALMON

(District Court, Oregon, Feb. 11, 1924)

N.J. No. 12221

Libels under section 10 of the Food and Drugs Act. Jury trial. Verdict in favor of the United States.

Bean, *District Judge* (charge to jury). Gentlemen of the jury: These are actions—there are two of them—brought by the Government to condemn certain lots of canned salmon on the ground that it is adulterated within the meaning of the Pure Food and Drugs Act. It is charged in each of the libels that this salmon was adulterated because it consisted in whole or in part of filthy, decomposed, and putrid animal substances. The respondent or owner of the property has filed an answer denying the allegations of the bill. It has been stipulated by counsel, however, that the salmon in question was in fact shipped in interstate commerce and that the samples taken by agents and representatives of the Government, or used by the representatives of the Government in their tests, were taken from this lot of salmon, so that the question for you to determine in this case and the contested question is whether or not this salmon was adulterated within the meaning of this statute.

As I said to you a moment ago, the statute provides that for the purpose of this act an article shall be deemed adulterated, in the case of food, if it consists in whole or in part of filthy, decomposed, or putrid animal substances. Now the word "filthy" in that connection simply means dirty, nasty, unwholesome; "decay" means decom-

posed, rotten, spoiled; and "putrid" means being in a state of putrefaction, tainted, or in such a state of decomposition that the odor therefrom is offensive to the smell. And if you believe from the preponderance of the evidence in this case that the salmon in question was either filthy, decayed, or putrid, it will be your duty to find in favor of the Government. If, on the other hand, you do not so believe, then it will be your duty to find in favor of the claimant in this case.

Now this is a civil action and a proceeding under the Pure Food and Drugs Act. That law is a wholesome law. It is a law that is designed and intended by Congress to protect the public by prohibiting the shipment in interstate commerce of unwholesome or deleterious food, and it should be enforced by courts and juries with that object in view.

Now the statute does not define what shall be considered filthy, decayed, or putrid within the meaning of the statute, so that each case must depend upon its own facts, and if it appears that this salmon—if you believe that this salmon was of such a character on account of its condition that it was not up to the standard required or ordinarily required in the commercial world—then it would be adulterated within the meaning of the statute.

It is not necessary, however, for the Government to show that the eating of the salmon would be injurious to the health of the individual. That is not the question in the case, but the question is whether unwholesome to such an extent that it would not satisfy the ordinary requirements of the commercial world. If it is, then it ought to be condemned; if it is not, then your findings should be in favor of the defendant.

The word "decomposed" as used throughout this trial does not, of course, mean "beginning to decompose" because decomposition sets in whenever life is extinct, and therefore there must be some state after a fish is taken out of the water and before it is put in the can when it cannot be said that it is decomposed or putrid or filthy or decayed, but if a canner keeps a fish out of the water before canning for such a length of time that it becomes putrid or decayed or filthy, then puts it in cans for the purpose of sale, he is violating the statute under which this proceeding is had.

Now the question in this case is a question of fact: Do you believe from the evidence that this salmon in question is either filthy, decayed, or putrid? If you do, then, as I said, you, of course, must find for the Government; if you do not, then you must find for the defendant. Now, that is a question for you to determine from the testimony in this case. You are the exclusive judges of it, and you are the exclusive judges of the credibility of the witnesses. Every witness is presumed to speak the truth. This, however, may be overcome by the manner in which a witness testifies, by his appearance upon the witness stand, and by contradictory testimony, and in weighing the testimony of any witness you should keep in mind the interest he may have in the result of this trial, if any such interest has been manifest or shown in this case.

Now there have been a good many witnesses testify here as experts, that is, men who have shown from their testimony that they are skilled in the particular business in which they are engaged and about which they testified here. You are to consider their testimony for whatever you may think it worth. They are entitled to testify. The

only way a court or jury oftentimes can arrive at the facts in a case is through the testimony of men skilled in the particular case, and for that reason these gentlemen have testified to their experiments, to their experience and study and other things in that respect, and you should weigh all their testimony and from that determine where you think the truth lies.

Now the burden of proof is on the Government in this case to satisfy you by a preponderance of the evidence that the charge made in the libel is true, and by a preponderance of the evidence I simply mean it must make out the best case upon the evidence. I do not mean that it must prove the charge beyond a reasonable doubt but simply that if the evidence is evenly balanced—you believe the evidence is evenly balanced—then it has not satisfied the law by requiring it to prove its case by a preponderance of the evidence.

Now there has been something said in this case about other salmon having been condemned, other salmon packed on the Columbia River having been condemned in suit filed by the Government. If that is true it, of course, has no bearing upon the merits of this particular case, that is, it would not be evidence either that this salmon was subject to condemnation or was not. It only became important and was developed during the trial as affecting the credibility and reliability of some of the witnesses who testified on the trial.

Now I don't know of any other questions of law involved in the case. It is a question of fact for you to determine. Do you believe from the testimony, from a preponderance of the evidence, that this salmon was filthy, decayed, or putrid? If so, find for the Government. If you do not, find for the defendant. I understand there are two cases consolidated for trial.

GOODWIN ET AL. v. UNITED STATES

(Circuit Court of Appeals, Sixth Circuit, Feb. 12, 1924)

295 Fed. 856

Appeal from the District Court for the Southern District of Ohio. On motion to dismiss. Case transferred to law side.[23]

Before KNAPPEN, DENNISON, and DONAHUE, Circuit Judges.

Per curiam. This was a proceeding brought under the Pure Food and Drugs Law, commenced by filing a libel in the district court against the property sought to be condemned. There was a trial by jury and a judgment of condemnation.

From this judgment the claimants appealed, petitioning for an appeal, procuring an allowance, and filing assignments of error—all as in an equity case. After the expiration of the trial term, and without any order made during that term extending time, the district court approved the paper which is printed in the record under the caption "Bill of Exceptions", but which was filed in connection with an order extending time "to perfect the reducing of the testimony in the above-entitled cause to narrative form." In the stipulation of counsel as to

[23] For case in district court, *United States* v. *22 Bottles of Crab Orchard Concentrated Mineral Water*, see p. 1055, *ante*. Judgment of district court affirmed, *Goodwin et al.* v. *United States*, p. 1130, *post*.

what papers should make up the record, this document was called "statement of evidence." In connection with its signature and approval by the district judge, it was nameless.

It is apparent that, under the rule stated in *Four Hundred and Forty-three Cans, etc.* v. *United States*, 226 U.S. 172, 179, 184, these review proceedings were confused and mistaken. Review should have been by writ of error, and this would necessitate dismissing the appeal, save for the effect of section 4 of the Act of September 6, 1916 (39 Stat. 727), which directs that such a mistake shall be disregarded and the appellate court shall "take the action which would be appropriate if the proper appellate procedure had been followed."

In compliance with this statute it is clear that the appeal should be treated as a writ of error; that, so far as the record may justify, further proceedings in this court should be as upon a writ of error; and that the reviewing jurisdiction and powers of this court will be in all respects the same as upon a review at law. Proper disposition of the so-called "bill of exceptions" is not so plain. If the review proceedings had from the beginning been at law, it would be becessary to strike out the bill of exceptions, because not settled within the trial term, or within any extension made during that term (*Exporters, etc.*, v. *Butterworth Co.*, 258 U.S., 365 368); but it would be of small avail for the appellate court to transfer a case from the equity to the law side, and at the same time leave the record fatally defective, because it had been made up under the wrong theory. We think a compliance with the spirit of this section 1649a requires these conclusions: (1) That the so-called "bill of exceptions" shall be deemed to be a statement of evidence in narrative form under general equity rule 75 (our rule 15), containing the substance of all the evidence (*Westerman* v. *Dispatch Co.*, 233 Fed. 609, 611, 612); (2) that this narrative statement be therefore treated as filed in due time, since the limitation to the trial term does not extend to the settling of such a statement of evidence (*In re General Equity Rule 75*, 222 Fed. 884); (3) that by analogy to the transfer of a case from the equity to the law side of a court, and by applying the "proper appellate procedure", nunc pro tunc, such statement of evidence becomes, and is, the bill of exceptions, as upon a writ of error.

The case will therefore proceed to hearing upon these principles. All the motions of the respective parties, except as herein granted, are denied.

UNITED STATES v. 1,974 CASES OF CANNED SALMON

(District Court, W.D. Washington, Mar. 13, 1924)

N.J. No. 12381

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict in favor of the United States.[24]

CUSHMAN, *District Judge*. The arguments in the case having been concluded, gentlemen of the jury, it is the court's duty to instruct you regarding the law.

[24] See *United States* v. *1,974 Cases of Canned Salmon*, p. 1037, *ante*, and *A. O. Andersen & Co.* v. *United States*, p. 1053, *ante*.

The plaintiff has filed a libel in this case, seeking to have condemned this parcel of salmon. In that libel it is alleged that this parcel of salmon was shipped in interstate commerce and that it was an adulterated food. It is alleged in the libel that it consisted in whole or in part of filthy, decomposed animal substance. The claimant has denied that it was adulterated or that it consisted in whole or in part of filthy, decomposed, or putrid animal substance. These are the issues that you are to try. There is no dispute here, as I understand, regarding its having been transported in interstate commerce. You understand this case is here because of that allegation. If this had been a shipment wholly within the State of Washington, this court would not have been concerned with it, because no Federal law would have been involved.

This law provides for the condemnation of adulterated foods, and adulteration is defined, in substance, that an article of food is adulterated when it consists, in whole or in part, of filthy, decomposed, or putrid animal substance making it unfit for food.

There has been in this case much said, in argument and in the testimony, regarding decomposition. There has been evidence in this case that decomposition begins when life ends. Fish is not decomposed, within the meaning of this law, at that early stage. To be decomposed within the meaning of this law means more than the beginning of decomposition; it contemplates a state of decomposition making the article unfit for human food. It does not have to be so decomposed that it has disintegrated and passed to its original elements, because the statute says a decomposed animal substance. Well, when it is entirely decomposed and has passed into its original elements, it has ceased to be an animal substance. All works of man and all that lives eventually becomes so decomposed that it is broken up and separated and the atoms which once composed it mingle again with the earth or the air or the sea. It is not in this sense that the word "decomposed" is used in this statute.

The evidence in this case has taken a wide range. Counsel in their arguments have not been at all restricted. You understand that you are to pass upon the questions of fact in this case, including this question of the extent of decomposition and whether these samples and this lot of salmon, this parcel of salmon, is unfit for human food. Those are questions of fact for your sole determination, and if the court in the course of its instructions or in the course of the trial has said anything touching the weight of evidence on these questions of fact, or stated any question of fact that is submitted to you for your determination, you should disregard any such statements of the court, unless they agree with the conclusions reached by yourselves. On the other hand, so far as counsel in their arguments have stated what the law was, if they have stated the law to be different in any respect from what the court instructs you, you will disregard their statements concerning the law and follow the instructions which the court gives you regarding the law. As examples of this, counsel for the plaintiff in his argument stated to you that this Pure Food Law provided that butter should not be shipped in interstate commerce, that contained a greater percentage of water than that prescribed in the law, that that renders it adulterated. That is true, but it is a dangerous argument in this case. The Pure Food Law has two main objects, that is,

the fitness for food and to protect the public from fraud. Now, regarding the water in butter, that does not make butter unfit for food, but by injecting water into the butter a fraud may be worked on the buyer by selling him water and not butter. So far as this section of the law that is involved in this case is concerned, what the law is aiming at is to protect the public from unfit food. The counsel on the other side, in his argument, advised you that he thought the court would instruct you that if there had been no negligence on the part of the packers of this salmon, that you should not condemn the salmon, if care had been used. Well, that is a dangerous argument in this case. You are not trying the men who packed this salmon, you are not trying the officers of the Bureau who are witnesses in this case or had something to do with instituting these proceedings; you are trying this article of food to determine whether it is so filthy, decomposed, or putrid as to make it unfit for human food, and the evidence on that issue has taken, as I have told you, a wide range. The court has permitted evidence to go in here regarding whether or not anyone had ever been made sick from eating tainted salmon and as to the condition of this salmon and this cannery where it was packed and the traps and their proximity to one another—evidence concerning those conditions was admitted; evidence was admitted regarding whether any complaints had come from consumers of this salmon; evidence was admitted regarding the situation in which persons who may have instituted this complaint were, as bearing on the question of whether the original complaint was begun because of unfitness of the food, or the salmon, or for some other reason. Now, all that evidence and other evidence that was admitted in the case was admitted to enable you to determine whether it was in fact fit for human food. You can understand that if taint in salmon—decomposition—rendered it deadly and that it was impossible to detect it except by reason of the fact that a person who ate it died, that you might reasonably conclude, on a smaller percentage, that that article was unfit for food than if the testimony showed that it was wholly innocuous and did not injure and was easily and readily detected when it was decomposed, when the state of decomposition existed.

On the question of whether this salmon was fit for food, you are to understand this provision of the law that it is adulterated when it is filthy, decomposed, or putrid, making it unfit for food; that unfit for food means there just what you would ordinarily understand that expression to mean. When language is used in the statute—and this is a statute of the United States, a statute of Congress—when ordinary language is used in the statute, having no technical meaning, why, then it is to be interpreted by what men ordinarily understand by the expression. Now, "unfit for food" does not mean that no one could be found so fastidious as to complain of it. On the other hand, it does not mean that it has to be so filthy or putrid that no one could be found who under any circumstances would eat it. It means what you would ordinarily understand by the expression "unfit for food."

In this case there is evidence regarding the testing of this product, of this parcel of canned salmon. The court instructs you that, before you can find this parcel of salmon guilty, that there must be a fair preponderance of the evidence showing these disputed allegations in the libel, which I have outlined to you. Where the entire parcel of food—in this case salmon—is not tested, it is nevertheless necessary,

before the verdict can be guilty, that a fair preponderance of the evidence show that the adulteration extends to the whole product. If the evidence on this point—the preponderance of the evidence—is with the claimant, or if it is evenly balanced so that it does no turn one way or the other, your verdict would be not guilty.

There may be such a small percentage of adulteration in such a small number of samples as to fail to show adulteration of the entire product. On the other hand, there may be such a large percentage of adulteration shown as to show that the entire product was adulterated.

I have pointed out to you that the main question for you to decide in the case was this question of adulteration, and I have told you that the evidence regarding the care taken in conditioning and canning this salmon was admitted, not that you were to acquit the salmon if care had been taken but that the taking of care was one of the circumstances from which you would determine whether it was probably fit for human food. If it is adulterated within the meaning of this law, it does not make any difference how it happened, whether care was taken or care was not taken, whether it was caused by sabotage among employees, or in any other way. If it is adulterated, it should be condemned, and your verdict should be guilty if the evidence so shows.

I have told you that the verdict should be guilty unless these allegations of the libel that I have pointed out have been shown to be true by a fair preponderance of the evidence. A preponderance of the evidence means the greater weight of evidence; that evidence preponderates which is of such a character and makes such an appeal to your intelligence and reason and your experience, as to create and induce a belief in your minds, and where there is a dispute in the evidence, that evidence preponderates which is so strong in these particulars as to create and induce a belief in your minds in spite of the opposing evidence and in spite of assaults made upon it by way of argument.

You are in this case, as in every case where questions of fact are tried to a jury, the sole and exclusive judges of every fact in the case and of the weight of the evidence and the credibility of the witnesses. In weighing the evidence and measuring the credit of the witnesses who appeared before you and testified, the law does not undertake to say everything that you should take into account in measuring the credit of these witnesses, but it has been settled that certain things you should consider. You should give consideration to the appearance and conduct and demeanor of each witness who has come upon the stand and testified; whether the appearance and conduct and manner of that witness in giving his testimony was such as to inspire you with confidence and lead you to believe that the witness was trying to tell the exact truth, neither adding to it nor taking from it, or whether some witnesses may have been reluctant or evasive, contradictory, or hesitating in their testimony; whether others may have been too willing, possibly evidencing an inclination to get something into the case that had not been inquired about. You will also take into account the reasonableness of the testimony of each witness, by itself, in view of the circumstances, whether it appears reasonable and probable or whether it appears unlikely and unreasonable; whether the testimony of a witness agrees with his conduct; whether he has acted at the time of the transaction and since consistently

with the testimony he has given; also take into account whether the testimony of a witness has been corroborated where you would expect it be corroborated if it were true, or whether it has been contradicted by other creditable testimony.

Where in the progress of the trial it develops that there are other witnesses or other testimony that could be produced to support the position taken by one side or the other, and the presence of that witness is not obtained or he is not brought here, and no explanation given for his absence, you have a right to conclude that that witness, if summoned, would not support the contention of the party that you would expect to bring that witness. You will also take into account, in measuring the credit of the witness, the situation in which he was placed as enabling you to know exactly what the facts were and exactly what took place, as one witness, by reason of his favorable situation and connection with the matters to which he testified, might have a great advantage in telling you exactly what the facts were, over another witness who was not so happily situated; also take into account the interest that any witness may have been shown to have in the case, an interest either shown by the manner by which the witness gave his testimony or as shown by his relation to the case.

Mr. McCord. There is one other exception that I would like to call Your Honor's attention to, and that is based upon Judge Pollock's decision.

I except to Your Honor's instruction that the claimant was not entitled to have a verdict for the release of these goods upon the showing that the cannery where they were packed was operated with the usual care and skill and judgment that the ordinarily prudent canneryman would exercise in the operation of his canning plant. In other words, as the law cannot be literally construed, must be given a reasonable interpretation, it is our contention that the reasonableness means that if the goods that are sought to be libeled are packed by an ordinarily prudent packer, who has reasonably complied with this law and has been guilty of no negligence, his goods ought not to be condemned, even though there may be a percentage of adulteration contained in them. I base this exception very largely upon Judge Pollock's opinion in St. Louis, who took that view, as I understand it.

The Court. No, it is the court's view that the product should be reasonably fit for food. The jury is so instructed. If it is not reasonably fit for food, then it is unfit for food, and it is not a question of whether reasonable and ordinary care or extraordinary care, for that matter, was taken in putting it up. If it is decomposed within the meaning of this law as I have instructed the jury, in spite of extraordinary care, then the parcel should be condemned.

Mr. McCord. You will allow me an exception, Your Honor?

The Court. Exception allowed.

Mr. Shackleford. If Your Honor please, I am not sure that the jury understands, when you refer to what is to be condemned, that they understand that it is what is still in existence, instead of the samples that were taken.

The Court. The jury will so understand. If there is nothing further, is a sealed verdict agreed to?

Mr. McCord. Yes, sir, as far as we are concerned.

Mr. Hill. It is entirely satisfactory to the Government.

The COURT. This form of verdict, gentlemen of the jury, is just the one form: "We, the jury in the above entitled cause, find the respondent 1,974 cases of canned salmon labeled in part Hypatia Brand pink salmon —— guilty as charged in the libel of information filed herein." If, under the evidence and the instructions as to the law that have been given you, you find the respondent salmon to be guilty, you will write in that blank the word "is." If you find the salmon not guilty, you will write in that blank the word "not," and have your foreman sign it after you have completed it, and seal it up and report with your verdict here in court tomorrow morning at 10 o'clock."

UNITED STATES v. 1,000 CASES OF SARDINES

(District Court, E.D. Virginia, Apr. 11, 1924)

N.J. No. 12656

Libels under section 10 of the Food and Drugs Act. Jury trial. Verdict in favor of the United States.

GRONER, *District Judge* (charge to jury). Gentlemen of the jury: This is a libel *in rem*, that is to say, against the thing sought to be condemned by the United States under the familiar Food and Drugs Act, the purpose of which is to condemn any article of food containing filthy, decomposed, or putrid animal or vegetable substance. The Government some years ago as, of course, you gentlemen all know, in a very commendable effort to prevent the adulteration of food and misbranding of foods and shipment of putrid or decomposed food, passed what is known as the Pure Food and Drugs Act. One of the provisions of the act is that it shall be unlawful to ship in interstate commerce any article which is adulterated, and it is adulterated if it consists, so the statute says, in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, whether manufactured or not. The whole question in this case is whether the shipment in question contains an article of food which is either putrid or decomposed or filthy. The Government to maintain its view of the case has introduced the evidence of a number of witnesses whom you gentlemen have heard testify and whose conclusion is that these sardines, or a considerable portion of the sardines, are adulterated within the meaning of the act in that, according to their opinion, they are decomposed and putrid. That question is a question which is the issue in this case, the question which you gentlemen must determine as a result of the evidence which you have heard from the different witnesses. You are the judges of the credibility of the witnesses and the weight to be given to their testimony. It is within your province to say which evidence you accept as correct. The burden of establishing the case is, of course, a burden which rests upon the Government, and it must be established by a preponderance of evidence. That does not mean any greater number of witnesses, but it must be such to satisfy the minds of the jury that it is the correct view of the case.

Now the cans of sardines have been examined by samples extracted from different packages. The proportion of them in which these

signs, according to witnesses for the Government, of decomposition appear has been testified to, and in the case of one of the Government witnesses, the state or condition, of a large part—or I think approximately 50 percent of the cans examined—was said to be decomposed but not putrid and not filthy, and the reason for the distinction was given to the jury. Now I haven't found nor have I been furnished by counsel with any precise definition of the word "decomposition." The act itself, unlike a great many Federal acts, does not contain any standard or determinative meaning of the word. The dictionary says that "decompose" means to resolve or separate into constituent parts or elements, as by means of chemical agents or by natural decay; especially to cause to decay or to rot; to become separated into elements; hence, to putrefy, rot and to decay. I had my secretary during the period of the argument look in the books which lawyers use very frequently, called "Words and Phrases", which contain judicial definitions of different words used in statutes, without finding any direct or judicial construction or determination of the word. I assume that Congress intended to mean just what the word itself implies to the ordinary mind, that in order to justify a condemnation of a food product there must exist what is the general acceptation of the word "decomposition" in the minds of the ordinary citizens of reasonable intelligence. So that we come back to the starting point, which is that you gentlemen must under the evidence in this case before you, the exhibit of the thing itself and the testimony of the witnesses as to what they ascertained as a result of their expert experience and knowledge, determine the question whether this particular product is sufficiently decomposed to come within the intent of Congress when it said such articles should not be shipped in interstate commerce.

The defendant, through its superintendent, has testified as to the manner in which the canning of sardines is accomplished from the catching of the fish to the final sealing of the can and shipment. It is apparently a big concern—a concern that does a large business—and it is, of course, a matter of serious concern to it that one of its products should be stamped as unfit for human food. On the other hand, it is equally important for the people of the United States that this law, which is intended to preserve the health of the people of the United States, should be carried out without regard to whether it affects the standing, character, or business interests of any individual if he has violated the law.

The whole question, therefore, gentlemen, which I submit to you is whether under the evidence—the testimony of these witnesses as to the condition of this fish and the exhibition of the cans to the jury themselves—you are satisfied that this product is or was in a process of decomposition. Now the act does not say that that process must have continued to any particular point. It does not define what point the decomposition must have arrived at to bring it within the inhibition of the statute. It says whatever is decomposed shall be subject to seizure and condemnation. I don't know a great deal about these matters of chemistry, but nearly everything of an animal character is decomposed to a certain extent on different occasions. As soon as fish is dumped from the pound net into the bottom of the boat and allowed to remain for a little while, the process of decomposition

sets in. Of course, it isn't that kind of decomposition that the act has in mind, because if it were, there wouldn't be anything like the sale or shipment of any animal products, but it is such decomposition as in the minds of the jury, it seems to me, would make them unfit for human food in the ordinary way. It doesn't have to be poisonous; it doesn't have to be so unfit as to make it dangerous to health. That isn't necessary. The act does not make that condition a condition precedent to the seizure and condemnation, but there ought to be, it seems to me, such decomposition as in the minds of an intelligent jury—business men, having due regard to the evidence and to the exhibit of the thing itself—would ordinarily suggest itself to them as an article reasonably unfit for human food. If it does that, then, of course, there ought not to be any question of condemnation. If the thing itself is decomposed only to that inevitable degree that is inherent in the packing of fish products and meat products, then, of course, they ought not to be condemned, because that would practically stifle commerce in these articles altogether. These chemists from the department have testified as to the causes of this particular decomposition which they point out. You gentlemen have had the benefit of their advice and judgment on that subject, and, as I said before, it is up to you to say whether or not it appeals to you as business men sufficiently to justify you in saying the Government has met the burden and has in fact shown this particular product to be one in which there is decomposition and that the process of decomposition has gone to the extent where it is not necessarily dangerous, but such an extent as to make the article itself unfit for human food. It does not have to apply to all of it. If a reasonable percentage is of such a character as to create that opinion in your mind, then the Government has made its case. The verdict of the jury should be: "We, the jury, upon the issues joined, find for the United States" or "find for the respondent."

UNITED STATES v. CHICHESTER CHEMICAL CO. (Two cases)

(Court of Appeals of the District of Columbia, May 5, 1924)

298 Fed. 829

Appeal from the Supreme Court of the District of Columbia. Libels by the United States for condemnation of certain drugs. From an adverse judgment the United States appeals. Reversed, and cases remanded for new trial.

MARTIN, *Acting Associate Justice.* The United States filed two separate libels seeking the condemnation and destruction of certain packages of pills, bearing the name of "Chi-Ches-Ters, Diamond Brand, New Style Pills," which were shipped from the city of Philadelphia into the District of Columbia. The Government averred that they were misbranded in violation of section 8 of the Food and Drugs Act (34 Stat. 771, as amended 37 Stat. 416), in that each package inclosed a booklet with representations that the pills possessed great curative properties in the treatment of divers female diseases therein specified, among them amenorrhea, whereas in fact they

contained no ingredients or combination of ingredients capable of producing the therapeutic effects claimed, and the representations were false and fraudulent.

In the answer the claimant company denied all of the incriminatory allegations of the libel. The two cases were tried together, with a verdict and judgment for the respondent. The Government has appealed. There are virtually but two assignments of error submitted by the appellant—the first relating to the exclusion of certain evidence at the trial; the second to the court's refusal to deliver to the jury a certain instruction which was requested by the appellant.

At the trial the Government called Dr. John Thomas Kelley, Jr., as a witness, for the purpose of examining him as a medical expert, and accordingly began to interrogate him respecting his qualifications as such, whereupon the respondent's counsel interposed the following statement:

> Unless you are concerned about it, you need not go any further in qualifying Dr. Kelley. Everybody knows his qualifications.

The Government accordingly discontinued the voir dire examination, and proceeded with the direct examination in chief. The witness testified that none of the ingredients of the pills in question would be of any aid in the treatment of any of the conditions causing amenorrhea, except sulphate of iron in the case of anemia, if given in doses of a grain or two grains, two times a day, over a period of several months. He was then asked by counsel for the Government if that was the consensus of medical opinion. This question was objected to by counsel for the respondent, as follows:

> He cannot answer that question. He can only testify as to what he knows. * * * He cannot speak of a medical opinion—the consensus of the medical opinion—any more than you can speak of the consensus of the opinion of the bar.

The trial court sustained the objection, and the Government excepted. Other similar exceptions were saved by the Government in the course of the trial. The record justifies the conclusion that these objections were not addressed to the qualification of the witness, nor to the form of the questions, but were intended and understood by both court and counsel as relating only to the character of the proposed evidence, the claim being that the "consensus of medical opinion" was not a competent subject of proof under the issue. These rulings of the trial court are now assigned as errors.

It is true that the Government's counsel did not tender the answers which they expected the witness to give in response to the questions, but we think that the Government nevertheless is entitled to prosecute the assignment upon this appeal. The question whether a tender of the proposed testimony is necessary, in order to obtain a review upon appeal of a refusal to admit it, has been variously decided. But in the Federal courts the rule is established that, when a witness testifies in person at the trial, and is asked a question in proper form, which clearly admits of an answer relevant to the issues and favorable to the party calling him, it is error for the trial court to exclude it, notwithstanding the omission of a tender of the expected answer by the party propounding the question, although of course the court, in its discretion, or on motion, may require the party, in whose behalf the question is put, to state the facts proposed to be proved by the answer. This rule prevails also in many State courts, notably in

Maryland. *Buckstaff* v. *Russell*, 151 U.S. 626, 14 Sup. Ct. 448, 38 L.Ed. 292; *Stanley* v. *Beckham*, 153 Fed. 152, 82 C.C.A. 304; *Harris* v. *Brown*, 187 Fed. 6, 109 C.C.A. 60; *Commissioners* v. *Gantt*, 78 Md. 286, 28 Atl. 101, 29 Atl. 610; *Robinson* v. *Old Colony Ry.*, 189 Mass. 594, 76 N.E. 190; *Londonderry* v. *Fryor*, 84 Vt. 294, 79 Atl. 46.

In the case of *Buckstaff* v. *Russell*, *supra*, Mr. Justice Harlan, speaking for the Supreme Court of the United States, said:

> If the question is in proper form and clearly admits of an answer relevant to the issues and favorable to the party on whose side the witness is called, it will be error to exclude it. Of course, the court, in its discretion, or on motion, may require the party, in whose behalf the question is put, to state the facts proposed to be proved by the answer. But, if that be not done, the rejection of the answer will be deemed error or not, according as the question, upon its face, if proper in form, may or may not clearly admit of an answer favorable to the party in whose behalf it is propounded.

We have not overlooked the opinions in *De Forest* v. *United States*, 11 App.D.C. 458, *Turner* v. *American Security & Trust Co.*, 29 App. D.C. 460, and *McCurley* v. *National Savings & Trust Co.*, 49 App.D.C. 10, 258 Fed. 154; but we regard the foregoing rule of practice as authoritative, and as especially applicable to this case, since the prior testimony of the witness herein made it apparent what answer the interrogating counsel expected from him. 3 Corpus Juris, p. 827, "Appeal and Error."

The only remaining inquiry is whether the excluded question did in fact clearly admit of an answer relevant and material to the issue and favorable to the Government's contention, or in other words whether the "consensus of medical opinion," if there was one, in respect to the therapeutic properties of the ingredients of the pills, was competent evidence in the case. In answer to this we may say that the weight of authority sustains the view that such evidence is competent and material in support of a charge like this, brought under the Food and Drugs Act. This rule doubtless rests in part upon the view that Congress did not intend by the act to condemn honest differences of opinion between different medical schools relative to the therapeutic value of drugs in the practice of medicine. *Seven Cases* v. *United States*, 239 U.S. 510, 517, 36 Sup. Ct. 190, 60 L.Ed. 411, L.R.A. 1916D, 164. In *Eleven Gross Packages* v. *United States*, 233 Fed. 71, 73, 147 C.C.A. 141, 142, which, like this, was a libel under the Food and Drugs Act, the Circuit Court of Appeals, Third Circuit, said:

> In support of its case, the Government called several witnesses, physicians of proven ability, knowledge, and experience, who testified that the pill would not, and why it could not, have any beneficial effects in locomotor ataxia and the other diseases named. They also testified to the fact that medical opinion was unanimous in so saying. * * * It is complained, however, that the testimony of these witnesses was not competent, being a mere expression of their personal opinions or views. But an examination of the proofs shows that the case was wholly different from one where witnesses were testifying to their personal views upon a controverted question of opinion. The testimony here was of fact, namely, that there was a general, uncontroverted consensus of opinion.

In *McLean Medicine Co.* v. *United States*, 253 Fed. 694, 696, 165 C.C.A. 288, 290, an indictment under the same act, the Circuit Court of Appeals, Eighth Circuit, said:

> As a part of the Government's case some well-qualified physicians were called as witnesses, and asked if a drug composed according to the formula used by

defendant in preparing this article would, in their opinions, be effective for the treatment of the diseases for which the defendant's labels and statements claimed it was effective treatment, and, after answering that it would not be effective, they testified that there was no difference of opinion among medical men on that subject. Objections were made to this testimony, and it is urged that it calls for the opinion of the witnesses, for a conclusion that only the jury could properly make, and that no conviction could be based on such matters of opinion. The testimony that there was a general agreement of medical opinion as to the therapeutic effect of such a preparation, and what that general medical opinion was, was properly admitted to show the falsity of the statements made by defendant.

See *Simpson* v. *United States*, 241 Fed. 841, 844, 154 C.C.A. 543; *Kar-Ru Chemical Co.* v. *United States* (C.C.A.) 264 Fed. 921.

We hold, accordingly, that it was error for the trial court to exclude the questions propounded by the Government's counsel.

The other assignment of error is based upon the refusal of the court to deliver the following instruction to the jury:

> The jury are instructed that persons who deal in substances or compositions alleged to be curative are in a position to have superior knowledge, and if the jury find that the statements in the booklet offered in evidence as set forth in the amended libels are false, they may infer that such statements were fraudulently made.

This assignment is overruled, first, because the general charge of the court sufficiently covered the subject dealt with by the instruction and, next, because the instruction seems to invite the jury, should they find the representations to be false, to infer from that fact alone that they were also fraudulent, whereas a finding of fraud by the jury should only be reached after a consideration and comparison of all the facts disclosed by the evidence. It is claimed by the appellant that the instruction is supported by the language of the court in *Seven Cases* v. *United States, supra.* It is true that it paraphrases certain parts of that opinion, but these were not intended to serve literally as instructions to the jury.

The judgments below are reversed, and the cases remanded for a new trial.

UNITED STATES v. 95 BARRELS, MORE OR LESS, ALLEGED APPLE CIDER VINEGAR

(Supreme Court of the United States, June 2, 1924)

265 U.S. 438; N.J. No. 12367

Certiorari to the Circuit Court of Appeals for the Sixth Circuit. Judgment reversed.[25]

Mr. Justice BUTLER delivered the opinion of the court.

This case arises under the Food and Drugs Act of June 30, 1906, c. 3915, 34 Stat. 768. The United States filed information in the District Court for the Northern District of Ohio, Eastern Division, for the condemnation of 95 barrels of vinegar. Every barrel seized was labeled:

> Douglas Packing Company Excelsior Brand Apple Cider Vinegar made from Selected Apples Reduced to 4 Percentum Rochester, N.Y.

[25] Reversing *Ninety-Five Barrels, More or Less, Apple Cider Vinegar* v. *United States*, p. 1079, *ante*. For case in lower court, *United States* v. *95 Barrels, More or Less, Alleged Apple Cider Vinegar*, see p. 1047, *ante*.

The information alleged that the vinegar was adulterated, in violation of section 7 of the act. It also alleged that the vinegar was made from dried or evaporated apples, and was misbranded in violation of section 8, in that the statements on the label were false and misleading, and in that it was an imitation of and offered for sale under the distinctive name of another article, namely apple cider vinegar.

The Douglas Packing Company appeared as claimant, and by its answer admitted that the vinegar was labeled as alleged, and that evaporated apples had been used in its manufacture. It averred that nevertheless it was pure cider vinegar and denied adulteration and misbranding. A jury was waived, and the case was submitted on the pleadings and an agreed statement of facts. The court found that the charge of adulteration was not sustained, but held that the vinegar was misbranded. Claimant appealed, and the Circuit Court of Appeals reversed the judgment (289 Fed. 181). Certiorari was allowed (263 U.S. 695).

The question for decision is whether the vinegar was misbranded.

The substance of the agreed statement of facts may be set forth briefly. Claimant is engaged in the manufacture of food products from evaporated and unevaporated apples. During the apple season, from about September 25 to December 15, it makes apple cider and apple cider vinegar from fresh or unevaporated apples. During the balance of the year, it makes products which it designates as "apple cider" and "apple cider vinegar" from evaporated apples. The most approved process for dehydrating apples is used, and, in applying it, small quantities of sulphur fumes are employed to prevent rot, fermentation, and consequent discoloration. The principal result of dehydration is the removal of about 80 percent of the water. Whether, and to what extent, any other constituents of the apple are removed is not beyond controversy; in the present state of chemical science, no accepted test or method of analysis is provided for the making of such determination. Only mature fruit, free from rot and ferment, can be used economically and advantageously.

In manufacturing, claimant places in a receptacle a quantity of evaporated apples to which an amount of pure water substantially equivalent to that removed in the evaporating process has been added. A heavy weight is placed on top of the apples and a stream of water is introduced at the top of the receptacle through a pipe and is applied until the liquid, released through a vent at the bottom, has carried off in solution such of the constituents of the evaporated apples as are soluble in cold water and useful in the manufacture of vinegar. Such liquid, which is substantially equivalent in quantity to that which would have been obtained had unevaporated apples been used, carries a small and entirely harmless quantity of sulphur dioxide, which is removed during the process of fining and filtration by the addition of barium carbonate or some other proper chemical agent. The liquid is then subjected to alcoholic and subsequent acetic fermentation in the same manner as that followed by the manufacturer of apple cider vinegar made from the liquid content of unevaporated apples. Claimant employs the same receptacles, equipment and process of manufacturing for evaporated as for unevaporated apples, except that in the case of evaporated apples, pure water is added as above described, and in the process of fining and filtration, an additional chemical is

used to precipitate any sulphur compounds present and resulting from dehydration.

The resulting liquid, upon chemical analysis, gives results similar to those obtained from an analysis of apple cider made from unevaporated apples, except that it contains a trace of barium incident to the process of manufacture.

Vinegar so made is similar in taste and in composition to the vinegar made from unevaporated apples, except that the vinegar made from evaporated apples contains a trace of barium incident to the process of manufacture. There is no claim by libelant that this trace of barium renders it deleterious or injurious to health. It was conceded that the vinegar involved in these proceedings was vinegar made from dried or evaporated apples by substantially the process above described. There is no claim by the libelant that the vinegar was inferior to that made from fresh or unevaporated apples.

Since 1906 claimant has sold throughout the United States its product, manufactured from unevaporated as well as from evaporated apples, as "apple cider" and "apple cider vinegar", selling its vinegar under the brand above quoted or under the brand "Sun Bright Brand apple cider vinegar made from selected apples." Its output of vinegar is about 100,000 barrels a year. Before and since the passage of the Food and Drugs Act, vinegar in large quantities, and to a certain extent a beverage, made from evaporated apples, were sold in various parts of the United States as "apple cider vinegar" and "apple cider", respectively, by many manufacturers. Claimant, in manufacturing and selling such products so labeled, acted in good faith. The Department of Agriculture has never sanctioned this labeling, and its attitude with reference thereto is evidenced by the definition of "apple cider vinegar" set forth in Circulars 13, 17, 19, and 136, and Food Inspection Decision 140.[26] It is stipulated that the juice of unevaporated apples when subjected to alcoholic and subsequent acetous fermentation is entitled to the name "apple cider vinegar."

Section 6 of the act provides that,

* * * The term "food", as used herein, shall include all articles used for food, confectionary, or condimen by man or other animals, whether simple, mixed, or compound.

Section 8 provides,

That the term "misbranded", as used herein, shall apply to all * * * articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, * * * That for the purposes of this act an article shall also be deemed to be misbranded: * * * In the case of food: First. If it be an imitation of or offered for sale under the distinctive name of another article. Second. If it be labeled or branded so as to deceive or mislead the purchaser, * * * Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which * * * shall be false or misleading in any particular. * * *

The statute is plain and direct. Its comprehensive terms condemn every statement, design, and device which may mislead or deceive. Deception may result from the use of statements not technically false or which may be literally true. The aim of the statute is to prevent that resulting from indirection and ambiguity, as well as from

[26] The definition referred to is: "Vinegar, cider vinegar, apple vinegar, is the product made by the alcoholic and subsequent acetous fermentations of the juice of apples."

statements which are false. It is not difficult to choose statements, designs, and devices which will not deceive. Those which are ambiguous and liable to mislead should be read favorably to the accomplishment of the purpose of the act. The statute applies to food, and the ingredients and substances contained therein. It was enacted to enable purchasers to buy food for what it really is. *United States* v. *Schider*, 246 U.S. 519, 522; *United States* v. *Lexington Mill Co.*, 232 U.S. 399, 409; *United States* v. *Antikamnia Co.*, 231 U.S. 654, 665.

The vinegar made from dried apples was not the same as that which would have been produced from the apples without dehydration. The dehydration took from them about 80 percent of their water content—an amount in excess of two thirds of the total of their constituent elements. The substance removed was a part of their juice from which cider and vinegar would have been made if the apples had been used in their natural state. That element was not replaced. The substance extracted from dried apples is different from the pressed-out juice of apples. Samples of cider fermented and unfermented made from fresh and evaporated apples, and vinegar made from both kinds of cider were submitted to and examined by the District Judge who tried the case. He found that there were slight differences in appearance and taste, but that all had the appearance and taste of cider and vinegar. While the vinegar in question made from dried apples was like or similar to that which would have been produced by the use of fresh apples, it was not the identical product. The added water, constituting an element amounting to more than one half of the total of all ingredients of the vinegar, never was a constituent element or part of the apples. The use of dried apples necessarily results in a different product.

If an article is not the identical thing that the brand indicates it to be, it is misbranded. The vinegar in question was not the identical thing that the statement, "Excelsior Brand Apple Cider Vinegar made from selected apples," indicated it to be. These words are to be considered in view of the admitted facts and others of which the court may take judicial notice. The words "Excelsior Brand," calculated to give the impression of superiority, may be put to one side as not liable to mislead. But the words, "apple cider vinegar made from selected apples," are misleading. Apple cider vinegar is made from apple cider. Cider is the expressed juice of apples and is so popularly and generally known. See *Eureka Vinegar Co.* v. *Gazette Printing Co.*, 35 Fed. 570; *Hildick Apple Juice Co.* v. *Williams*, 269 Fed. 184; *Monroe Cider, Vinegar & Fruit Co.* v. *Riordan*, 280 Fed. 624, 626; *Sterling Cider Co.* v. *Casey*, 285 Fed. 885; affirmed 294 Fed. 426. It was stipulated that the juice of unevaporated apples when subjected to alcoholic and subsequent acetous fermentation is entitled to the name "apple cider vinegar." The vinegar in question was not the same as if made from apples without dehydration. The name "apple cider vinegar" included in the brand did not represent the article to be what it really was; and, in effect, did represent it to be what it was not—vinegar made from fresh or unevaporated apples. The words "made from selected apples," indicate that the apples used were chosen with special regard to their fitness for the purpose of making apple cider vinegar. They give no hint that the vinegar was made from dried apples, or that the larger part of the moisture content of

the apples was eliminated and water substituted therefor. As used on the label, they aid the misrepresentation made by the words "apple cider vinegar."

The misrepresentation was in respect of the vinegar itself, and did not relate to the method of production merely. When considered independently of the product, the method of manufacture is not material. The act requires no disclosure concerning it. And it makes no difference whether vinegar made from dried apples is or is not inferior to apple cider vinegar.

The label was misleading as to the vinegar, its substances, and ingredients. The facts admitted sustain the charge of misbranding.

Judgment reversed.

UNITED STATES v. MARMARELLI ET AL.

(District Court, S.D. New York, June 13, 1924)

N.J. No. 13092

Information in two counts alleging violation of section 2 of the Food and Drugs Act. Jury trial. One count dismissed. Verdict of not guilty on remaining count.

The United States attorney filed an information against Demetrius Marmarelli et al. alleging that said defendants, in violation of the Food and Drugs Act, shipped from the State of New York into the State of Massachusetts a quantity of olive oil; that said article was adulterated in that a substance, cottonseed oil, had been mixed and packed therewith so as to reduce and lower and injuriously affect its quality and strength, and had been substituted in part for olive oil which the article purported to be; and that said article was misbranded for the reason that the statement, to wit, "Pure Olive Oil," borne on a tag attached to the barrel containing the article, was false and misleading in that it represented that the article consisted wholly of pure olive oil, and for the reason that it was so labeled as to deceive and mislead the purchaser into the belief that it consisted wholly of pure olive oil, whereas it did not so consist but did consist in part of cottonseed oil, and for the reason that the article was an imitation of and offered for sale under the distinctive name of another article.

The court delivered the following charge to the jury:

CLAYTON, *District Judge.* Gentlemen of the jury: I call your attention to elementary and familiar rules, which will govern you in your consideration of this case.

Every man is presumed when charged with a crime to be innocent, and that presumption of innocence goes with him and protects him until, or unless, it is overcome by evidence which convinces the jury beyond a reasonable doubt—that is, to a moral certainty—that he is guilty as charged. Then the presumption no longer protects him, because that presumption is overcome by proof that convinces a jury to a moral certainty that he is guilty.

Now, it is for you to judge of the evidence in this case, and, in the light of that presumption, has the evidence satisfied you beyond a

reasonable doubt that the defendants are guilty as charged—satisfied you to a moral certainty that they are guilty as charged in the first count of this information.

Now, you want to know what is the duty of the Government. It is the duty of the Government to prove the charge made against the defendants and to prove it beyond a reasonable doubt, for otherwise they are entitled to an acquittal. They are not required to prove their innocence, but the Government must establish by the evidence, beyond a reasonable doubt, their guilt, or else they are entitled to an acquittal.

Now, you want to know, perhaps, what a reasonable doubt is. Well, a reasonable doubt is what the words imply—that is, a doubt for which you can give a reason, a substantial doubt, a doubt that grows up out of the evidence, or a doubt that arises from a lack of evidence sufficient to convince your minds that the fact has been established as charged. It is not a mere flimsy maybe or perhaps. It is not such a doubt that you might conjure up in any case, but it means a substantial, reasonable doubt.

Now, if it is probable that the defendants are not guilty, that would be a reasonable doubt; and if it is probable that they are innocent, that would be a reasonable doubt.

There is a reasonable doubt which compels an acquittal in every case, unless the evidence is so strong and cogent as to convince the jury that to a moral certainty the defendants are guilty.

In short, gentlemen of the jury, as sensible men I think you will understand that a reasonable doubt is a reasonable doubt. I cannot make it, I think, any plainer to you.

Now, the defendants had a right to testify for themselves, and the law will not permit a man to testify and then say in the next breath that his testimony is not to be believed, because that would be a vain and a foolish thing to say—that a man may testify and yet you must disregard his testimony.

You take the testimony of the defendants in this case and consider it like you do the other evidence in the case, and along with the other evidence, and in the light of all the evidence, and in the light of the fact that they are interested in your verdict in this case. When people make statements to us that they are interested in a personal way or in a financial way, why, ordinarily we weigh that more carefully, what they say, than if we knew they were not interested in what they were saying, not interested in our judgment or our conclusion as to the truth of what they say.

You take the same common sense rule that you practice every day in your practical affairs of life with you into the jury box, and that is why you are put there, because you are possessed supposedly of a large amount of experience and common sense and common knowledge, and that is the reason why jurors are selected, because they have common knowledge, common sense, and common experience, and that is what qualifies you as jurors, together with your good character and standing and your desire to do the right thing as good citizens in the jury box and out of the jury box.

Now, coming, gentlemen, to this case, I have dismissed from the case count 2 of the indictment. Of course, you very readily understand why I did it. There the charge was a misbranding of this barrel of

oil. There was no evidence, in my opinion, that the barrel itself was misbranded. The proof showed that the shipping tag which was in evidence was attached to it, and that it had on it the words "Marmarelli Brothers and Katramados, importers of olive oil, black olives, cheese, figs, and all groceries."

Mr. WOLFF. That is, "Marmarelli Brothers and Katramados, pure olive oil" on the head, and a quite small figure on the barrel, [and] "Marmarelli Brothers and Katramados, pure olive oil" on a small slip, a small head of another barrel. In the middle of the picture on the back, and under [were] those words "Italian, Greek, and Oriental products, 63 Thompson Street, New York."

The COURT. Evidently it was an ordinary shipping tag, with an eyelet of about one inch to it, and that was a product made by hand, or, as in this case, it can be attached to the articles shipped by putting a tack in each corner, as the proof in this case showed, and as the original tag showed, and it was tacked with four tacks to the barrel.

Now, that was not a misbranding in the eyes of the law, and therefore this second count charging the misbranding of it, which is wrong and which is a violation of the law, to misbrand an article and to ship it in interstate commerce, that is a violation of the law, and I did not think that that charge was sustained by the evidence.

Now, there is evidence, in my opinion, in the case which authorized me to submit to you the first count of this information.

This count, of course, will be before you, and you will read it for yourselves, "which said article", it goes on to say, "article of food especially as aforesaid was then and there adulterated, in that a substance, to wit, cottonseed oil, had been mixed and packed with the article so as to lower and reduce its quality and strength, and the said article was further adulterated in that a substance, to wit, cottonseed oil, had been substituted for olive oil, which action purported to be against the peace of the United States and their dignity and contrary to the form of the statute", and so forth.

So you see that charges the defendants with having shipped in interstate commerce an adulterated article.

Now, of course, at once you see that there are involved in this charge several elements. First, the element of adulteration of the article shipped. Now, that is for you to determine. Was this barrel of so-called olive oil adulterated by the addition of cottonseed oil?

Now, it may be that cottonseed oil, and I think it is, is just as wholesome as olive oil, but it is, nevertheless, a violation of the law to mix cottonseed oil with olive oil, when the stuff shipped purports to be pure olive oil.

The law is designed to protect the public against that sort of fraud, and it is a fraud to mix cottonseed oil with olive oil and to ship it as pure olive oil.

Now, this barrel of so-called olive oil with the bill of lading, and which they shipped out according to the evidence in this case shows they shipped it and sold it as pure olive oil, was it adulterated with the addition of, say, 40 percent of oil or any other material amount of cottonseed oil, by putting that, by mixing it with the olive oil in the barrel?

Even if that be so, these defendants can not be convicted unless they had to do with the mixing of the cottonseed oil with the olive oil,

or they knew or had good reason to believe that it had cottonseed oil in it, and with that guilty knowledge that they shipped it and sold it as pure olive oil.

So you see that it is essential, before you can convict the defendants in this case, for you to find beyond a reasonable doubt that the oil was adulterated by the addition of cottonseed oil as charged, and then you must go further and find beyond a reasonable doubt that the defendants did the adulterating or knew that it was adulterated when they sold it and shipped it as pure olive oil.

Now, if the evidence falls short of either one of these things, of convincing you of either one of these facts beyond a reasonable doubt, why, the defendants are entitled to an acquittal.

Now, as to the adulteration of this oil, I express the opinion, which is not binding upon you, that the oil was adulterated by the addition to the olive oil in the barrel, of cottonseed oil.

I think these Government experts and others, the expert from Massachusetts, I think their evidence is sufficient to warrant the conclusion that it was adulterated, but if that be proven beyond a reasonable doubt it is not sufficient to convict these defendants unless the evidence is clear and shows, as I have attempted to say, that they either adulterated it themselves or knew it was adulterated or had good reason to believe it was adulterated when they sold it and shipped it in interstate commerce.

If the oil was adulterated after it passed out of their possession, after it had been received up in Massachusetts, they could not be convicted; or if when they shipped it they had no guilty knowledge, and if there is nothing to charge them with the knowledge or belief that it was adulterated, they could not be convicted.

The evidence must be convincing to a moral certainty on those propositions or they can not be convicted, although you may find that the oil was adulterated at some time, somewhere.

Now, if you believe from all the evidence in this case beyond a reasonable doubt that these defendants are guilty as charged in the first count of this indictment, a part of which I read to you, and you will read it entirely, why, you will find the defendants guilty under that first count, but if, however, under the rules that I have given you and in the light of this evidence all fairly considered, you are not convinced beyond a reasonable doubt or to a moral certainty that their guilt has been shown, to wit, that the article was adulterated with cottonseed, and that they either did it themselves or knew it was done when they shipped it, and that it was not done by somebody else after it got to Massachusetts, and that they knew that, or had reason to know it, that it was adulterated, if they had all that guilty knowledge why, then they could be convicted, but unless they did have that guilty knowledge they can not be convicted.

No man can be convicted of a crime unless he knowingly—as a rule—unless he knowingly and intentionally violated the law. There must be the criminal intent. There must be the guilty knowledge somewhere in most crimes, and I think in a case like this there must be the guilty knowledge, the criminal intent, shown.

Now, the evidence, if it falls short of convincing you of that to a moral certainty, they are entitled to an acquittal. But if, on the other hand, after thoroughly considering all the evidence and in the light of all the facts and circumstances, you are convinced that they

shipped adulterated oil, knowingly and intentionally shipped the oil as pure olive oil, adulterated with cotton-seed oil, if the evidence convinces you of that to moral certainty, then you should convict them, but if there is a reasonable doubt on that proposition, they should be acquitted.

Now, do you want all these charges that you wrote?

Mr. ROMANO. I think Your Honor has covered most of them, and I shall withdraw them.

The COURT. What?

Mr. ROMANO. I withdraw them. I think Your Honor has covered most of the charges.

Mr. WOLFF. I will ask Your Honor to change a portion of your charge in a small respect.

The COURT. Yes.

Mr. WOLFF. The statute in this case nowhere requires——

The COURT. Let me see the statute. What is it? Let me see it. Go ahead. I do not mean to interrupt you.

Mr. WOLFF. The statute in this case nowhere requires that the crime shall have been committed willfully or knowingly. By that meaning to infer that the mere fact that a person transports in interstate commerce adulterated food—the crime has been committed because it is his duty to protect the public and to examine whether or not that food has been adulterated, and I will stand responsible and ask Your Honor to charge to that effect.

The COURT. I do not think there is any difference—any substantial difference—and yet there may be, in my view of the law from yours.

What I meant to say, gentlemen of the jury, and I now tell you as being a part of the law that I gave you in the consideration of this case, is that the general law—under all general law these men, before they can be convicted, must first have shipped in interstate commerce an adulterated article as charged in the indictment.

Now, that must be first shown, and then I think the law requires that they must have known that it was adulterated or they must have had reason to believe that it was adulterated.

I do not think that the law contemplates that a man was violating the law when he had no intention whatever to violate the law. That would be a very hard law, and I do not altogether agree with that view. I think there must be an intention to violate the law somewhere.

Mr. WOLFF. That is exactly where the decisions disagreed. That was my opinion until about a week ago; but the mere effect of my request to change was this, that this law confers upon the dealer a duty to investigate, to learn the substance and quality of what he ships.

The COURT. And to know that it is absolutely pure when he shipped it?

Mr. WOLFF. Yes, sir; that is the purport.

The COURT. I think, if the jury has any reasonable doubt on that proposition, I will put it that way, a reasonable doubt on that proposition, that they could give the defendants the benefit of it, but I am not going to say any more than that. I am not going to say any more to them. I think you can take this case and return your verdict, gentlemen.

UNITED STATES v. McILVAINE BROS.

(District Court, E.D. Pennsylvania, June 20, 1924)

N.J. No. 12919

Information alleging violation of section 2 of the Food and Drugs Act. Trial before the court. Judgment of guilty.

The United States attorney filed an information against McIlvaine Bros., a corporation, Philadelphia, Pa., alleging shipment by said company, from the State of Pennsylvania into the State of New York, of quantities of an article labeled in part "Powdered Colocynth Apple", which was adulterated and misbranded, in violation of the Food and Drugs Act.

It was alleged in the information that the article was adulterated for the reason that it was sold under a name recognized in the United States Pharmacopœia, and differed from the standard of strength, quality, and purity as determined by the test laid down in said Pharmacopœia, in that it contained 25 percent of seeds, and upon extraction with purified petroleum benzine yielded 11.39 percent of fixed oil, whereas said Pharmacopœia provided that colocynth apple should contain not more than 5 percent of seeds, and upon extraction with purified petroleum benzine should yield not more than 2 percent of fixed oil, and the standard of the strength, quality, and purity was not declared on the container thereof.

It was alleged that the article was misbranded for the reason that the statement, "Colocynth Apple", borne on the label attached to the package, was false and misleading in that it represented that the article consisted wholly of colocynth apple, to wit, a product that contained not more than 5 percent of seeds and yielded not more that 2 percent of fixed oil, whereas, in truth and in fact, it did not so consist but did consist of a product which contained 25 percent of seeds and yielded 11.39 percent of fixed oil. Misbranding was alleged for the further reason that the article was an imitation of colocynth apple and was offered for sale under the distinctive name of another article.

The case having come on for trial before the court, the following opinion was delivered by the court:

DICKINSON, *District Judge.* A statement of the cause of action and of the defense out of which the question to be decided arises may begin with the act of Congress directed against adulterations and misbranding of drugs. There is a product known to the trade as powdered colocynth. This has recognition in the United State Pharmacopœia and to it is applied a pharmacopœial standard of strength, quality, and purity. As the trade name indicates, this product is sold to druggists in a powdered form. What may be called the raw product goes to the manufacturer in a form which gives it, because of this form, the name of apple, and makes it known to the trade as "colocynth apples." In the raw product form these apples contain seeds. If these apple seeds and all are reduced to powder it will contain about 25 percent of seed. In the standard powdered

colocynth the percentage of seed ingredient should not exceed 5 percent. The defendants sold the product of which complaint is made, which was branded and invoiced as "powdered colocynth apple." The seed ingredient exceeded the 5 percent limit and reached approximately 25 percent. If this had been branded and sold as powdered colocynth, a finding of misbranding and adulteration would not be opposed. The question raised is whether the addition of the word apple relieves the defendants of the charge of misbranding and of adulteration. The real test is to be found in the effects and consequences. To the general public, such a branding without a doubt would be misleading, and from the same viewpoint would be an adulteration because the significance of the addition of the word apple would be lost upon them. Inasmuch, however, as the dealings of the defendants are with the trade, the purchasers would be expected and presumed to know what difference in the product the difference in the label indicated. An administrative ruling would call for the decision that there was a misbranding because anything should be condemned which might mislead. The defendants themselves accept this view and have changed the descriptive branding so as to make the difference between "powdered colocynth" and "powdered colocynth apple" clear.

The question before us is the narrower question of whether there should be a judical determination that the defendants have incurred the penalty of the act. In view of the fact that the defendants have changed the markings of the product so as to make it clear that there is no pretense that it is the powdered colocynth described in the United States Pharmacopœia, and that it complies with the standard of quality officially established for that product but is something different therefrom, the present ruling is reduced to the more or less formal one of whether the original branding adopted by the defendants was a violation of the statute. The result of most importance is that manufacturers should be enabled to know definitely what is and what is not a compliance with the statute. An administrative ruling, if followed by a manufacturer, protects him from further criticism but does not necessarily give him the protection to which he is entitled, against his trade rivals making use of the branding which he has voluntarily abandoned. Nothing short of a judicial ruling will do this. This defendant thus becomes as much concerned with a ruling condemning the branding first adopted as are those who are concerned with the administration and enforcement of the act. Fortunately, the Supreme Court of the United States in the apple cider vinegar case (265 U.S. 439) has charted the course to be followed. The general rule is that the act of Congress should be so read as to further the accomplishment of its purposes, and that not only any branding which is misleading or liable to mislead but also any which is ambiguous should be visited with the condemnation of the act.

Following the course thus indicated, we encounter the fact finding now made that the branding first given this product has the vice of ambiguity, in that, although it is not expressly stated that the product is what is known to the trade as powdered colocynth and it is stated that it is powdered colocynth apple, yet it is none the less true that the

difference in the product is not so stated as to command attention to the fact that there is a difference but is so stated that the difference may be overlooked and the purchaser be buying one product with the thought in his mind that he is buying another.

As we interpret the spirit and true meaning of the ruling cited, it is that a branding which is misleading because of its ambiguity is as much within the inhibition of the statute as if it was misleading in statement.

This leads to a finding in favor of the plaintiff and against the defendants, with costs. Following the usual rule no formal judgment or decree is now entered, but the parties have leave to submit a form of decree or judgment in accordance with this opinion.

UNITED STATES v. THE MERCHANTS BISCUIT CO.

(District Court, D. Colorado, Oct. 25, 1924)

Information alleging violation of the Food and Drugs Act. On demurrer to information. Overruled.

SYMES, *District Judge*. The demurrer to this information attacks the constitutionality of the third section of the Pure Food and Drugs Act, Comp. Stats., section 8724, and a very interesting argument is made in support of the demurrer. I do not think that *U.S.* v. *Cohen Grocery Co.*, 255 U.S. 81, and similar cases construing the food control act, otherwise known as the Lever Act, are in point. That statute clearly did not fix an ascertainable standard of guilt that in any way informed a defendant accused of violating the act of the charge against him.

The act in question here, however, is very specific that the weight and measure, or numerical count must be plainly stated on the package, in so many words. There can be no doubt as to what the producer or manufacturer must do under that provision, and it is not made uncertain because a "reasonable variation" shall be permitted. That does not mean that persons subject to the act do not have to be accurate in their representations, and that they do not have to ascertain and affix the weight, measure, or numerical count at the time they put up the package, etc. It does mean, that if, due to causes over which they have no control an unavoidable variation occurs after the goods leave their possession, then the law is not violated if the variation is a reasonable one.

That part of the section which is attacked, therefore imports common sense or the rule of reason into the act, and does not require the impossible. But for this provision we might be compelled to hold it unconstitutional under the doctrine of *Burns Baking Co.* v. *Bryan*, 264 U.S. 504, as imposing an intolerable burden, or impossible requirement.

The demurrer is overruled.

GOODWIN ET AL. v. UNITED STATES

(Circuit Court of Appeals, Sixth Circuit, Nov. 5, 1924)

2 Fed. (2d) 200; N.J. No. 12844

Appeal from decree of condemnation entered in the District Court for the Southern District of Ohio. Judgment affirmed.[27]

Before DENISON and DONAHUE, Circuit Judges, and SATER, District Judge.

DONAHUE, *Circuit Judge*. The Food and Drugs Act of 1906 and the amendment of 1912 do not confer and do not purport to confer admiralty jurisdiction upon the United States District Courts, in proceedings to condemn property seized under the provisions of that act and amendment thereto. The provision that a libel shall be filed and the proceedings shall conform as near as may be to the proceedings in admiralty, relate only to procedure and not to jurisdiction. (*443 Cans of Frozen Egg Product* v. *United States*, 226 U.S. 172, and cases there cited.)

This prosecution was based solely on the amendment of 1912 to section 8. The libel quoted from the label a long list of ailments for which the water was said to be beneficial with "healing powers" and a "reliable remedy." It then denied that the water "is capable of producing the therapeutic effects claimed in the statements upon and in said cartons as hereinbefore set forth."

This does not fail to state a case under the statute, and did not make the libel subject to demurrer or motion to quash. It would be sustained by evidence sufficiently showing the false and fraudulent character of any one of the various claims recited. If defendant needed a better specification of the particulars upon which the Government would rely, if it did not rely upon all the statements, a motion for a bill of particulars would doubtless have been granted or an amendment of the libel permitted.

The record in this case does not present the question whether mineral spring water as it comes from the earth is or is not a drug, for the reason that the Crab Orchard concentrated mineral water is not transported and marketed in its original condition. While it appears that the constituent drug elements are not completely extracted therefrom and transported and sold without the admixture of other elements, nevertheless the processes of separation are carried to such an extent that the water can no longer be used as a beverage, but only in small quantities or doses, as a medicine. For this reason Crab Orchard concentrated mineral water can not be classified as "food" but, on the contrary, comes fairly within the meaning of "drug" as used in the Pure Food Act and amendments thereto.

Upon the trial of the issue of fact joined by the libel, charging the misbranding of mineral water, and the answer of the intervenor, expert evidence may be properly admitted. If it appears from the testimony of a witness upon preliminary examination that he is

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[27] Affirming *United States* v. *22 Bottles of Crab Orchard Concentrated Mineral Water*, p. 1055, *ante*. See also *Goodwin et al.* v. *United States*, p. 1107, *ante*.

learned in the science of chemistry or has been regularly and legally admitted to the practice of medicine, that he has knowledge of the drug elements contained in the article transported in interstate commerce and their efficacy or lack of efficacy as curative agents, used either separately or in combination in the treatment of the diseases specified on the label, his opinion on that subject is competent evidence, regardless of whether he has had actual experience or observation of the effect of the use of such drugs in the exact form in which they are transported in interstate commerce. The weight of his evidence is a question for the jury.

This court has no authority to determine the weight of the evidence or reverse the judgment for the reason that the verdict is against the weight of the evidence where the verdict of the jury is sustained by substantial evidence. (R.S. sec. 1011; Comp. Stat. sec. 1672); *Bullock* v. *United States*, 289 Fed. 29–32; *Atlantic Ice & Coal Co.* v. *Van*, 276 Fed. 646.)

The Government having charged misbranding in general terms and no motion being made to require it to file a bill of particulars, the general verdict must be sustained if there is substantial evidence that any one of the statements made on the label is false or fraudulent, but the verdict and judgment relates to and affects only the particular label on the bottles seized in interstate commerce. This general verdict is sustained by substantial evidence.

For the reasons stated, the judgment of the District Court is affirmed.

UNITED STATES v. 243 CASES OF CANNED SALMON

(District Court, E.D. Texas, Jan. 5, 1925)

N.J. No. 12956

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict in favor of the United States.

Estes, *District Judge*. Gentlemen of the jury: This case, a rather unusual proceeding, has been instituted under the provisions of a Federal statute generally known as the Pure Food and Drugs Act. The act prohibits the introduction into any State or Territory, from any other State or Territory, of any article of food which is adulterated. According to the provisions of the act, food is to be considered adulterated "if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance." It contemplates that the Secretaries of the Treasury, of Agriculture, of Commerce, and of Labor shall make uniform rules and regulations for carrying out the provisions of it, but such rules, so far as I know, have not yet been made. So the enforcement of the law, under conditions like those obtaining here, involves more or less of an original undertaking.

The evidence, as regards material matters, is uncontroverted. Both parties concede that certain of the cans among the samples taken out of the cases shipped from the State of Washington to Paris, in this State, contained putrid and tainted fish. The samples were gotten

on four different occasions, three on behalf of the Government and one on behalf of the claimant, by taking 48 cans from the 109 cases of Sambo brand chum salmon and 48 cans from the 134 cases of Snowshoe brand salmon. The analyses or tests of these samples disclosed a percentage of putrid or tainted fish, varying as the opinions of the witnesses varied.

Now, the question for you to determine from the production of these samples, taking into consideration the number of them and what the analyses of them disclosed—all the testimony, both for the Government and the claimant, on that point—is whether you find or feel capable of finding that the whole product is adulterated. To illustrate, an examination was made of a shipment of oysters in which some defective oysters were found in every can of the shipment. In that state of affairs, the jury might have no difficulty in determining that the entire shipment was in a state of decomposition or adulterated. On the other hand, if only 2 or 3 cans in a large shipment of oysters were found to contain oysters in a state of decay, there might be some doubt in your minds as to whether the entire shipment was thus affected.

You are therefore to determine, from a preponderance of the evidence, whether this entire shipment of fish contained decomposed or putrid animal matter to the extent that it should be condemned. You should bear in mind, when determining that point, that the law requires nothing impossible of a shipper. The canning industry in this country is one of our largest and most outstanding enterprises. I think there was some testimony that it is impracticable to prevent a fish in a state of decomposition from now and then getting into the cannery and being put into the cans. The theory is that this cannot be avoided. On the other hand, there is testimony that the canneries can be so managed, and the fish so handled and treated, as to prevent decaying fish from being put into the cans. The test to determine that is ordinary care.

If you find and believe, from a preponderance of the evidence, that the parties who canned these fish exercised ordinary care in the handling of their products and found it impracticable to avoid a putrid fish from being canned now and then, and that the percentage of decayed fish found in this shipment represents no more than is inevitable in the canning process, then the claimant would not be responsible here and this shipment would not be condemned, even though the samples disclosed that some of the cans contained putrid or decomposed matter.

So, in determining whether this shipment can properly be condemned, you should take the question of ordinary care into consideration. I, therefore, charge and instruct you that if you find and believe, from a preponderance of the testimony, that these cases of fish—that is, the 109 cases of Sambo brand chum salmon and 134 cases of Snowshoe brand salmon—consisted in whole or in part of decomposed or putrid animal substance, it will be your duty, unless you find for the claimant under the instruction I shall presently give you, to return a verdict in favor of the Government. If, from the samples procured, you do not find that the proof is sufficient to convince you that a percentage of adulteration existed throughout this shipment, or if you find that no more adulteration existed than was inevitable in canning fish when ordinary and proper care is exercised, your verdict should be for the claimant.

UNITED STATES v. 2,205 CASES OF CANNED SALMON

(District Court, W.D. Texas, Jan. 29, 1925)

N.J. No. 13605

Libels under section 10 of the Food and Drugs Act. Jury trial. Verdicts in favor of the United States.

WEST, *District Judge.* Gentlemen of the jury: The issues of fact in six separate suits are submitted to you for determination. The parties have agreed and the court has consented that this may be done. The evidence in general has relevancy to each and every suit. Direct evidence having application to each particular suit is also offered. The issues being practically alike, a single jury may try them, thereby securing six separate trials without calling as many juries.

The Government has seized six certain interstate shipments of canned salmon described in the six several suits, claiming adulteration, in that each shipment consisted in whole or in part of decomposed salmon. An added ground of seizure is alleged as to two of the shipments, claiming that each was misbranded.

Section 7, paragraph 6, of the Food and Drugs Act of 1906, provides:

> That for the purpose of this Act an article shall be deemed to be adulterated: * * * In the case of food: * * * Sixth. If it consists in whole or in part of a decomposed * * * animal substance.

Section 8 provides:

> That the term "misbranded", as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, * * * which shall be false or misleading in any particular.

And in the case of food, paragraph 2—

> If it be labeled or branded so as to deceive or mislead the purchaser.

Section 10 of the act provides that adulterated articles shall be excluded from interstate commerce and be subject to seizure by the Government through the district courts by process of libel for condemnation. It is conceded that the salmon was moving from Seattle, Wash., consigned to Texas points.

The Government as libelant in each of the suits stands as a plaintiff and seeks condemnation and destruction of each shipment. The claimants are owners or consignees, taking the attitude of defendants.

Responsive to the publication of notices of the Government's purpose, the various claimants named in each libel have intervened, asserting ownership of the several shipments seized in each suit, and deny in each suit that the salmon was adulterated or misbranded as charged by the Government and charge that no lawful grounds exist for the seizure, condemnation, or destruction of the property and say that each shipment should be delivered to the respective claimant.

The statute requires you to decide whether the salmon consisted in whole or in part of decomposed animal substance and, in two of the suits, whether those two particular shipments of salmon were misbranded.

The word "decomposed" as used in the statutes, applying its ordinary meaning, is a state of decomposition, and "decomposition"

means a condition of being decayed, putrid, or rotten. If, therefore, you find that the salmon in question was decomposed as defined, you should find for the Government, libelant, and against the claimants.

Section 7 of the act refers to the adulteration of the "article." Each shipment consists of hundreds of cases of salmon, each case containing 48 cans. Does the use of the word "article" in the statute have reference to a single package, such as a can, or does it refer to the separate case, or to the shipment as a whole? You are instructed that the word "article" as used does not refer to the single, separate can, or to the single or separate case, of salmon in each shipment, but refers to each lot or shipment seized under each of the several suits.

The letter of the statute forbids the transportation and sale in interstate commerce of an article of food which is decomposed. The words used are free and clear from ambiguity, and each has a common, ordinary, everyday, well-known meaning. It would, therefore, be improper for you to take into consideration any evidence which tends to show that the salmon is fit or unfit for food, or harmful to health. There is nothing in the statute itself which would make the state of healthfulness or the edibleness of the article relevant to your inquiry. Those considerations, if in your minds, must be disregarded. It makes no difference whether the salmon was fit for food and healthful or was not.

Decompostion begins where life ends, but that is not the sort of decomposition meant by the statute. The moment life commences, in a sense it begins to fade, and the moment that life ceases, in a sense decomposition begins, and increases by degrees to rottenness, decomposition, and decay. The witnesses both for the claimants and the libelant uniformly testify as to salmon that three well-defined degrees of decomposition exists after life has ceased. The first definite or least degree of decomposition was described as "stale", the second or next greater degree was called "tainted", and the third or last degree indicates total decompostion and was called "putrid." If you find and believe that the evidence in these suits has fixed such degrees or states of decomposition, you may consider them in arriving at your judgment as to whether the shipments of salmon were adulterated or not. That is to say, whether or not the salmon was "stale", "tainted", or "putrid", in whole or in part; and if you find that either degree of decomposition existed as shown by a preponderance of the evidence, then your verdict would be for the libelant.

The burden rests upon the Government, libelant, to establish to your satisfaction by a preponderance of evidence that each of the various lots of salmon seized is adulterated as herein defined. If, therefore, you believe that the greater weight or preponderance of the evidence does not satisfy you that the salmon was adulterated, in whole or in part, as defined herein, then the Government has failed to sustain the burden cast upon it, in which event you would find for the claimant or claimants, in the several separate suits submitted.

The statute declares that an article of food which consists in whole or in part of a decomposed animal substance may be condemned. The state of decomposition, in whole or in part, as applied to the various shipments of salmon involved in these suits, requires some elucidation; for instance, what part of the whole of each shipment of salmon is to guide the jury? To what extent would the whole of the

shipment be considered as partly decomposed? Would an infinitesimally small fraction of the whole of a shipment be within the meaning of the law as a "part", and thus require a finding against the claimants and in favor of libelant? On these questions the court instructs you that you will carefully consider the evidence of all the witnesses, both for the Government tending to establish a substantial degree of decomposition as applied to the whole of each shipment on the one hand, and all of the evidence introduced by the claimants in each suit tending to show that decomposition did not exist to any appreciable extent. It is your duty to reconcile conflicting statements of the witnesses, and likewise must you consider the evidence as a whole and thus arrive at a proper verdict in the light of all the evidence. The words of the statute "in whole or in part" should be given a reasonable and common sense application, having reference to the purpose of the act.

Therefore, if you should find that the adulteration or decomposition referred to extended to the whole shipment sought to be condemned in each suit, although you need not find that each and every can of salmon was so decomposed, nevertheless you should find, before warranting condemnation, that the decomposition extended to a substantial degree throughout the whole of each shipment. If such condition does exist you should find for the Government, libelant. If, on the other hand, you should find that decomposition extended to the entire shipment in each of the several suits, but that the degree of decomposition which extended throughout the whole of the shipment was in so small a proportionate degree to the whole as to be insignificant or inconsiderable, then you would find your verdict in favor of the claimant or claimants in the several suits where so small a state or degree of decomposition did so exist.

And again, if you should find that no adulteration and no decomposition existed in any one or in all of the several shipments in the several suits being considered by you, you would find in favor of such claimant, or all of the claimants.

You are instructed as to the allegations and charges of misbranding as set forth in cases nos. 1032 and 1055: The Government, libelant, claims in these two cases that condemnation has been incurred because of the adulteration by decomposition of the canned salmon, and it should also be declared forfeited because of being misbranded. The misbranding in case no. 1032 is charged to consist of a false and misleading statement and design appearing on the labels of the cans containing the food product, having reference to a picture of a salmon with the words on the picture "Select Pink" and words underneath "Alaska Salmon"; that the picture and the words were intended to convey the false representations that the can contained select pink Alaska salmon but the truth is that the contents consisted of a poor pack of pink salmon of inferior and not of a select grade; that it thus was calculated to deceive prospective purchasers. The label in question was submitted to you in evidence. If you believe the greater weight of the evidence is that the cans were so labeled, bearing the picture and statements set out, and that the words and the picture were false and misleading, and that the contents of the cans was not select pink salmon, but was of a poor and inferior grade and not selected, and was thus calculated to deceive prospective purchasers,

then you would be warranted in finding for the Government, libelant. But if, on the other hand, you are not so satisfied and do not find that the cans were so labeled, or that the words and the picture in evidence are not false or misleading, and that the contents of the cans was of select pink Alaska salmon and of a select grade, then you would be authorized to find the words and the representations were not misleading and calculated to deceive as charged, in which event then your verdict would be for the claimant.

The misbranding in case no. 1055 consists of a statement appearing on the labels of the cans of that shipment as follows: "15½ Oz. Net Fresh Salmon Cooked in Can After Sealing," charged in the libel to be false, in that it represented the contents as fresh salmon, the fact being that it was not fresh in the sense as used in the canning trade, wherefore the representation was misleading and calculated to deceive prospective purchasers. The label was submitted to you in evidence; if you believe that the greater weight of the evidence is that the cans were so labeled, bearing the statement set out, and that the representation was to the effect that the salmon canned was fresh salmon, when in fact it was not fresh in the sense the term was used in the canning trade, and that the statement was false or misleading and calculated to deceive prospective purchasers, then you would be warranted in finding for the Government, libelant. But if, on the other hand, you are not so satisfied and do not find from the evidence that the cans were so labeled or that the statement in evidence was not a representation that the salmon was canned while fresh and the contents was fresh in the sense used in the canning trade, and was not false or misleading in the particulars set forth, then your verdict will be for the claimant.

As stated in the beginning, you are to return six separate verdicts representing your finding in each one of the several suits submitted.

The following authorities were consulted and support the instructions given:

United States v. *200 Cases Tomato Catsup* (D.C.), 211 Fed. 780; *United States* v. *Boeckel Co. et al.* (C.C.A.), 221 Fed. 885; *United States* v. *496 Boxes Oranges* (D.C.), 249 Fed. 505; *A. O. Andersen & Co.* v. *United States* (C.C.A.), 284 Fed. 542; *United States* v. *200 Cases Salmon* (D.C.), 289 Fed. 157; *Wood Mfg. Co.* v. *United States* (C.C.A.), 292 Fed. 133.

Department of Agriculture records:

Notice of Judgment No. 5527, District Judge Landis, Illinois, charge to jury in *United States* v. *5,060 Cans Tomato Pulp*, January 16, 1917.

Notice of Judgment No. 12056, District Judge Faris, Missouri, charge to jury in *United States* v. *496 Cases Salmon*, January 16, 1924.

UNITED STATES v. 2,995 CASES OF CANNED SALMON

(District Court, W.D. Washington, Mar. 13, 1925)

N.J. No. 12535

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict in favor of the United States.

The United States attorney filed a libel for seizure and condemnation of 2,995 cases of canned salmon, alleging that the article had been

shipped and transported from the Territory of Alaska into the State of Washington and remained in the original unbroken packages, and that it was adulterated in that it consisted wholly or in part of a filthy, decomposed, and putrid animal substance, in violation of the Food and Drugs Act.

The case having come on for trial before the court and a jury, after the submission of evidence and arguments by counsel, the court delivered the following charge to the jury.

CUSHMAN, *District Judge.* Gentlemen of the jury: You have heard the evidence in the case, and the arguments. It is the duty of the court now to instruct you regarding the law. The task devolving upon the court has been much lightened by the thorough and exhaustive manner in which the case has been tried and has been argued. You will take out the pleadings in the case with you, when you go to your jury room. These pleadings consist of the libel filed by the United States attorney, and the answer filed by the claimant. You understand this suit is against this particular parcel of salmon. The client of Mr. McCord and Mr. Shackelford interposes a claim to it, and, claiming to be the owner, is allowed to defend the salmon; but what you are trying in this case is this parcel of salmon.

The libel filed by the United States attorney alleges that this salmon was shipped in interstate commerce from Alaska to the State of Washington; alleges that it is adulterated; alleges that it was adulterated at the time that it was shipped in interstate commerce; and prays its condemnation.

The answer of the claimant admits that it was shipped from Alaska to the State of Washington; denies that it was adulterated.

Your verdict in this case will not be "guilty" unless a fair preponderance of the evidence has shown that it was adulterated within the meaning of this law.

"Adulteration" or "adulterated" is about the only word that occurs to me in this law that requires a definition at the hands of the court. The other words used in the statute are words of ordinary meaning and are used in their ordinary sense, but this statute defines an adulterated article of food about as follows, that is, an article of food is adulterated when it consists, in whole or in part, of filthy, decomposed, or putrid animal substance, making it unfit for human food; and before your verdict can be "guilty" in this case, or before it should be "guilty" in this case, you will have to find that there was a fair preponderance of the evidence showing that it was either filthy, decomposed, or putrid to an extent that rendered it unfit for human food.

It may be that decomposition begins as soon as life ends, but a food product, this canned fish product, is not decomposed within the meaning of this law at that early stage. "Decomposed" in this law does not mean the beginning of decomposition; it means the state of decomposition that renders the article of food unfit for human food. "Decomposed" within this law does not mean that it shall have reached such an advanced state of decomposition that it is resolved to its elements, that it has ceased really to be flesh. Regarding this expression "unfit for food," the court does not undertake to enumerate all of the things that you might take into account in determining whether an article is fit or unfit for food.

The evidence in this case has taken a wide range. You are not to understand from that fact that you are trying either the packers or

the Bureau of Chemistry; you are trying this particular parcel of fish to determine whether it is filthy, decomposed, or putrid to an extent rendering it unfit for food. This evidence regarding the manner in which the fish was packed, the conditions under which it was packed, and much of the other testimony in the case was to enable you to determine whether it was reasonably probable that it was a fit food product if it was put up in the manner described. In other parts of the testimony, witnesses have been examined and cross-examined about their experience and what they had done and what they had not done. Now, much of that testimony went into the case so that you might determine the value of their opinions from their experience and their interest, if any, in the case.

Now, coming back again to the question of the fitness or unfitness of this fish for food: in order to be unfit for food, within the meaning of this law, it would not be sufficient if you found some one person with an appetite so pampered and cloyed with delicacies as to become so fastidious that he would turn up his nose at a can of salmon; that would not be sufficient to condemn it. Neither would it be sufficient to sanction and warrant its being carried in interstate commerce, if you found somebody so hungry that he would eat it. "Unfit for food" here in this statute means reasonably unfit for food.

The evidence in the case regarding the fact, if it be a fact, that salmon may be stale, tainted, or decomposed without being an injurious food, you will understand that the fact that it is not injurious does not make it fit for food, if it is so decomposed as to be unfit for food. The fact regarding whether it would injure the person eating it or not was admitted in the case, as you can understand that if an article of food in a certain condition was deadly, as you have heard of mushrooms—I do not undertake to say that they are deadly—but if an article of food was deadly and you could not determine, before eating it, whether it was deadly or not, you would understand that such an article of food would be unfit for human food on a certain percentage of the impurity or conditions that rendered it deadly, when another article of food that was perfectly harmless and could be easily detected would not be unfit for human food, measured by those standards alone. It is a matter of common knowledge that in determining whether an article is fit for food or appropriate for food, that you take into account whether it is harmful or not, you take into account whether it has food value, whether it satisfies your hunger, whether it builds up the wasted tissues that are exhausted because of a lack of food, and to a certain extent you take into account whether it pleases the taste. Now, what value you are going to place upon these different things that will be taken into account in measuring the fitness of this or any article of food, is for you to determine, not the court.

I believe I have instructed you that before you could find a verdict of "guilty", that you must be able to find, from a fair preponderance of the evidence, that this salmon was either filthy, decomposed, or putrid to an extent rendering it unfit for human food. Now, where a parcel of food has been tested, where the tests that have been made do not extend to the entire parcel, it is nevertheless necessary that the preponderance of the evidence should have shown that the adulteration extends to the whole product sought to be condemned before

your verdict would be "guilty." It might be that a small percentage of adulteration in a small percentage of samples taken from such a product would not amount to a fair preponderance of the evidence, where an adulteration of a large percentage of the product would establish that fact.

The thing that is charged is that this was an adulterated article of food when it was shipped in interstate commerce. That is necessary. But there has been no particular contention made here, either under the evidence or the arguments, that the fish is in any different condition now, or at the time it was examined here in Seattle, than it was when it was shipped.

You are in this case, as in every case where questions of fact are tried to the jury, the sole and exclusive judges of every question of fact in the case and the weight of the evidence and the credibility of the witnesses. In weighing the evidence and measuring the credit of the witnesses who have appeared before you and testified, the law does not undertake to point out all of the things that you may take into question in measuring such credit of such witnesses. You are authorized to consider any and everything that as men of experience you have found to be of value in measuring where the truth lies, from human testimony and human transactions. The law does say that you should observe and weigh the appearance and conduct and demeanor of the witnesses who have come before you and testified; whether from their manner of giving their testimony it created a belief in your minds that they were doing their utmost to tell you the exact truth as they understood it, or saw it; whether some of them may have been reluctant and evasive and kept trying to get away from the question, creating the belief in your minds that they were trying to keep from telling you the straight of it, or whether other witnesses may have appeared to you to be willing, trying repeatedly to get something into the case that nobody had asked for—what the law calls a "swift" witness; also take into account the situation in which the witness is placed, as enabling the witness to know the exact facts, as one witness, by reason of his experience and by reason of his situation in regard to the transactions about which he is testifying, might be in a much better position to tell the exact truth than another one who was just as much inclined to tell you the truth as the first; also take into account the reasonableness and probability of the testimony of each witness, in view of the circumstances, whether it appears to be reasonable and probable or whether it appears unreasonable and unlikely; take into account the interest that any witness may have been shown to have in the case, an interest either as shown by the manner in which the witness gave his testimony or as shown by the relation of the witness to the case and the matters therein involved.

The court has, in the course of the instructions, used the expression "preponderance of the evidence." Preponderance of the evidence is the greater weight of the evidence. That evidence preponderates which so appeals to your experience and reason and intelligence as to create and induce a belief in your minds, and, if there is a dispute in the evidence, that evidence preponderates which is so strong in these particulars as to create and induce a belief in your minds, in spite of what is opposed to it in the way of evidence or assaults that have been made upon it in the way of argument.

There was something said, I believe, in argument, regarding the care taken in putting up this fish. For fear that you may not yet understand the rule of law on that matter: if this fish is decomposed to the extent that it is not reasonably fit for food and the fair preponderance of the evidence shows that fact, the verdict should be "guilty", no matter how it came about—its decomposition. If it came about in spite of the care taken in putting it up, or if some malicious person brought it about, that does not make any difference. You are trying this article of food. If it is so decomposed as not to be reasonably fit for food, the verdict should be "guilty." If a fair preponderance of the evidence has not shown that fact, your verdict should be "not guilty."

Is there anything further, gentlemen?

Mr. McCord. We except to that portion of Your Honor's instructions as to the preponderance of the testimony. The burden of proof is on the Government to show, by a fair preponderance of the testimony, Your Honor stated, that the allegations of the libel were supported. This is an action in the nature of forfeiture of property, and I think the instruction should have been that the allegations of the libel must be established, not only by a fair preponderance of the evidence, but that the evidence should be clear and convincing.

The Court. Exception allowed.

Mr. McCord. I also except to Your Honor's failure and refusal to give the first instruction requested by the claimant.

The Court. Exception allowed.

Mr. McCord. The claimant also excepts to Your Honor's refusal to give the second instruction requested.

The Court. Exception allowed.

Mr. McCord. The claimant excepts to Your Honor's refusal to give the third instruction requested by the claimant.

The Court. Exception allowed.

Mr. McCord. The claimant excepts to Your Honor's refusal to give the fourth instruction requested by the claimant.

The Court. Exception allowed.

Mr. McCord. The claimant excepts to the action of the court in refusing to give the fifth instruction requested by the claimant.

The Court. Exception allowed.

Mr. McCord. The claimant excepts to the refusal of the court to give the sixth instruction requested by the claimant.

The Court. Allowed.

Mr. McCord. The claimant excepts to the action of the court in refusing to give the seventh instruction requested by the claimant.

The Court. Allowed.

Mr. McCord. The claimant excepts to the refusal of the court to give the eighth instruction requested by the claimant.

The Court. Exception allowed.

Mr. McCord. The claimant excepts to the refusal of the court to give the ninth instruction requested by the claimant.

The Court. Exception allowed.

Mr. McCord. The claimant excepts to the action of the court in refusing to give the jury the tenth instruction requested by the claimant.

The Court. Exception allowed.

Mr. McCord. The claimant excepts to the action of the court in refusing to give the eleventh instruction requested by the claimant.

The Court. I will allow an exception. I think I covered that.

Mr. McCord. The claimant excepts to the action of the court in refusing to give the twelfth instruction requested.

The Court. I think that has been covered. You are allowed an exception however.

Mr. McCord. The claimant excepts to the failure of the court, in final instructions of the court, to give the thirteenth instruction requested by the claimant.

The Court. I will give that instruction, since something has been said about it in the course of the trial.

In your deliberations, you will not consider the question as to whether or not the salmon involved in this controversy can or cannot be reconditioned. The reconditioning of the salmon is not within the issues in this case.

Are there any exceptions?

Mr. Hill. If the court please, the Government excepts to the courts refusal to give the libelant's first requested instruction.

The Court. Exception allowed.

Mr. Hill. The libelant excepts to the courts refusal to give the second requested instruction.

The Court. Exception allowed.

Mr. Hill. The libelant excepts to Your Honor's refusal to give the libelant's third requested instruction.

The Court. Exception allowed.

Mr. Hill. The libelant excepts to Your Honor's refusal to give the libelant's fourth requested instruction.

The Court. Exception allowed.

Mr. Hill. The libelant excepts to Your Honor's refusal to give the libelant's fifth requested instruction.

The Court. Exception allowed.

Mr. Hill. And the libelant excepts to Your Honor's refusal to give the libelant's sixth requested instruction.

The. Court. Exception allowed.

Mr. Hill. The libelant further excepts to that portion of Your Honor's instructions in which it is stated that the issue is whether or not this salmon consists, in whole or in part, of filthy, decomposed, or putrid animal substance, and stating, in addition to that, "unfit for food."

The Court. "Making it."

Mr. Hill. Making it unfit for food.

The Court. Exception allowed.

Gentlemen, in the progress of the case, the court, as evidence came in, instructed you regarding the purpose for which it was admitted. Many of those instructions I have not repeated to you in the charge I have just given you. It is your duty to bear in mind the instructions the court gives you in the progress of the trial, as well as those that are given at the conclusion.

The form of verdict as prepared reads: "We, the jury in the above-entitled cause, find the respondent 2,995 Cases Canned Salmon Labeled in part 'Hypathia Brand Pink Salmon,' ——— guilty as charged in the libel of information filed herein." If you find this salmon guilty under the evidence and instructions you will write in

the blank the word "is." If you find the salmon not guilty, you will write the word "not" in there and have your foreman sign it.

Is a sealed verdict agreed to if the jury agree after 5 o'clock?

Mr. McCord. Yes.

Mr. Hill. That is satisfactory, Your Honor.

The Court. You understand, gentlemen, the method of returning a sealed verdict. If you agree before 5 o'clock, you will advise the bailiff of the fact that you have agreed and come into court with your verdict. If you agree after 5 o'clock, you will complete your verdict, seal it up, leave it with your foreman, and report here with your verdict at 10 o'clock tomorrow morning.

You may now retire.

UNITED STATES v. SOUTH HERO CREAMERY ASSOCIATION

(District Court, District of Vermont, Mar. 13, 1925)

N.J. No. 13251

Information in two counts alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty on one count, not guilty on one count.

The United States attorney filed an information against the South Hero Creamery Association, a corporation, South Hero, Vt., alleging shipment by said corporation, from the State of Vermont into the State of Massachusetts, of a quantity of butter which was adulterated and misbranded, in violation of the Food and Drugs Act. It was alleged in the information that the article was adulterated for the reason that a product deficient in butterfat had been substituted for butter which the article purported to be, and for the further reason that a product which consisted of less than 80 percent by weight of milk fat had been substituted for butter, a product which should contain not less than 80 percent by weight of milk fat, as prescribed by act of March 4, 1923, which the said article purported to be. It was alleged that the article was misbranded for the reason that it was in package form and the quantity of the contents was not plainly and conspicuously marked on the outside of the package.

The case having come on for trial before the court and jury, after the submission of evidence and arguments by counsel, the court delivered the following instructions to the jury.

Howe, *District Judge.* Gentlemen of the jury: There are just two questions of fact in this case for you to decide; one question of fact on each charge. There are two charges that the Government makes against the South Hero Creamery. First, they say that they shipped in interstate commerce some butter that didn't contain 80 percent of butterfat, that that shipment was made on the 23d day of June; and second, they say that they shipped this butter in interstate commerce without marking on the tubs the weight. It is an offense against the laws of the United States to ship in interstate commerce any butter that contains less than 80 percent of milk fat, or butterfat; those terms

we have been told mean the same thing, and it is equally an offense to ship food, and, among other things, butter, without marking the weight on the tubs, if it goes in tubs. Whatever the packages are [they] must have the weight marked on them. Those are the two questions of fact. You can find the creamery guilty of both of these offenses, you can find it not guilty of either offense, or you can find it guilty of one and not guilty of the other.

Now, this is a criminal case, and the same rules that I have given you here repeatedly apply to this case just as much as to any other criminal case. The creamery is presumed to be innocent, and that presumption is to be weighed in its favor as evidence in the case. If there are two theories in the case, each equally reasonable, it is your duty to adopt the theory leading to innocence, rather than the one leading to guilt. I think you have all been on several trials in which we have gone over this. Is there anyone on this panel who hasn't heard these rules? The reason is, gentlemen, that different lawyers come in, and they don't know how often you have heard these rules. It would be an error on the part of the court to submit a case to the jury without giving these rules. No unfavorable inference can be drawn against the creamery because it has been complained of and charged with this crime. Remember that. The reasonable doubt doctrine, you will remember that. The defendant cannot testify, because it is a corporation. It is an invisible person, so I won't need to say anything about the defendant's testimony. The butter maker has testified, and the inspector and the chemist and the professor. Now, the young man that makes the butter over there testified. You have heard some questions asked him about what he told down in Boston to the chief of the Agricultural Department. You weigh the testimony of all these witnesses and give them just such credit as you think they ought to have. It is for you to say whether you are satisfied that this lot of butter didn't have 80 percent of butterfat while it was in transit.

There is no offense committed here, gentlemen, unless you are satisfied beyond a reasonable doubt that when that butter was taken to the station over there, at the South Hero railroad station, and while it was on those cars to Boston, in transit, it must have contained less than 80 percent of butterfat. The evidence of the Government is that it didn't contain 80 percent, except one of the samples. The evidence of the young man that made it is that he tested it and it tested all right, 80 percent. He says he understood the law required him to put on weights. He understood that when he was before this man down in Boston.

You take the evidence in the case, gentlemen, and all the circumstances and all the inferences to be drawn from the evidence, and, if you are satisfied beyond a reasonable doubt, after giving the creamery the benefit of the presumption of innocence, if you are satisfied beyond a reasonable doubt that when this butter was delivered to the railroad station, and while it was in transit to Boston, it didn't contain 80 percent, you will find the defendant guilty under the first count. If you are not satisfied of those facts beyond a reasonable doubt you will find it not guilty. As to the second count, take into consideration all the evidence in the case. If you are satisfied beyond a reasonable doubt that the weight wasn't marked on these 36 tubs of butter, you will

find the creamery guilty under the second count. If you are not satisfied beyond a reasonable doubt that the tubs were not marked, you will find the defendant not guilty under the second count. You may take the case, gentlemen.

The jury then retired and after due deliberation returned a verdict of guilty on the adulteration charge and of not guilty on the misbranding charge.

UNITED STATES v. MONOTTI-LARIMER

(District Court, N.D. California, Mar. 18, 1925)

N.J. No. 13319

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of acquittal.

The United States attorney filed an information against Monotti-Larimer, a corporation, San Francisco, Calif., alleging shipment by said corporation, from the State of California to the Territory of Hawaii, of a quantity of butter which was misbranded, in violation of the Food and Drugs Act. It was alleged in the information that the article was misbranded for the reason that the statement, "Net Contents 1 Lb.", borne on the packages containing the article, was false and misleading, in that it represented that each of said packages contained 1 pound net of butter, and for the reason that the article was labeled so as to deceive and mislead the purchaser into the belief that each of said packages contained 1 pound net of butter, whereas each of said packages did not contain 1 pound net of butter but did contain a less quantity thereof. Misbranding was alleged for the further reason that it was in package form and the quantity of the contents was not plainly and conspicuously marked on the outside of the package.

The case having come on for trial before the court and jury, after the submission of evidence and arguments by counsel, the court delivered the following instruction to the jury.

ST. SURE, *District Judge.* Gentlemen of the jury: I will try and be as brief as possible in my instructions to you. You have sat upon juries here in several cases and you have heard me from time to time deliver instructions upon various matters of law which it is my duty to give to you. It may be that you are already familiar with most of the principles of law which govern in cases of this kind.

I have pointed out to you, I think, and it becomes my duty to do so again, that you are the exclusive judges of the facts. The court is to pass upon the law in the case and to give to you such rules of law as it deems proper for your guidance. You are to accept the law as given to you by the court. You must not decide this case upon any preconceived notions you may have of the law, or what you think the law should be. It is my duty, as I have said, to give you the law. It is my duty to pass upon questions of law that may arise during the trial of the case. Now, if I make a mistake in ruling upon the law during the trial of the case, or if I make a mistake in giving you in-

structions, those mistakes of mine may be corrected in another tribunal. If you make a mistake, however, in your verdict, by reason of the fact that you go off on some preconceived idea that you have of what the law should be or what it is, why, that mistake cannot be corrected. So you see it is quite important that you observe the rule that you judge only the facts of the case, and that you take the law from the court.

The information in this case, as you have heard, charges the defendant corporation with violating an act of Congress known as the Food and Drugs Act. Briefly, the defendant is charged in the first count with shipping and delivering for shipment a certain lot of butter which was misbranded. The second count charges that in violation of said act an article of food was shipped and delivered and misbranded by the defendant, in that the contents was not plainly and conspicuously marked on the outside of the package. In the information there is also a charge that this defendant has heretofore been convicted of a charge of violating this act.

As to the charges in the indictment or information it is the duty of the Government to prove each and every element of the charges against the defendant beyond and to the exclusion of a reasonable doubt. The fact that it appears from the evidence that the defendant has been heretofore convicted of a violation of this Food and Drugs Act should not be considered by you in determining the innocence or guilt of the defendant. You should bear in mind that the defendant here is charged with a violation of the act by shipment of butter from San Francisco to Honolulu, on February 5, 1924, which was underweight, and on that charge alone you are to determine the innocence or guilt of the defendant in this case. The indictment is a mere formal accusation against the defendant and is no evidence of its guilt.

The burden of proof rests, of course, upon the Government, and, as I have stated, the burden is upon the Government to prove to your satisfaction and beyond or to the exclusion of a reasonable doubt every material element in the case. The defendant is not required to prove his innocence. Every person is presumed to be innocent when charged with a crime. That presumption remains with the defendant throughout the entire trial of the case and goes with the defendant into the jury room with you and remains a part of the case until you arrive at your verdict finding that the defendant is guilty.

The plea of not guilty entered by the defendant in this case puts in issue every allegation of the information. You must not convict upon mere suspicion, no matter how great that suspicion may be in your minds. You must not convict upon mere conjecture, nor mere probability, but only upon the evidence and all of the evidence in the case, and you must find that that evidence makes the defendant guilty beyond and to the exclusion of a reasonable doubt.

Now, I have used the words "reasonable doubt" several times during my charge to you. It is difficult to define just exactly what reasonable doubt means. It is a substantial doubt, that is to say, it is something that is founded upon reason. And I may say to you, as an illustration, that it is a doubt which you are not permitted to base upon mere fancy or mere whim or conjecture or sympathy or because you may not approve of the law or something of that kind. It is something more substantial than that—a doubt which must satisfy a reasonable mind after a full comparison and consideration of all the

evidence; a substantial doubt arising from insufficiency of the evidence, not a mere possibility or probability of innocence.

If two inferences can be drawn from a given act or circumstance, or from a number of given acts or circumstances, one inference being that of guilt and the other that of innocence, it is your duty to draw the inference of innocence and not that of guilt. And I may say that the defendant is clothed with the presumption of good character.

Now, you are the exclusive judges of the evidence in the case, and you may judge the credibility of a witness by the manner in which he testifies, by his means of knowledge, by his interest in the case, taking into consideration any fact or circumstance that may throw any light upon the case, so long as that fact or circumstance has arisen during the trial of the case. You are to try this case upon the evidence adduced here in this court room at the trial, and not from any evidence you may have obtained on the outside or anywhere else.

If you find from all the evidence that the shipment of butter when it left its place of business was full weight and the shortage, if any, was due to the physical condition of the butter and beyond the control of the defendant, you should of course acquit the defendant. If you find from all of the evidence that the statement upon the packages of butter "Net contents One Pound" was not labeled so as to deceive and mislead the purchaser into the belief that each of said packages contained 1 pound net of the article but the shortage, if any, was the result of inaccuracy beyond the control of the defendant, you must acquit the defendant.

Now, your verdict should not be made or should not be based upon any single fact in this case, you must understand. You must arrive at your verdict upon a consideration of all of the facts in the case, all of the facts taken together by you and considered and weighed in a dispassionate manner, and you should bring to the trial of this case and to the consideration of the case the same common sense and good judgment that you use in every day affairs of your business.

Now, gentlemen of the jury, when you are in the jury room you will select one of your number as foreman. When you have agreed upon a verdict the foreman will sign the verdict, and you will be returned into court where you may deliver your verdict. Remember, of course, that your verdict must be unanimous. You may now retire.

UNITED STATES v. SWIFT & CO.

(District Court, District of Oregon, Mar. 25, 1925)

N.J. No. 13711

Information alleging violation of section 2 of the Food and Drugs Act. Demurrer to information sustained.

Bean, *District Judge*. This is a proceeding against the defendant for an alleged violation of the Pure Food and Drugs Act by shipping reworked butter from Portland to San Francisco, consigned to themselves. It is charged that the butter is adulterated, in that a product deficient in milk fat had been substituted in whole or in part, and that it is misbranded for the same reason. It is branded reworked butter, but it is charged that it was adulterated because it is deficient in milk

fat. There is no allegation in the bill as to the proportion of milk fat, or that it was the result of the introduction of any foreign substance.

The Pure Food Law does not define butter. It does define adulterating and misbranding. The adulteration of an article is where another substance has been mixed or packed with it so as to reduce or lower or injuriously affect its quality, or a foreign substance has been substituted in whole or in part, or a valuable constituent has been wholly or partially abstracted, or it has been mixed with coloring matter whereby damage or impurity has been concealed, or where it contains poisons or other deleterious ingredients, or consists wholly or in part of filthy, decomposed, or putrid animal or vegetable matter.

There is no allegation in the bill that this butter comes within any of the definitions. The Pure Food Law defines misbranding as follows: If it be an imitation of or offered for sale under the distinctive name of another article, or if it shall be labeled or branded so as to deceive the purchaser, or if the contents are not plainly and conspicuously marked or pictured, or if the label shall bear any statement or device regarding the ingredients or substance thereof, which statement or device shall be false or misleading.

The Oleomargarine Act defines butter as a food product usually known as butter and which is made exclusively from milk or cream, or both, with or without common salt, and with or without the addition of coloring matter. And that same act defines adulterated butter as a grade of butter produced by mixing or reworking butter, and where any substance is introduced for the purpose or with the effect of deodorizing or removing the rancidity, or if any substance foreign to butter has been introduced with the intent to cheapen the cost, or with intent to cause the absorption of an abnormal quantity of water, milk, or cream.

It is not alleged in this bill that the butter in question comes within the definition of adulterated butter under the Oleomargarine Act. I presume the bill was filed in view of a rule or regulation of the department, in force at that time or which had been formulated prior to the time of the shipment, prescribing the standard for butter, in which it is stated that it shall contain at least 82.5 percent of milk fat. But it was held in *Lynch* v. *Tilden Products Co.* recently that the department has no authority under the law to make such regulations or rule. Subsequent to the shipment in question Congress passed an act prescribing the amount of milk fat, but that was not in force at the time the shipment in question was made.

The demurrer will be sustained.

UNITED STATES v. SOUTH PEACHAM CREAMERY CO.

(District Court, District of Vermont, Apr. 10, 1925)

N.J. No. 13706

Information alleging violations of section 2 of the Food and Drugs Act. Jury trial. Verdict of acquittal.

The United States attorney filed an information against the South Peacham Creamery, a corporation, Barnet, Vt., alleging shipment

by said corporation, from the State of Vermont into the State of Massachusetts, of a quantity of butter which was adulterated, in violation of the Food and Drugs Act. It was alleged in the information that the article was adulterated in that a product which contained less than 80 percent by weight of milk fat had been substituted for butter, a product which should contain not less than 80 percent by weight of milk fat, as prescribed by the act of March 4, 1923, which the article purported to be.

The defendant corporation having entered a plea of not guilty and the case having come on for trial before the court and jury, after the submission of evidence, the court delivered the following instructions to the jury.

HOWE, *District Judge* (charge to jury). Gentlemen of the jury: I am going to give you my charge right now. These gentlemen can argue afterwards. We are going to finish this case up. This South Peacham Creamery is complained of for having too little butterfat in their butter. Now, you were all here in that other trial, weren't you, every one of you? Is there anyone on this panel that didn't hear the other trial and my charge in that other case? Now, the question for you to decide is whether you are satisfied beyond a reasonable doubt that when this butter was shipped in interstate commerce it did not have 80 percent butterfat. That's the question for you to decide.

Now, in order to find the defendant guilty you must be satisfied beyond a reasonable doubt. The Government must prove beyond a reasonable doubt that when this butter was shipped it did not contain 80 percent butterfat. You have heard the testimony of this chemist, who operates on one fifteenth of an ounce. Now, as practical, reasonable men you heard him say that a slight error in computation would make a heavy difference when you apply it to a pound or 20 pounds. You have heard these butter makers testify it contained more than 80 percent butterfat. Now, the question for you to decide is how much or how little credit you will give the testimony of the witnesses. You should keep in mind the presumption is that the butter did contain 80 percent when it was shipped. If you return a verdict of guilty here, you must be satisfied beyond a reasonable doubt that when this was shipped it didn't contain 80 percent butterfat. You apply the presumption of innocence, which is very old law, very sound law. If there is more than one theory in the case, both equally reasonable, one leading to innocence, the other leading to guilt, you should adopt the theory leading to innocence, because it is better and safer to believe good of a person rather than to believe evil of him. It is for you to say how much or little credit is to be given to the testimony. If you are satisfied beyond a reasonable doubt this did not have 80 percent of butterfat when it was shipped, you will find the defendant guilty. If you are not satisfied it contained less than 80 percent butterfat, you will find the defendant not guilty.

Well, gentlemen, if you are satisfied beyond a reasonable doubt that it didn't contain 80 percent, find the defendant guilty. If you have a reasonable doubt about that find it not guilty. If you are satisfied that it did contain more than 80 percent, you will find it not guilty.

UNITED STATES v. BARNET CREAMERY ASSOCIATION

(District Court, District of Vermont, Apr. 10, 1925)

N.J. No. 13707

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of acquittal.

The United States attorney filed an information against the Barnet Creamery Association, a corporation, Barnet, Vt., alleging shipment by said corporation, in various consignments, from the State of Vermont into the State of Massachusetts, of quantities of butter, a portion of which was alleged to be adultered and misbranded and the remainder of which was alleged to be misbranded, in violation of the Food and Drugs Act. Adulteration was alleged in the information, with respect to a portion of the article, in that a product deficient in milk fat had been substituted for butter which the said article purported to be, and in that a product which contained less than 80 percent by weight of milk fat had been substituted for butter, a product which should contain not less than 80 percent by weight of milk fat, as prescribed by the act of March 4, 1923. Misbranding was alleged for the reason that the statements, to wit, "40 POUNDS NET" or "40# NET", as the case might be, borne on the labels of the boxes containing the article, were false and misleading, in that said statements represented that the boxes each contained 40 pounds of butter, and for the reason that that the article was so labeled as to deceive and mislead the purchaser into the belief that the said boxes each contained 40 pounds of butter, whereas the said boxes did not each contain 40 pounds of butter but did contain a less amount.

HOWE, *District Judge* (charge to jury). Gentlemen of the jury: You will have three questions to decide in this case. There are seven different charges against the defendant. The court submits only three of them to you. There are four charges in the information that are withdrawn from your consideration. I have made a schedule of the number of the charge, the date of the charge, and what the charge is, that I am going to ask you to consider and decide. A charge in an indictment is called a count. The first column here gives the number. Now, charge, or count, No. 6 charges that the boxes contained less than 40 pounds, shipment of November 30. Count 7 charges that the boxes contained less than 40 pounds, shipment of December 3. Count No. 4 charges that the boxes contained less than 80 percent butterfat, shipment of December 3. I think that will make it more simple and easy for you than it will to give you this long indictment.

Now, you may find the defendant guilty or not guilty upon all of these counts, or charges, or you may find the defendant guilty of any of them, or you may find the defendant guilty of one alone and not guilty of the remainder. It's a simple question of fact for you to decide. In two counts, two different shipments, shipment of November 30 and December 3, the Government charges that those boxes didn't contain 40 pounds of butter, and in count No. 4, shipment of December 3, the Government charges that the butter didn't contain 80 percent of butterfat. Three simple questions of fact.

The Government's evidence shows that in the shipment of November 30, a number of crates containing 40 pounds each, the maximum

shortage was six ounces. One, two, three, four, five, six, seven, eight nine, ten, there were 10 crates supposed to contain 40 pounds each. Some of them had more than 40 pounds, but of the ones they claim were short the largest shortage is six ounces, and the minimum shortage in any of those 40-pound packages was one ounce. That's all there is to that charge. Some of them contained too much. Of course it isn't unlawful for them to contain too much, so the Government has complained against the Barnet Creamery Co. for shipping 10 boxes of butter, containing 40 pounds each, one of which they say lacked 6 ounces of having 40 pounds, and in another of those boxes they say the creamery should have put in another ounce. Now, on the shipment of December 3, one, two, three, four, five, six, seven, eight, I haven't got the date written down here, they say that one of those 40-pound boxes was a pound and six ounces short and another one was three and one half ounces short. There is a greater shortage there, a pound and six ounces, not quite a pound and a half. The minimum shortage in that shipment was three and one half ounces. Some of the boxes they shipped contained more then 40 pounds. Still, as it has been suggested here, the fact that they contained more than 40 pounds isn't material except such bearing as you think it has on whether the Barnet Creamery was short-weighing their butter. It is material on that question. If a concern is selling short weights, they would not be likely to have a considerable number of the packages overrun. The evidence of the Government is that they sent out their inspector, that he got samples and took them to some laboratory and had their chemist analyze them. They weighed up these packages and come up here and tell you how much they weighed and how much butterfat they contained. The defendant tells you that they used a lever scale, that they put a quarter of an ounce more in each pound to take care of evaporation—that is, an eighth of an ounce in each half-pound print—and they weighed that up. Each box of 40 pounds contained 40 pounds. Well, now, the law is, gentlemen, that it must contain 40 pounds when it was shipped. Unless you are satisfied beyond a reasonable doubt that these boxes didn't contain 40 pounds when they were shipped, why, no offense is committed by the creamery association. It is not the law that they must continue to weigh 40 pounds three days, three weeks, or three months after shipment. So the time of materialty is the day it is taken to the express company and shipped. It has been suggested here that these boxes made of spruce, fir, hemlock, pine, and dry lumber absorb the moisture in the butter. Some one said they are permitted to put in 16 percent moisture, got to have 80 percent butterfat, 3 percent salt, 2 or 3 percent—at least 2 or 3 percent—salt. Well if they had 16 percent moisture and 40 pounds of butter, it would be 6.40 pounds of water. Sixteen percent of 40, that's 6.40; that's more than 6 pounds of water starting out in a pine box, spruce box, or fir box. Well, it is important for you to say what bearing, if any, that would have upon what that package would weigh three days later or six days later. Would some of that moisture be likely to go from that butter into the box and from the box into the air? Now, another thing for you to consider is which one of these witnesses, the chemist of Boston, the inspector at Boston, or the butter maker at Barnet, you are inclined to put the greatest faith and confidence in, and which scale you are inclined to have the most confidence in, the spring scale or the lever scale. Now, gentlemen, there are two questions here as to whether the packages weighed 40 pounds, con-

tained 40 pounds of butter when they were shipped, and whether they contained 80 percent of butterfat when they were shipped, not whether they contained 80 percent three days later, three weeks later, or six weeks later. Now, all the rules I gave you yesterday apply to this case. The same rules apply. I see some of you on this case that were on the other case, but I will have to repeat all those rules I gave you yesterday to guide you in determining whether you are going to find this defendant guilty or not guilty. In the first place, the presumption is that the defendant is innocent. The presumption is that these boxes did contain 40 pounds, that the butter did contain 80 percent butterfat. This presumption is to be weighed and considered by you throughout the trial, which means that you must start in the trial of the case with the thought and belief uppermost in your minds that the packages did contain 40 pounds, that the butter did contain 80 percent butterfat, and this presumption should continue with you until the Government has convinced you beyond a reasonable doubt that the packages did not contain 40 pounds and that the butter did not contain 80 per cent butterfat. The fact that the defendant, the creamery company, has been complained of and placed on trial for this charge should not be taken against them in the least. No unfavorable inference can be drawn against the Barnet Creamery Co. because the Government has made this complaint against it. If you can reconcile the evidence in the case on any reasonable basis consistent with the defendant's innocence, you should do so, and, in that case, find the creamery company not guilty. You cannot find the creamery company guilty unless from all the evidence you are satisfied of its guilt beyond a reasonable doubt. A reasonable doubt does not mean beyond all doubt; it does not mean beyond a fancied doubt; it does not mean that you are to examine all the evidence with a view to seeing if you can find something that you can call reasonable doubt; but it means such a doubt as a reasonable man would have after considering all the evidence in the case. If, after an impartial consideration of all the evidence in the case, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt, and you should find the company not guilty. But if, after such impartial consideration, you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in important matters of your own, you have no reasonable doubt, and you should find the company guilty. The weight to be given to the testimony, the credibility of the witnesses, are questions entirely for your consideration and determination. The law is that you are not bound to give the same credit and the same weight to the testimony of each witness, but you should give their testimony just such credit and just such weight as you think it is fairly entitled to receive. Consider their appearance upon the stand, their candor or lack of candor, their feeling or bias, if any, their interest in the result of the trial, if any, and the reasonableness of the testimony which they give, and believe as much or as little as you think you should. Now, applying these rules to the testimony that you have heard, if you are satisfied beyond a reasonable doubt that the shipment made on November 30 didn't contain 40 pounds of butter when it was taken to the express office, you should find the defendant guilty; and, likewise, if you are satisfied beyond a reasonable doubt that the shipment made on December 3 didn't contain 40 pounds of butter when it was taken to the express office, you will find the defendant guilty. If you are satisfied the shipment made on December 3 did not contain 80 percent butterfat, you

will find the defendant guilty; but if, on the other hand, you have a reasonable doubt as to whether there was 40 pounds of butter in the shipment of December 3, you will find the defendant not guilty on those. Likewise, if you have a reasonable doubt as to whether there was 80 percent of butterfat in the shipment of December 3, you will find the defendant not guilty on that charge. That's all there is to the case, gentlemen. Any suggestions by the district attorney or defendant?

Mr. Gardner is appointed foreman. Your verdict will be oral. You will say guilty or not guilty. If you find the defendant guilty, you will say on which count.

Mr. AMEY. If it please Your Honor, there was nothing said about the weight of the wrappers on the butter.

The COURT. You will take into consideration all the evidence as to the wrappers and everything else, gentlemen.

UNITED STATES v. TRINIDAD CREAMERY CO.

(District Court, District of Colorado, Apr. 15, 1925)

N.J. No. 13365

Information in 31 counts, alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict directed for defendant on three counts. Verdict of guilty on 28 counts.

SYMES, *District Judge* (charge to jury). Gentlemen of the jury: You have listened carefully and patiently to this evidence. Counsel for both sides have given you the benefit of all the testimony that can be produced upon the charges made here, and have performed their part of the case in a very creditable manner as is their duty as officers of this court. You are also officers of this court, in that it is your duty now to determine the facts of this case and bring in your verdict accordingly.

The information in this case contains 31 counts. In other words, the defendant is charged with 31 different offenses. The court instructs you, however, to find the defendant not guilty on three of those counts, to wit, the 17th, the 20th, and 25th, because in the opinion of the court there is not evidence enough to substantiate those counts, and if you should find the defendant guilty on those counts, it would be the duty of the court to set them aside in the performance of its function as judge. That leaves for your consideration, then, 28 counts, and you will bear in mind that each count is a separate charge, and that the defendant is entitled to separate consideration in the case on each count and a verdict of guilty or not guilty on each count. It is, therefore, necessary for you to segregate the evidence and apply that evidence to each count which is material and bears upon it, and no other evidence.

The evidence offered by the Government in this case is in part at least that a Government inspector, charged with the enforcement of the Food and Drugs Act, which it is alleged was violated here, went out into the field and found 14 different places, I think, in New Mexico and Texas, where there was butter, the product of the defendant, for sale. It is admitted by the defendant and it stands undisputed that this particular butter referred to in the information was offered and put into and shipped in interstate commerce by the defendant from a point in the State of Colorado to points in other States. Therefore it was an interstate shipment and comes directly under the statute in question. This inspector, according to his evidence, at Dalhart, Tex.,

found a considerable quantity of this butter, took samples of it and weighed it and found that it averaged 2.55 percent short. He then went to Santa Rosa and there found 61 pounds of butter of the defendant, and that, according to his testimony, was 2 percent short in weight. He then went to a place in New Mexico, East Vaughn, N.Mex., and there he found butter of the defendant which averaged 4.56 percent, or better than 4.5 percent, short in weight. The maximum of some of that butter was 12 percent short. He then went to the Piggly Wiggly store at Carlsbad, N.Mex., and found 60 pounds there, 2 boxes, and weighed the samples from that, and they showed net 2.94 percent short. The maximum was 7 percent short, and most of it was under 9 percent, and so on, at all the different places he found butter of the defendant, and in all cases that he has testified to, according to his evidence, the percentage of shortage ran from 2 percent up to, as I have stated, over 4.5 percent. He testified that wherever he went and found any considerable quantity of this butter and weighed it, he found it short without exception, taking an average of each consignment that he found, that is, what was left of it. He then also described the condition of the butter as he found it; that it was at most places being kept in a cool place, and was firm and in good condition. He then testified as to experiments that he had made, and said that, allowing for the necessary shortage due to dry weather and other conditions, the shortage he found exceeded that necessary under such conditions—in his opinion, of course, that is. He then described his visit to the factory of the defendant and what he saw there. We have, then, the testimony of a qualified Government chemist, Mr. Feldstein, who made various tests of this butter which was shipped by this gentleman in the field, and you will recall what he testified to. Another Government chemist testified as to the analyses of samples that he made. That was in the main the testimony offered by the Government.

Then the defendant offered as a witness, among others, Mr. Jacobson, secretary and manager of the defendant, who stated this factory had a daily output of 2,500 pounds. He described in detail the method of manufacture and the various tests that they made, and the precautions that were taken in order to keep the butter from being short weight and to comply fully with the law and the requirements of the Government inspectors. He then described the scales, and there was some testimony in regard to his statements at the hearing the Government afforded the defendant before the department at Denver. Then a man named Fulton, the former butter maker of the defendant, described his work, which was that of butter maker, and the precautions taken. Similar testimony was given by Mr. Fulton, by Miss Flaiz, and by two or three other young ladies, and also by the vice president of the company. His work, according to his testimony, was mostly official. There was some conversation with the weight inspector, who at various times, I believe, found, or in a few instances anyhow found, the scales inaccurate, sometimes overweight and sometimes underweight, as I recall the testimony. Then we had the weight inspector who did not qualify as an expert because he had no experience or qualifications, and I don't think his testimony is very good one way or the other, but that is, of course, for you to judge. We then had Mr. Osburn of the State Agricultural College, a very competent gentleman, well qualified to testify as to what he did testify to. He testified

as to the variations in butterfat and butter content that necessarily take place, and he stated that those ran as high as 3 percent or 4 percent, and that the defendant's methods as far as he knew constituted good practice in that particular trade, and that it was impossible to keep every pound up to 80 percent of butterfat without making an impure product.

The Government then called Mr. McKendrie of the Beatrice Creamery in rebuttal. He disagreed with Mr. Jacobson as to the accuracy of some of his tests. I think that, in substance, is the testimony as I recall it. The court instructs you, however, gentlemen, that you are the sole judges of the facts, and it is for you to say what has been proven and what has not been proven as a matter of fact, and decide the issues of fact accordingly, without being influenced by the court, the remarks of the court on the facts, of course, being given only to aid you if you so desire, but you are the sole judges of the facts, and it is for you to decide the facts and what has been proven and what has not been proven according to your own view of the testimony, and you, of course, had the same opportunity to hear the witness that the court did.

Counts 1, 3, 5, 7, 9, 11, 13, 15, 23, 28, and 30 of this information charge that on the dates mentioned therein certain shipments of food, to wit, butter, were made by the defendant from its plant in Trinidad to the consignee named at points outside of the State; in other words, in interstate commerce. This is not denied by the defendant. These counts further charge that the contents of these shipments were misbranded within the meaning of the law known as the Pure Food Act, in that the labels on each of said separate packages of butter bore this statement, to wit, "One Pound"; that this was false and misleading because it purports to and did represent to the purchaser that each of said packages contained a pound of butter, when, as a matter of fact, they did not contain a pound but a smaller quantity. The statute in question on which this information is based, parts of it which are applicable here, reads as follows:

> That the term "misbranded," as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein whlch shall be false or misleading in any particular.

And then it goes on in regard to packages of food, and says "Third. If in package form"—that is, if the food is in package form such as butter—[it] shall be a violation of the law "if the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count." In other words, that means so many pounds of butter, so many bushels of apples, or so many pieces of something else, whatever the particular product in question may be.

Congress also gave the Department power to make certain regulations for carrying out this act. These regulations, of course, cannot add to or detract from the statute, but aid in its enforcement and understanding. There is one which is applicable to this case, which reads as follows—or before I refer to that I should go on and say that the statute says this: "Provided, however, that reasonable variations shall be permitted," and tolerances shall be allowed in effect according—as established by rules and regulations made in accordance with

provision three of the act. The regulation in regard to tolerances is that "Discrepancies due exclusively to errors in weighing, measuring, or counting which occur in packing conducted in compliance with good commercial practice." It therefore follows, gentlemen, that if you are convinced beyond a reasonable doubt, after a careful consideration of all the evidence, that at least as to these particular counts or any one or more of them the labels did not represent the true weight of the butter content at the time of shipment, but were false and misleading under the law and regulations I have read to you, then there was a misbranding under the law referred to, and it is your duty to find the defendant guilty on one or more of such counts.

Counts 18, 21, and 26 likewise charge misbranding within the meaning of the act of Congress, in that the statement "Butter One Pound," borne on the label of the package containing the article, was false and misleading, in that it represented the article to be butter, when, according to the Government, it was not butter, because butter, according to the law, must contain 80 percent by weight of milk or cream fat, as prescribed by the act of March 4, 1923. There is evidence both ways on this question; the Government that the butter referred to contained less than 80 percent by weight of milk fat, and the defendant that it contained more. If, after a careful consideration of the evidence on this particular question, or these particular counts, rather, you find beyond a reasonable doubt that the shipments of the defendant referred to in these three counts or any of them at the time of the shipment contained an article which was labeled butter, but which contained less than 80 percent of milk fat, then you should find the defendant guilty on one or more of these counts.

There is a great deal of evidence pro and con in regard to the butter content, and that evidence, of course, applies only to these particular counts, and not the question of short weight. The following counts, to wit, 2, 4, 6, 8, 10, 12, 14, 16, 19, 22, 24, 27, 29, and 31, charge that the contents of certain packages of butter shipped by the defendant in interstate commerce, which shipments are admitted by the defendant, were not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count. The proof offered by the Government on this is the testimony of their witnesses to the effect that these packages or shipments of butter bore a conspicuous mark or label, which is admitted, I believe, stating that they contained 1 pound net of butter, when, as a matter of fact, according to the Government's evidence, they contained less than a pound of butter at the time of shipment, and therefore were misbranded in that they did not give the correct weight—all in violation of section 8 of the Pure Food Law which I have read to you. Therefore, if you are convinced beyond a reasonable doubt that any of the packages of butter referred to in these particular counts did not contain the amount of butter stated on the label or carton containing them, to wit, 1 pound, when shipped, after allowing for reasonable variation in accordance with the regulation I have read to you, then it is your duty to find the defendant guilty on one or more of said counts, as you may decide.

The court instructs you, gentlemen, that there must be proof in cases of this kind of an intent to violate the law on the part of the defendant. An intent implies knowledge of the violation, but such intent need not be proved separately and apart from the other facts,

necessarily, because intent is a state of mind and the intent of a party may be proved by his acts and conduct under any particular set of facts or circumstances, because everybody is presumed to intend the reasonable and probable consequences that may reasonably be anticipated and follow from his acts. In other words, if, as reasonable men, you can say that the defendant put short weight into these packages, or should have known that it was short weight, and that that was the rule and not the exception in reference to the shipments referred to in the counts, then you may be justified, if you so find that he intended to do that, because short weight would be the reasonable and probable consequences of his act. Further, in this case the defendant is a corporation, and therefore is to be judged by the acts and intents of its officers, agents, and employees when acting within the scope of their duties, and there is no question here, as I recall the evidence, but what these various employees acted within the scope of their duties in matters that have been testified to. They, when acting within the scope of their authority, act and speak for the corporation, and it therefore follows that their acts and conduct are the acts and conduct of the corporation, and that the latter is responsible for any violation of law committed by them in the course of their duties.

The court further instructs you that in determining the weight of each pound package of butter you shall make allowances for any reasonable discrepancies in the weight of each 1-pound package due exclusively to differences in atmospheric conditions at various places, which discrepancies unavoidably result from the ordinary and customary exposure of the butter to evaporation or to the absorption of water by the wrappers and containers; and that a crime or misdemeanor consists in the violation of a public law, in the commission of which there must be a union or joint operation of act and intention. Intention may be manifested by circumstances capable of proof. The object of this statute, gentlemen, of course is to protect the purchaser or consumer of food products that move in interstate commerce, and to that end Congress has enacted that the quantity of the contents of any food products in package form must be plainly and conspicuously marked on the label in terms of weight, measure, or numerical count, so the purchaser thereof may rely upon them and get what he has the right to ask for, and determine for himself what he will buy and receive, and to accomplish this result the law condemns as guilty any person or corporation that introduces into interstate commerce any article that is misbranded within the terms of the statute and the regulation referred to, and misbranding includes a failure to state the weight of the contents of the package correctly. The main question in the case for you to determine is whether the butter in question was misbranded; that is, under the statutes and regulations which I have read, did it fail to come up to the representations or statements made on the label? If so, the defendants are guilty, because the act declares that any person who shall ship or deliver for shipment from one State to another, food in package form that bears a label that is false or misleading in any particular, shall be guilty of a misdemeanor as charged in the information.

The evidence of the Government is that the particular butter referred to in the counts in this information was all underweight, the percentage of underweight varying, as you will no doubt recall from the evidence. This evidence stands uncontradicted, as the defendant

has offered no evidence as to the weight of the particular shipments referred to. They have, however, offered considerable evidence showing their methods of manufacture, methods of weighing, and the care taken by them to comply with the law. This is all competent for you to consider along with the other evidence, but it is not evidence, of course, on the question of what the shipments referred to in the information actually contained and what they actually weighed. No amount of care exercised or precautions taken will excuse defendant, if you find that after making allowances for honest or occasional mistakes and variations or tolerances allowed by the statute and the regulations made pursuant thereto, which I have called to your attention, the butter was underweight when shipped by the defendant. Anyone engaged in this business is conclusively presumed to know what the law is, and they must substantially comply with it at their peril. They must so equip their factories with proper scales and conduct their business that the law will be complied with, and if you find as a matter of fact that that part of their product which was shipped in interstate commerce and referred to in the information did not comply with the law, it is some evidence that they did not take the necessary precautions in the conduct of their business.

It is clear from the evidence that butter varies in its moisture content and that it cannot be absolutely controlled; that it is liable to dry out, and thereby it loses weight after it is manufactured. That fact, however, seems to be well known to the trade, and the defendant, of course, is presumed conclusively to have full knowledge of that fact and the necessary results that follow therefrom, and in manufacturing and shipping their product in interstate commerce they must make reasonable allowance for this variation and see that each package contains, as a usual thing, when shipped, the amount of butter that the label says it does.

You will decide the case, gentlemen, solely upon the law, irrespective of your opinion of the law. It is the province of the legislative branch of the Government to make and repeal laws. The only province the court has—and you are a part of the court—is to enforce the law fairly and fearlessly, irrespective of what your personal opinion may be upon it.

There is some evidence here, and it is admitted, that this defendant has been convicted in this court of a previous violation of this law. The court instructs you, however, that that must not in any way influence your verdict in this case. That simply goes to the question of penalty if the defendant is convicted. It is on trial simply for the offense as charged in this information and nothing else.

The court further instructs you that it is the duty of the Government to find the defendant guilty beyond a reasonable doubt. The Government must prove the defendant's guilt, and the defendant need not prove its innocence, and if you have any reasonable doubt as to any fact necessary to constitute the defendant's guilt on any one of the counts, it is your duty to give the defendant the benefit of that doubt and return a verdict of not guilty. You are prohibited, however, by law and your oath which you have taken, from going beyond the evidence to seek for doubts upon which to acquit the defendant, and you must confine yourselves strictly to a dispassionate and an impartial consideration of the evidence. You must not have recourse to extraneous facts or circumstances. You are the exclusive judges

of the facts, and it is for you to find from the evidence what has been proven and what has not.

A doubt, to justify an acquittal, must be a reasonable doubt, not imaginary or conjectural, and must arise after a candid and impartial consideration of the evidence, and unless it is such a doubt, for instance, as, were it interposed in the graver transactions of your everyday business life, would cause you to hesitate and pause as reasonable men, then it is not a reasonable doubt and would not authorize a verdict of not guilty.

The court further instructs you that you are the sole judges of the credibility of the witnesses and of the weight to be given to the testimony of any particular witness. In judging of their credibility and the weight to be given to their testimony, it is proper, if you so desire, to take into consideration their manner or demeanor upon the witness stand, their bias or interest in the outcome of this case, if any has been shown by them, and any other fact which appeared upon the witness stand which you think affects the weight to be given to their testimony. Of course, if you believe that any witness has testified falsely as to any material fact, you are at liberty to disregard his evidence entirely, except so far, of course, as it is corroborated by other competent evidence.

These, gentlemen, are the instructions which will govern you in deciding this case and you will consider each instruction of equal weight and take and consider them all together, being bound by the instructions on the law as given you by the court. Decide the case solely upon the evidence, because the arguments of counsel, the remarks of the court, and the rulings of the court upon evidence stricken out, and evidence stricken out, will not be considered by you in deciding the case.

Are there any exceptions to the charge of the court?

Mr. Bock. I understood the court to say that they found it short without exception.

The Court. I mean every place he went.

Mr. Bock. The court meant as an average weight. The defendant asks to take exception in regard to the county scale inspector, as to the weight of his evidence. The defendant also desires to save exception as to the instruction that the defendant should have known that his scales were—what weight; if he didn't know, he should have known. We save exception to that part of the instruction. The charge on the ground of misbranding, the court did not put in the element of intent in that particular definition. Nearly all the instructions on intent include the element to deceive and mislead. We except to that. The defendant further excepts to the instruction of the court that the manufacturer must make allowance for the variations, it being the viewpoint of the defendant that the retailer must make the allowance and not the manufacturer. The defendant also desires to save an exception to the court's instruction on the second offense, it being prejudicial, as to being any part whatever of the instruction, because it only relates to sentence and not the question of guilt.

Mr. Ireland. We desire to ask that the regulation under (1) of section 8 be given. I desire to save my exception to the instruction on intention.

The COURT. Gentlemen, the court further instructs you that what I said in reference to the evidence of the county inspector, as I recall the evidence was that he had had no experience or training, and testified that the weights he used in testing he had not weighed. The court wants to emphasize that you are the sole judges of the facts in deciding what the witnesses testified to. You had the same opportunity to hear the evidence that the court did, and you will decide the evidence on the facts uninfluenced by the court. In speaking of intent, that means an intent to violate the law. I further call your attention to the fact that the regulations referred to, part of which I read, also contain this: "Discrepancies"—that means variations—"under classes (1) and (2) of this paragraph"—paragraph (1) being the one I read to you—"shall be as often above as below the marked quantity." Are there any further exceptions?

UNITED STATES v. MYERS

(District Court, District of Colorado, Apr. 15, 1925)

N.J. No. 13539

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Motion by defendant to suppress certain evidence sustained. Verdict directed for defendant.

The COURT. The defendant in this case has made timely motion to suppress the evidence that has been offered, or rather, testified to by the witness Kathe, on the ground that it violates the constitutional rights of the defendant and also is in violation of the post-office regulations or acts pertaining to the post office.

It is stipulated and agreed by both sides that Mr. Kathe, an inspector of the Bureau of Chemistry of the United States Department of Agriculture, who is not connected in any official way with the Post Office Department, without a search warrant entered the post office and opened seven packages of butter which had been deposited in the post office by the defendant for shipment in interstate commerce.

Mr. IRELAND. That stipulation doesn't cover with the consent of the postmaster or superintendent, but that is a part of the stipulation in the record.

The COURT. He did this with the consent of the postmaster. After opening the packages, he took samples therefrom and weighed the contents to determine whether they complied with section 8 of the Pure Food Act, under which the defendant is being prosecuted for misbranding. He further took samples to be shipped to the bureau or branch of the Department of Agriculture in Denver for further test, and in place of the samples he took he substituted another product of the defendant, which he had bought in the open market, and sealed up the packages and put them back in the mail, and they went forward to the consignee.

In order to narrow the question to be decided, it is well to bear in mind all these facts, and also the further fact in addition, that this inspector did not have any authority under any act of Congress for his acts, and, further, had no search warrant. In addition he had no

grounds, so far as it appears here, to suspect that the defendant was violating a law of the United States. In other words, he did not act upon any probable cause or grounds to suspect that a crime was being committed by the defendant, so we must look at his acts from the point of view that he was seeking evidence rather than acting upon any previous information or knowledge that would justify him in believing defendant had or was about to commit a crime.

The Government contends, first, that, granting that the search was illegal and in violation of law, the defendant cannot urge that issue because he had given up possession and parted with the packages in question when he put them in the mail, and therefore the fourth amendment to the Constitution of the United States is no protection, or cannot be availed of under such conditions; secondly, that the Pure Food and Drugs Act gave the Department the power to make regulations for the enforcement of the act, and that under that authority that Department has enacted or promulgated the regulation that the food or drugs within the scope of sections 1, 2, and 10 of the act may be sampled wherever found.

Taking up the last point first, it may be said as a matter of law that a regulation put out by any official or any department cannot add to or detract from the original act. I have not been cited to any section of the act that gives any official of the Department power to sample or seize property wherever found, and it is not necessary to pass upon that at this time. Certainly any mere regulation of the Department would not stand if in conflict with any fundamental right of the defendant, guaranteed him under the Constitution of the United States; it would have no force or effect.

Going back now to the first question, as to whether the fourth amendment of the Constitution was violated, or whether the defendant avail himself of its provisions under the peculiar circumstances of this case, I am clearly of the opinion that the inspector had absolutely no authority to go into the post office and open a sealed package. He was not a post-office inspector or employee. He had no more right to interfere with mail in its transportation and stop its transportation than the merest stranger. The Government officials must act within the scope of their authority. Their authority is always limited, and when they go beyond the limits of the same, their acts must be judged like the acts of any other person not holding a Government position. The permission granted by the postmaster to open this mail was without the scope of his authority, and does not affect the lack of authority of this inspector. In any doubtful case I think the doubt ought to be resolved against the Government official, because it is against public policy for any officer, without proper cause or authority, to interfere in any way with property of other people or to interfere with their papers, and when a man deposits property in the post office he has a right to assume that it will not be interfered with in any way except pursuant to some specific authority granted by Congress for the particular purpose in point. The case of *Ex parte Jackson*, which has been cited, in 96 U.S., holds specifically that the fourth amendment to the Constitution applies to papers or property of a citizen wherever it may be, that case saying that:

> The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can

only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment to the Constitution.

We do not say that Congress might not give to an inspector of the Department the power to invade the secrecy of the mails. It is not claimed here that such power was ever given. So we have before us a stronger set of facts than that referred to and covered in the quotation from the Jackson case which I have cited. Further, it is against sound public policy for Government officials without probable cause or proper grounds to suspect a crime is being committed and, without specific authority, to go around on fishing expeditions and interfere with the privacy of the individual or his property. This case of breaking into mail was no more or less than a trespass. I am not holding that this regulation could not empower the inspector to sample or seize the butter when offered for sale, but I don't think it gave him power—it could not give him power under the law laid down in the *Jackson case*—to commit a trespass upon mail matter. The recent decisions of the Supreme Court contain notice that the fourth and fifth amendments are still in full force and effect, and that indirect and partial repeals thereof must be especially guarded against.

So the motion to suppress the evidence will be granted and exception allowed by the Government.

Mr. IRELAND. Now, if Your Honor please, the question that you have taken up I did not think would come up in this case, but at this time the Government offers to submit evidence to the effect that they did have reasonable ground to believe that the law was violated and was being then and there violated. I don't think it will make any difference, but I want it for the record.

The COURT. In order to make a record you may show that you made the offer and the same is rejected. It will not affect the case under the facts, in view of the fact that the inspector has no right to violate the secrecy of mail matter.

Mr. IRELAND. There is one other thing I would like to have the record show: that while the stipulation shows this was sealed, the stipulation does not show it is sealed first class mail; and that the Government offers to prove that the facts in this case are that this was parcel post mail, fourth class, and does not come under what is termed first class sealed matter.

The COURT. The stipulation states that they were sealed packages—in other words, they had to be broken to get into—and that the information that the Government obtained by virtue of the inspection could not have been obtained without breaking the seal or the package.

Mr. IRELAND. No, it could not. It had to be broken, but it is not what is first class sealed mail, but I believe it has labeled on it "Inspection allowed."

The COURT. That disposes of this case.

Mr. PACKARD. I then move the court for an instructed verdict in favor of the defendant on all the counts.

The COURT. The motion will be granted. Gentlemen of the jury, under the ruling of the court the evidence that has been given is not

admissible. Therefore, there being no other evidence, the court instructs you to find the defendant not guilty on each and every count of this information. The first juryman will please sign the verdict, and the defendant will be discharged.

UNITED STATES v. 18 CASES OF TUNA FISH

(District Court, W.D. Virginia, Apr. 20, 1925)

5 Fed. (2d) 979; N.J. No. 15601

Libel under section 10 of the Food and Drugs Act. On issuance of monition and attachment. Libel upheld.

On April 6, 1925, the United States attorney filed a libel praying seizure and condemnation of 18 cases of tuna fish, remaining in the original unbroken packages at Abingdon, Va., alleging that the article had been shipped by the M. De Bruyn Importing Co., from New York, N.Y., in February 1925, and had been transported from the State of New York into the State of Virginia, and charging adulteration and misbranding in violation of the Food and Drugs Act.

On April 20, 1925, the court handed down the following opinion as to the necessity for supporting affidavits other than that of the United States attorney before issuance of monition and attachment:

McDowell, *District Judge.* This is a proceeding for forfeiture under the Food and Drugs Act. The information does not allege previous seizure of the food sought to be condemned, and admits that it is in the possession of its owner, a wholesale dealer in groceries in this district. The information is not verified or supported, otherwise than by an affidavit by an assistant district attorney, which reads: "The foregoing facts are true to the best of affiant's knowledge and belief." The prayer is for the issue of monition attachment. For present purposes I shall assume that the Food and Drugs Act (34 Stat. 768) does not contemplate or require previous seizure (see *United States* v. *Geo. Spraul & Co.*, 185 Fed. 405, 406, 407, 107 C.C.A. 569; *United States* v. *Two Barrels, etc.* (D.C.), 185 Fed. 302; *United States* v. *One Hundred Barrels, etc.* (D.C.), 185 Fed. 471, 475), and on such assumption I shall discuss the question of verification of informations for forfeiture of food and drugs, where a search warrant is not asked for.

If the fourth amendment forbids the issue of the attachment, except on probable cause, supported by oath or affirmation, or if the conformity provision of section 10 of the Food and Drugs Act requires that the information be on oath or affirmation, the affidavit here is, I think, insufficient. See *Rice* v. *Ames*, 180 U.S. 371, 375, 376, 21 S.Ct. 406, 45 L.Ed. 577; *Ex parte Bollman*, 4 Cranch, 75, 130, L.Ed. 554; *Salter* v. *State*, 2 Okl.Cr. 464, 102 P. 719, 25 L.R.A. (N.S.) 60, 139 Am.St.Rep. 935, 939–944; *Mowry* v. *Sanborn*, 65 N.Y. 581, quoted in *Clarke* v. *Neb. Nat. Bank*, 57 Neb. 314, 77 N.W. 805, 73 Am.St.Rep. 512; *Ex parte Lane* (D.C.), 6 Fed. 34–38; *Ex parte Morgan* (D.C.), 20 Fed. 298, 307; *Ex parte Spears*, 88 Cal. 640, 26 P. 608, 22 Am.St.Rep. 341, 342; *Leigh* v. *Green*, 64 Neb. 533, 90 N.W. 255, 101 Am.St.Rep. 592, 595.

However, I know of no sufficient reason or authority for a belief that the fourth amendment was intended to apply to an attachment for the seizure of property. The bald letter of the amendment suggests that it was intended to apply only to warrants which direct both search and seizure. But, at least as to warrants for the arrest of persons charged with crime there seems no room for doubt that the amendment applies. *Ex parte Buford*, 3 Cranch, 448, 451, 453, 2 L.Ed. 495; *West* v. *Cabell*, 153 U.S. 78, 85, 87, 14 S.Ct. 752, 38 L.Ed. 643; *In re Rule of Court*, 3 Woods 502, Fed. Cas. No. 12,126; *United States* v. *Tureaud* (C.C.), 20 Fed. 621; *In re Gourdin* (D.C.), 45 Fed. 842; *In re Dana* (D.C.), 68 Fed. 886, 895; *Johnston* v. *United States*, 87 Fed. 187, 30 C.C.A. 612; *United States* v. *Sapinkow* (C.C.), 90 Fed. 654; *United States* v. *Baumert* (D.C.), 179 Fed. 735; *Weeks* v. *United States*, 216 Fed. 292, 132 C.C.A. 436; L.R.A. 1915B, 651, Ann. Cas. 1917C, 524.

A very satisfactory reason for discriminating attachments from search warrants, and from ordinary warrants for the arrest of persons for crime, is that there is no historical evidence, so far as I know, of abuses in respect to writs of attachment, either in England or in America, prior to the adoption of the fourth amendment, and therefore there was no reason for an intent that the amendment should include attachments.

In *Boyd* v. *United States*, 116 U.S. 616, 624, 6 S.Ct. 524, 529 (29 L.Ed. 746), is said, obiter:

> The entry upon premises, made by a sheriff or other officer of the law, for the purpose of seizing goods and chattels by virtue of a judicial writ, such as an attachment, a sequestration, or an execution, is not within the prohibition of the fourth or fifth amendment, or any other clause of the Constitution.

In *Den ex dem. Murray* v. *Hoboken Land, etc., Co.*, 18 How. 272, 285, 286 (15 L.Ed. 372), in respect to the distress warrant, an extent, authorized by the Act of May 15, 1820, c. 107, § 2 (3 Stat. 592), against delinquent collectors of Federal revenues, it is said:

> The remaining objection to this warrant is that it was issued without the support of an oath or affirmation, and so was forbidden by the fourth article of the Amendments of the Constitution. But this article has no reference to civil proceedings for the recovery of debts, of which a search warrant is not made part. The process in this case is termed, in the act of Congress, a warrant of distress. The name bestowed upon it cannot affect its constitutional validity. In substance, it is an extent authorizing a levy for the satisfaction of a debt; and as no other authority is conferred, to make searches or seizures, than is ordinarily embraced in every execution issued upon a recognizance, or a stipulation in the admiralty, we are of opinion it was not invalid for this cause.

A distress warrant issued by the order of a treasury agent and directing the seizure and sale of goods and chattels, and an attachment issued by order of a court and directing the seizure of goods and chattels, are not identical. But if the fourth amendment does not apply to the distress warrant, I see no reason for saying that it applies to the attachment.

I have discovered only two adjudications relating to the application of the fourth amendment to the issue of attachments in forfeiture proceedings under section 10 of the Food and Drugs Act. In *United States* v. *Eight Casks of Drug Products*, Notice of Judgment 697, 5 Fed. (2d) 971, the District Court for the Southern District of Ohio in 1910 sustained a demurrer to the information because, inter alia, the "libel was not properly verified by any persons having knowledge of the

facts." In *United States* v. *Three Hundred Cases of Mapleine*, Notice of Judgment 163 (no opinion filed), the District Court for the Northern District of Illinois, in 1909, overruled, without discussion, an exception to the information on the ground that it was not under oath. In the first case there is some discussion, but it is quite unconvincing and no authority in point is cited.

The only satisfactory conclusion I can reach is that the fourth amendment does not apply to the issue of the writ of attachment in forfeiture cases under section 10 of the Food and Drugs Act.

Section 10 contains a provision reading:

> The proceedings in such libel cases shall conform, as near as may be, to the proceedings in admiralty * * *.

If it be assumed that the "proceedings in admiralty" intended were not those followed in forfeiture cases based on previous seizure (rule 22 of 1854, 3 How. xiii), but were those in ordinary libels in instance causes (rule 23 of 1854 and rule 22 of 1920); still the use of the expression "as near as may be" authorizes the exercise of some degree of judicial discretion. As was said in *Indianapolis etc. R. Co.* v. *Horst*, 93 U.S. 300, (23 L.Ed. 898):

> The conformity is required to be "as near as may be"—not as near as may be *possible*, or as near as may be *practicable*.

See also *Mexican Central R. Co.* v. *Pinkney*, 149 U.S. 194, 207; 13 S.Ct. 859, 37 L.Ed. 699; *Shepard* v. *Adams*, 168 U.S. 618, 624, 625; 18 S.Ct. 214, 42 L.Ed. 602.

It is quite possible that food may be so "adulterated" within the meaning of the act as to be poisonous. It is also possible that drugs, either because of adulteration or misbranding, may be highly dangerous. And if seizure previous to the drafting of the information is not authorized by the act, it is clear that great rapidity of action on the part of the district attorney will frequently be necessary. Outside of the District of Columbia and of the insular possessions, the (domestic) article to be condemned must be either in transit or still unloaded, unsold, or in original unbroken packages. So far as my experience goes, it is rarely practicable to attach in transit, and it is sometimes necessary to use great expedition to attach before the article has been sold; and where haste is necessary the delay involved in having affidavits by the Government agents who know the facts transmitted to the judge may easily be wholly or in part fatal to the effort to condemn. In view of this fact it seems a reasonable exercise of discretion to hold that the information in such cases need not be verified.

It may be added that the practice in admiralty under old rule 23, new rule 22 (254 U.S. appendix), in instance causes in which the United States is the libelant, is not and seemingly has never been uniform. In some of the district courts such libels are not required to be verified, and in others they are. See Waples Proceedings in Rem. p. 77; 2 Foster Fed. Pr. (5th Ed.) p. 1947; The J. R. Hoyle Fed. Cas. No. 7557; *United States* v. *2 Barrels etc.* (D.C.), 185 Fed. 302, 307. In this circuit the affidavit is required in the District of Maryland and in the Eastern District of Virginia. No affidavit is required in the Eastern District of South Carolina, and such, I believe, is the practice also in the Eastern District of North Carolina.

In section 4 of the Food and Drugs Act is a requirement of verification by the analyst of every analysis of food or drugs found to be

adulterated or misbranded. And this verified analysis is to be certified by the Secretary of Agriculture to the proper district attorney. But, as there is no requirement for an affidavit showing other equally indispensable facts justifying a forfeiture, such, for instance, as an interstate transit, and as the affidavit required by section 4 is not directed to be filed with the information for forfeiture, it seems to me that the provision in question was intended either merely to insure accuracy on the part of analyst or as a basis for a warrant for the arrest of a person to be criminally prosecuted under section 1 or 2 of the act.

Section 10 of the act is of very doubtful meaning in several respects; and which of several practices in admiralty was in the mind of the draftsman, will, I believe, always be in great doubt. It may have been the practice (under old rule 22) in forfeiture cases where previous seizures had been made and in which verification was needless; or it may have been the practice (under old rule 23) in those courts which required that all libels in instance causes be verified; or it may have been the practice in those courts which did not require libels in instance causes in behalf of the United States to be verified. But this doubt need not be solved in respect to informations for forfeiture which seek only the issue of monition and attachment. As has been said, the words "as near as may be" permit the exercise of a reasonable discretion, and as the delays involved in laying before the court affidavits by persons who have first hand knowledge of the facts may frequently be fatal to the efficacy of the proceeding, I believe it permissible and judicious to order the issue of monitions and attachments on informations which are wholly unsupported by oath or affirmation.

UNITED STATES v. 37 ONE-POUND PACKAGES OF COLORS

(District Court, E.D. Pennsylvania, May 8, 1925)

N.J. No. 13970

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict, in part, in favor of the United States; in part, in favor of the claimant.

THOMPSON, *District Judge.* Members of the jury: In this case the United States officials, agents of the Pure Food and Drugs Bureau of the Department of Agriculture, seized certain packages containing dyes for food products which had been sold by the claimant to D. S. Dengler & Son, of this city. They were seized under the provisions of the Pure Food and Drugs Act on the charge of being misbranded and adulterated. That act provides that in case any food products are transported from one State to another in interstate commerce, that are misbranded or adulterated within the meaning of the law, they may be seized and forfeited to the United States. So that is the nature of this proceeding. The proceeding is against the articles themselves, and the claimant, H. Kohnstamm & Co., has come in as claimant for the merchandise, and is defending the action brought by the United States.

The Pure Food and Drugs Act was an act passed by Congress to protect the public from imposition in the sale of food products, among

other things, in order that persons who were dealing in food products in interstate commerce might not impose upon the public by selling them articles which were either deleterious to health, or which were short in weight or quantity, or which were in some other manner being imposed upon the public at that time when the act was passed, without any regulation by Congress.

Under the law there are certain offenses prescribed by Congress, and one of them is misbranding. In this case it is charged that these 1-pound packages which were seized were misbranded, in that the label contained a statement that was false and misleading, which tended to mislead the purchasing public as to the contents of the package. The misleading statement on each of the packages is substantially as follows: "We guarantee the contents of this package to contain no coal-tar color excepting our certified colors." Then comes the name, H. Kohnstamm & Co., Inc., New York-Chicago, and so on, and then the statement that it is a 1-pound package.

The Pure Food and Drugs Act authorized the issuance by the Government authorities of regulations governing the transportation and sale of food being taken from one State to another. You will understand that is how this case got into the United States Court, because the Federal authorities alone have control of commerce between the States.

These regulations are binding on parties who are dealing in food products in interstate commerce.

The regulations here with regard to coloring for food products adopted by the Department, made, no doubt, after a careful examination of the various constituents entering into coloring substances for food products, confectionery and so on, authorized the use of certain coal-tar dyes as not being deleterious to health, but the regulations required that the colors sold by the dealers might be certified, the contents of the composition of the colors certified to the Department of Agriculture, and when so certified a number was assigned to that particular composition, and the seller then had a right to use that number and state that the contents of the package was certified.

The contention in this case on the part of the Government is that the statement on the package, "We guarantee the contents of this package to contain no coal-tar color except our certified colors" was misleading, and tended to deceive and mislead the purchasers, leading them to suppose that these colors which were being sold by the claimant here, H. Kohnstamm & Co., were certified under the regulations and, therefore, the purchaser would be protected in case there were any deleterious or unlawful matters contained in the packages. That as I understand it, is the contention of the Government.

The claimant on the other hand contends that, there being no reference to the fact that when they used the word "certified" they meant that they were certified to the Pure Food and Drugs Bureau of the Department of Agriculture, there being no statement to that effect, it was entirely an innocent statement, and the defendant was entitled to refer to certain colors as its certified colors, whether or not they were in accordance with a certificate filed with the Department of Agriculture.

That is, as I understand it, the substance of the controversy in regard to the use of this guaranty, or this statement on the label,

that there was a guaranty that no coal-tar colors were in the package excepting the Kohnstamm & Company's certified colors.

There is another question arising in the case, and that is the question of adulteration. The Department regulations require where coal-tar colors are used along with other substances that, in order to protect the purchasing public and assure them of getting the strength and quantity of the actual coal-tar colors which they are entitled to have when they buy a package by the pound, if there are other ingredients entering into the composition, that this shall be certified to the Department along with other matters which they may be required to certify, and thereby the public generally, trading in this sort of article, may have this source of information to know just what they are getting when they buy a package alleged to contain food coloring matter.

So that the charges here are first, misbranding, and second, adulteration, in that a foreign substance, a substance not specified on the label, was contained in the package, and that other ingredients had been mixed with the coloring matter.

You have heard the testimony in the case. You have heard the witnesses called, some of whom testified that they read the label and saw it contained the word "certified," that in the trade that conveys the idea that the description of the contents of this package has been certified to the Department, and a serial number issued, and the certification referred to there of the word "certified" refers to such a certification.

It is contended on behalf of the defense, however, and it has been testified to on their behalf, that the word "certified" would not convey any such meaning. So that that is a fact for you to consider.

It appears that these packages as put up were not certified to the Department of Agriculture. As I understand it, there is no dispute about that. But the claimant claims that his company is entitled to use a number on the package and use the word "certified" and to state that such coal-tar colors as are used in the package are only those coal-tar colors which have been certified by the claimant. So that is a question for you to determine as to whether these statements on the packages, by reason of the regulations which I have referred to and the provisions of the law, were false and misleading, so as to mislead the purchaser into thinking he was getting something which he did not get. If you find that that is the case, then, in order to simplify the matter, I will instruct you to return a verdict in favor of the plaintiff, that is to say, for the Government.

If, however, you find that charge is not sustained by the evidence, that there were no false and misleading statements in this guaranty, taking into consideration not only the act of Congress but the Government regulations—it does not make any difference in a case of this sort what the seller intended, but the question is, what would be the effect on the mind of the persons purchasing this article, would they be deceived and misled into thinking they were getting something they did not get—if you do not believe from the evidence that they would by this statement of guaranty be misled or deceived into believing that the contents of the package was something that it was

not, then your verdict should be for the defendant as to the misbranding charge.

As to the question of adulteration, it appears that these coloring matters were put up in some sort of paste, which was harmless in itself, and that it did not contain anything like 100 percent of coloring matter. I do not recall the exact percentages, but it seems to me they ran from about 6½ to 8¾ percent of coloring matter, and that the rest was the substance of which the paste was made up, and this paste was what was used in the confectionery and other manufactures for coloring the articles to be sold.

The pure food and drugs regulation, as I understand it, provides that where any substances are added to coal-tar coloring matters the quality thereof shall be certified to the Department at Washington, and that the statement shall contain the proportion in which the other constituents, besides the coloring matter, stand with relation to the actual coloring matter. If you find that under the regulations there has been no certification of the composition of these various coloring matters to the Department, stating the quantities of the foreign substances which were contained, then that would be an adulteration, because it would be increasing the quantity of the contents of the package so that the actual coloring matter would be only from 6 to 8 or 10 percent, whereas the foreign substances would be the remainder of 90 percent and over of foreign substances.

If you believe from the evidence that that was what the defendant did, and that they were selling these colors with 90 percent or over of an addition of other substances mixed with the coloring matter, without having complied with the regulations of the Department in filing the description of what they were selling under these various labels, then this product was subject to seizure and forfeiture, as adulterated.

If, however, you believe that this coloring matter as sold by the claimant was put on the market either in its pure form in these packages, as contained in these packages, or that the claimant had complied with the law in filing at Washington a description of what he was selling, then your verdict should be for the defendant on that point.

If you find that on either one or both charges the Government has made out its case to your satisfaction, then you will return a general verdict, unless counsel desire to have the verdict separated as to the counts. I suppose you do not desire that. You will return a general verdict for the plaintiff. If, however, the Government has not sustained its contention as to either charge, then your verdict should be for the defendant.

Insofar as I have in my general charge sustained the Government's written requests, I will grant an exception to the defendant. Insofar as I have refused them I will grant an exception to the Government.

The same rule will apply in regard to the defendant's requests. Insofar as I have sustained them in my general charge, the Government will have an exception, and insofar as I have overruled them, the defendant will have an exception.

I do not think it is necessary to charge on all of these points.

Mr. BUTTERWORTH. May I have an exception to that portion of your charge wherein you instructed the jury that under the food-

inspection decisions there is an obligation on the manufacturer and sellers of coal-tar colors to have them certified?

(Exception noted for the intervening defendant, as requested, by direction of the court.)

Mr. BUTTERWORTH. May I also have an exception to that portion of Your Honor's charge referring to adulteration, wherein you say that if any articles have been mixed with the color and the mixture has not been certified, that would constitute an adulteration under the act? As I understand it, the Government's contention is that there would be no adulteration unless these articles were sold as certified colors, because there is no standard for the color content of of a plain color.

The COURT. If I gave the impression you indicate by your request for an exception I will say to the jury now that insofar as the Government regulations containing certificates on mixtures with pure colors are concerned, they have no application to this case unless you find from the evidence that the words endorsed on the package in regard to the guaranty as a certification are such as to indicate that the package contains what is referred to in a certificate which has been filed by the intervening defendant. You may have an exception to that if you like.

(Exception noted for the defendant, by direction of the court.)

Mr. BUTTERWORTH. On considering the matter further, if we could have the verdict separated, if it comes to that point, I think it would be preferable.

The COURT. Members of the jury, insamuch as it has been requested by defendant, and in order that there will be no doubt about your findings in the case, when you return your verdict you will be requested to return your verdict first as to the misbranding, and on that subject you will state whether or not the verdict is for the plaintiff or for the defendant. You will then be asked how you find on the charge of adulteration, and you will then similarly state on that charge whether you find for the plaintiff or for the defendant, in order that the two substantial charges in the information that has been filed may be separated.

Plaintiff's points read as follows:

1. If an article of food shipped in interstate commerce is not the identical thing that the brand indicates it to be, it is misbranded, and if you find that the colors in this case are not the identical things that the brands indicate them to be, then your verdict should be for the Government.

2. Statements on the labels of articles of food shipped in interstate commerce which are ambiguous and liable to mislead the purchaser render the article misbranded, and if you find that the statements on the labels in this case are ambiguous and liable to mislead, then your verdict should be for the Government.

3. The Food and Drugs Act condemns every statement, design, and device which may mislead or deceive, and statements which result in deception or ambiguity, even if they are not technically false, or even though they may be literally true, come within the condemnation of the act. Therefore, if you find that the labeling in this case results in deception or ambiguity, even if it is literally true, the verdict should be for the Government.

4. If as a matter of first impression the labeling of colors in this case tends to convey a false and misleading impression to the purchaser, even though a deliberate reading of the label might correct such an impression, then the verdict should be for the Government.

5. If you find that the package containing the article or its label bears any statement, design, or device regarding the ingredients or substances contained therein, which statement, design, or device is false or misleading in any particular, then the verdict should be for the Government.

6. A statement may be misleading not only by what it says but by what it fails to say, therefore if you determine that the statements on the labels were such that as a whole the labeling indicates that the packages contained food colors of the quality known as certified colors, when they did not contain colors of that quality, or if you determine that the labeling indicates that the packages contained nothing but coal-tar colors and you believe that such was not the fact, then your verdict should be for the Government.

7. Any foreign substance not declared on the label of an article of food and not a normal constituent of the article as described by the label renders that article adulterated, and if from all the facts in evidence you determine that foreign substance has been mixed and packed with the colors the labels purport the packages to contain, so as to reduce, lessen, or weaken the quality or strength of the article, then the verdict should be for the Government.

8. The substitution of any material other than a normal constituent of the article of food offered by its label is adulteration, and if from the evidence in this case you determine that substances other than the normal constituents of color have been in whole or in part substituted for the color the labeling purports the article to be, then the verdict should be for the Government.

9. The substitution of another and different article for the article of food offered by the label constitutes adulteration, and if from the evidence in this case you believe the colors involved were by their label offered as certified colors and were not certified colors, then that state of facts would constitute a substitution of a different article from the article which the label purports the article to be, and the verdict should be for the Govermnent.

10. If from the evidence in this case you determine that the labeling of the colors as set out in the libel indicates to the purchaser that the packages involved are composed entirely of colors, and if from the evidence it is determined that said packages are not so composed but contain in addition to color other substances, then those other substances would render the article adulterated and the verdict should be for the Government.

The defendant's points read as follows:

1. The Food and Drugs Act and the food inspection decisions thereunder did not require the intervening defendant to certify samples of the batches of color mixture, parts of which have been seized in this proceeding, unless the intervening defendant desired to and did sell the mixture as one which had been certified to the Department of Agriculture

2. Unless you find that the labeling on the packages in this suit was so similar to the manner in which the intervening defendant labeled colors which had been certified to the Department of Agriculture and which it sold as certified colors so as to lead the color trade generally familiar with colors manufactured and sold by the intervening defendant to believe that the colors in this suit were certified colors, then you must find that the colors in this suit are neither misbranded nor adulterated under the Food and Drugs Act.

3. If you find that the color content of the articles in this suit have been certified by the intervening defendant to the Department of Agriculture, then you must find that the articles are not misbranded or adulterated within the meaning of the Food and Drugs Act.

4. Under the pleadings and all the evidence you must find that the articles are not misbranded under the Food and Drugs Act.

5. Under the pleadings and all the evidence you must find that the articles are not adulterated within the meaning of the Food and Drugs Act.

6. Under the pleadings and all the evidence you must find that the articles are neither misbranded nor adulterated within the meaning of the Food and Drugs Act.

On May 11, 1925, the jury after due deliberation returned a verdict for the Government on the misbranding charge, and for the defendant on the adulteration charge.

UNITED STATES v. GORMAN & CO.

(District Court, W.D. Washington, Sept. 29, 1925)

N.J. No. 14664

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of acquittal.

The following charge was delivered to the jury:

NETERER, *District Judge.* Members of the jury: The information in this case charges that the defendants did ship in interstate commerce articles of food containing filthy, decomposed, and putrid animal substance, on the 2d day of September 1924 and also on the 15th day of August 1924. On the 15th day of August 1924 a number of cases were sent, and a number of cans out of these cases contained, it is charged, filthy, decomposed, and putrid animal substance. The other shipment was on September 2, 1924, and was made subsequently. The words used in the information simply mean what is ordinarily implied—putrid, tainted, decomposed, or decayed—the process of putrefaction—decay of albuminous or other matter.

You are instructed that the defendant in this case has pleaded not guilty; therefore denies the charge. The burden is upon the Government to show that it is guilty beyond every reasonable doubt. The defendant is presumed innocent until proven guilty by that degree of proof, and this presumption continues throughout the trial and until you are convinced by the testimony that the defendant is guilty.

You are instructed that it is against the law to carry any article of food in interstate commerce containing filthy or decomposed, putrid animal or other substance. The intent with which it was sent bears no relation to the shipment, if the intent is undisclosed. If in fact there is a disclosed intent of which the Bureau is advised, and that before the article would be considered as human food other tests were to be made and the Department so advised, that would take the shipment out of the rule. In this case there are two shipments. One, it is contended, was made as a special consignment of which the Bureau was advised, and that it would not be shipped as food or delivered to the trade until further tests had been made of it.

In this case, as in any criminal case, you are the sole judges of the facts, and you must determine what the facts are from the witnesses who have testified and the circumstances which have been disclosed.

The first question that you will want to determine is whether the food, or the salmon that was shipped, contained filthy or decomposed, putrid matter in its content. If it did not, then you will return a verdict of not guilty upon both counts. If it did, then you will return a verdict of guilty upon such count upon which you are convinced that there was filthy, decomposed, putrid animal or other substance. In determining whether there was putrid animal or other substance in any of these shipments, of course you will take into consideration the shipment that was made, what was found in the shipment, the disposition of it, the construction placed upon these shipments by the Department at the time, with a view of determining

whether it did contain the substance which is contended, and you will determine then what is the right. There is evidence here that after the one shipment—I think the shipment in count 2—that a consignment or shipment was made from a part of that consignment to Seattle with the consent of the Bureau. The testimony discloses that this was shipped, I think, to some place in Virginia, and after the entire consignment was seized here, this shipment was traced to the ultimate destination and was also seized, and after having been seized samples were submitted to the Department at Washington, and this was afterwards released. I think that is a circumstance for you to take into consideration with relation to this shipment in count 2, together with the testimony that has been presented here, and if from all of the testimony you believe that this consignment which was made here, of which the salmon in count 2 in the information was a part, was filthy and contained decomposed, putrid matter and was condemned, beyond a reasonable doubt, then you will return a verdict of guilty upon that count; if you have a reasonable doubt, then you will return a verdict of not guilty. You will likewise do the same with relation to count 1 if you find it did not contain any putrid matter as charged.

There is this further element to be taken into consideration with relation to count 2, the shipment made on the 2d of September, in which the defendant contends that the Government was advised that that shipment would not be made as food until it had been submitted to the department. It is not necessary for me to relate to you the circumstances detailed by the witnesses here with relation to that consignment. You will remember that testimony with relation to the fish brought in from the traps and the nets and the amount of fish—I think 600 or 800 putrid fish that had been brought in and thrown by the fishermen with 4,000 or 5,000 trap fish that were lying on the floor—when this was discovered by the Department agents they called the attention of the defendants to it. They then picked out some 400 or 500 rotten fish from the balance that was on the floor, but a part of these fish were then in retorts, and the defendants testified that it was then they advised the Government officials that those salmon would be set aside, and if found unfit for human food they would not be used for that purpose; that before they would be applied to that purpose they would bring them to the attention of the Department, and then they testified that they laid those cases aside and did not ship them in the general shipment because they did not want to get them mixed up with the other consignment, and brought them down personally, and personally went to the bureau and informed them that this shipment was here. Now what do you think is the fact? Was there a disclosed purpose with relation to that shipment, an understanding that those cases would be brought to Seattle for further test and approval, and which would excuse them from the direct provision of this law? And if you find that to be the fact, or if the question raises a reasonable doubt in your minds with relation to count 1, then you will return a verdict of not guilty.

You will weigh the testimony fairly. Neither you nor I have anything to do with the policy of this law. We have to do only with the enforcement, and your sole duty and purpose is to find what the facts are. A maximum and minimum penalty is fixed, to be determined by the presiding judge. You will therefore give the Govern-

ment a square deal, and give the defendant a square deal. If the defendant has not transgressed the law, then it ought not to be punished; if it has, it should be punished. The question of intent with relation to shipment of the consignment of goods brought down from Alaska with the purpose of labeling here and finally shipping from here would not excuse the defendant if this fish was putrid, unfit for human food, and brought here in interstate commerce. Intent is immaterial and could not excuse the defendant with relation to the filthy or putrid condition of the food. The Government, under such circumstances, could not enforce this law. But when there is a disclosed purpose to the plaintiff, as the defendant contends there was with relation to count 1, then that should have operation in your minds in determining what the fact is here.

A reasonable doubt is just such a doubt as the term implies, a doubt for which you can give a reason, not a speculative, imaginary, or conjectural doubt. It is such a doubt as a man of ordinary prudence, sensibility, and decision, in determining an issue of like concern to himself as that before the jury to the defendant, would make him pause or hesitate in arriving at his conclusion. It may be a doubt which is created by the want of evidence, or may be by the evidence itself. A juror is satisfied beyond a reasonable doubt when he is convinced to a moral certainty of the truth of the charge which is made and the guilt of the defendant.

Are there any exceptions? The verdict is in the usual form. Before the word "guilty" is a blank, and you will write in there "is" or "not", as you find the fact to be. You may retire.

UNITED STATES v. SMITH

(District Court, S.D. Iowa, Oct. 22, 1925)

N.J. No. 14119

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of acquittal.

REEVES, *District Judge* (charge to jury). Gentlemen of the jury: At the conclusion of arguments of counsel in this case and after all the testimony has been introduced it becomes the duty of the court to charge you with the law applicable to the facts in the case. With the law of the case you have nothing to do, and with the facts of the case the court has nothing to do. It is your exclusive function to pass on all controversies of fact, and it is the exclusive function of the court to declare the law, and it is your duty to accept that declaration of the court as to the application of the law to the facts in the case. In your consideration of the facts the court will not attempt to infringe upon your purview of deciding the facts of the case. You should make up your minds as to the facts and return your verdict according to the facts, according to your judgment, and according to your judgment under the guidance of the facts and the extent of the facts and not favor any judgment the court may have in the matter. Anything the court may say is for your guidance in this case.

Gentlemen, Congress has enacted the following statute with reference to interstate shipment of adulterated food:

The introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this Act, is hereby prohibited; and any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this Act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded foods or drugs, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor.

Now, gentlemen, the indictment in this case charges that the defendant, on or about the 30th day of July 1923 shipped or offered for shipment a certain number of cases of eggs containing adulterated eggs—that is to say, eggs that contained decomposed matter—that is, a putrid animal substance.

If you should find on the evidence that on or about the 30th day of July 1923 the defendant shipped or delivered for shipment in the city of Lorimor, in the State of Iowa, to the city of Chicago, in the State of Illinois, to Peterson Brothers, a number of cases containing adulterated eggs, that is to say, eggs that were moldy, partly rotten, as described in the evidence as black rot, mixed rot, etc., and most of the eggs contained blood rings, then, in such case, you should find the defendant guilty as charged in the information.

Now, gentlemen, as has been suggested heretofore there is only one little simple question in this case, and that is, whether or not the eggs that, according to the testimony of both the plaintiff and the defendant, were shipped, the eggs shipped from Lorimor, in the State of Iowa, on the 30th day of July 1923 were adulterated when they were offered for shipment, or when they were shipped. That is the one question to determine. If you find they were adulterated when offered for shipment or when they were shipped, then, gentlemen, it will be your duty to render a verdict of guilty in this case.

If, on the other hand, you believe they were not adulterated when offered for shipment, or shipped, and if they afterwards became decomposed, that many of them contained mixed rots, black rots, or blood rings, or became moldy, as the testimony tends to show, then under such circumstances the defendant is not guilty of shipping or offering for shipment.

There is testimony, and the court is briefly referring to that, in effect that when the eggs arrived in Chicago on the 8th day of August 1923 some 8 or 9 days after they were shipped from Lorimor, the tesmony is that they were not then adulterated. On the other hand, there is testimony on the part of the Government that on that day they were adulterated, and there is testimony tending to show that if the eggs had not been adulterated when shipped, because of the refrigeration conditions they would not have become adulterated, they wouldn't have deteriorated in the course of shipment. The defendant on his part says that he made an inspection of this shipment of eggs after they gathered

them up in the country, and, in substance, if they were adulterated when offered for shipment the defendant denies he had any such knowledge. The court, under this status, is constrained to say that it is not a question of whether or not he had knowledge of their adulteration, or it is not a question of whether or not he made reasonable, proper, and careful inspection to determine whether or not they were adulterated. Under this law as the court interprets it, the defendant is responsible if he ships adulterated eggs regardless of what he may have done to ascertain whether or not they were adulterated. So, in this case, if you should determine from the testimony that the defendant shipped or offered for shipment adulterated eggs, on or about the 30th day of July 1923 then, gentlemen, it will be your duty to return a verdict of guilty in this case.

You gentlemen, in retiring to your jury room to deliberate on your verdict, should consider your verdict in this case. You should bear in mind that there will be no question of the effect on the Government or the defendant with reference to your verdict insofar as the effects are concerned. If the defendant is guilty of having offered for shipment or shipped adulterated eggs in violation of this law, then it is your duty to return a verdict of guilty regardless of the effect upon him. If, on the other hand, you find that the defendant did not offer for shipment and did not ship adulterated eggs, then it is your duty to return a verdict of not guilty. The fact that they may have been adulterated when shipped or may have been adulterated somewhere else it is your duty to determine from the testimony in the case, and then return your verdict in the case, expressive of what you concede to be true in the case under your oaths and qualifications of that duty, because your responsibility as men demands that you do that, and without question for or against anybody. When you have done that, it is your full duty.

The court will give you these fundamental rules enabling you to analyze the testimony in the case.

In the first place, you are the sole judges of the witnesses and the weight to be accredited to their testimony, of each and every witness who testified in this case. In determining the weight and credibility you should give the testimony of any witness, you should take into consideration his conduct and demeanor on the witness stand, his willingness or unwillingness to testify to what he is asked about, his knowledge of the facts, and the reasonableness or unreasonableness of his testimony, his interest, if any, in the result of the case, his bias or prejudice for or against any of the parties in the case, and any other facts or circumstances that may tend to throw light on such witnesses' testimony, and if you should find any witness has willfully sworn falsely to any matter or fact in the case you have a right to disregard all or any part of it and you may believe any part.

The defendant testified in his own behalf. He is a competent witness. And you should take into consideration the fact that he is the defendant, and is on trial. The law presumes that he is innocent and not guilty. This presumption protects the defendant throughout the trial, until the Government has proven his guilt to your satisfaction, beyond a reasonable doubt. Now, while reasonable doubt does not mean notions, it means, as the word implies, a substantial doubt; that is, a doubt founded on reason, and one that would

cause a reasonable, prudent man to hesitate before acting, and such a doubt as may arise on the testimony or from the lack of testimony. After all is said and done if it should exist in your mind, that is, a reasonable doubt as to the innocence or guilt of the defendant, it would be your duty to give the defendant the benefit of such doubt and acquit him.

UNITED STATES v. 384 CASES OF CANNED CHERRIES

(District Court, N.D. Ohio. Nov. 12, 1925

N.J. No. 14090

Libel under section 10 of the Food and Drugs Act. Trial before the court. Judgment in favor of the United States.

WESTENHAVER, *District Judge.* This libel is filed under act of Congress, June 30, 1906, known as the Food and Drugs Act, against 384 cases, more or less, of cherries. The Fredonia Preserving Co., of New York, has intervened as claimant and makes defense. It is admitted that these cases of cherries were shipped by the claimant in interstate commerce to the Summit Wholesale Grocery Co., at Akron, Ohio. Condemnation is sought on the ground that these cases of cherries consist in whole or in part of filthy, decomposed, or putrid vegetable or animal substance, contrary to and in violation of section 7, paragraph 6 under "Food" of said Food and Drugs Act. Neither party demanding a jury, the case was tried to the court.

The Government was permitted to withdraw 30 cans at random from the several cases and have tests and examinations made of the contents by chemists. The claimant was permitted to withdraw in like manner a dozen cans and have examinations and tests made thereof by an expert chemist. The claimant's counsel conceded on the hearing that the cans were fairly drawn and were typical of the entire shipment.

The Government's witnesses testified that each contained decomposed and spotted cherries and also worms or larvae. Each can contained between 875 and 980 cherries. In one group of six cans, the average number of larvae or worms in the can was 39.3. The highest number in any one can was 119 worms, and the lowest, 18. In the same lot of six cans the average number of decomposed or spotted cherries was 43. The highest in any one can was 107, and the lowest, 8. The Government witness testified that in another lot of 12 cans the average number of worms to the can was 75. The highest in any one can was 353, and the lowest, 10. In the same group the average number of decomposed and spotted cherries to each can was 22.8. The highest number in any one can was 47, and the lowest, 3. The Government witness testified that in still another group of 12 cans the average number of worms to each can was 25.6. The highest number in any one can was 71, and the lowest, 2. In the same group, he testified, the average number of decomposed and spotted cherries to each can was 32.4. The highest number to any one can was 78, and the lowest, 10. In the group of six cans examined by respondent's

expert he divides the so-called worms into two families, the offspring of the cherry fly and the offspring of the curculio; but for our purposes the totals only of both need be stated. He testified that the average number of worms or larvae found in each was 28. The highest number in any one can was 53, and the lowest, 11. He testified that the average number of cherries in each can showing fungus growth was 53. The highest in any one can, he testified, was 77, and the lowest, 21. He excludes from this classification all cherries showing merely a brown spot or its equivalent on one or both sides, because mere spots, while perhaps evidence of the beginning of decomposition or rot, do not indicate such an advanced state of decomposition as would be the equivalent of rot or decay or disintregration of the substance of the cherry.

Thus it appears that there is little or no difference between the results as given by witnesses for libelant and for claimant. It was conceded that the cans were fairly drawn and were typical. It was found that every can contained worms, averaging in one group of six, 43 to the can; in another group of twelve, 75 to the can; in another group of twelve, 25.6 to the can; and in the group examined by respondent's witnesses, 28 to the can. In one can the number ran as high as 353 and was only rarely below 12. Hence the presence of cherry fly or curculio larvae in substantial numbers in each can cannot be denied. The larvae thus found were preserved in glass vials and produced and exhibited in evidence. The sight of them makes a very disagreeable, not to say repulsive, impression on the trier of facts. Equal certainty is not possible in weighing the evidence as to decomposition or decay. The cherries were seeded before being canned. The mutilation and disintegration incident to manufacturing and subsequent handling make it difficult for a nonexpert witness to distinguish between sound and decomposed or decayed cherries. Even so, the results as testified to by the Government witnesses are substantially the same as given by claimant's expert. The decomposed cherries, as well as some samples of sound cherries, are preserved. The impression made on me is that the Government witnesses were not resolving doubts against claimant.

Upon the basis of the above facts I am of the opinion that these cases of cherries must be condemned as adulterated. Evidence that adulteration is injurious to health is not required. Whether an adulterated product should be condemned is not dependent on the degree of care the manufacturer exercised in producing it. It is still subject to condemnation if shipped in interstate commerce, even though the manufacturer was unable to procure cherries free from worms or free from decomposition. Claimant urges that some margin of tolerance should be allowed because it is impossible to produce a food product 100 percent pure. The Food and Drugs Act has not established a precise standard whereby adulteration can be determined. Because of this fact the courts have uniformly permitted each case to be judged upon its own special facts. It would be unwise, even if practicable, to establish a standard of count whereby a can of cherries should be condemned if that standard were exceeded. It is sufficient in the present case to say that the adulteration, particularly in the number of worms, exceeds any reasonable allowance for accidents or results unavoidable by the exercise of due care.

The authorities need not be reviewed. I am informed by counsel that Hon. John C. Knox, United States district judge, in a recent case involving a shipment of cherries made by the same claimant and presenting facts substantially the same, announced the law as herein set forth, and, when the jury returned a verdict in claimant's favor, set it aside as against the clear weight of the evidence. The principles of law and the application thereof to a situation somewhat analogous will be found set forth in the following cases to which reference is made:

United States v. *200 Cases Catsup* (D.C.), 211 Fed. 780. *United States* v. *462 Boxes Oranges* (D.C.), 249 Fed. 505. *Union Dairy Co.* v. *United States* (7 C.C.A.), 250 Fed. 231. *Andersen & Co.* v. *United States* (9 C.C.A.), 284 Fed. 542.

Judgment of condemnation will be entered, with costs against claimant. An exception may be noted.

UNITED STATES v. GERMACK

(District Court, S.D. New York, Nov. 20, 1925)

N.J. No. 14353

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

The United States attorney filed an information against Elias Germack, a member of a copartnership trading as the Armenian Importing Co., New York, N.Y., alleging shipment by said defendant from the State of New York into the State of Pennsylvania, of quantities of olive oil which was misbranded, and from the State of New York into the State of Rhode Island, of a quantity of salad oil which was adulterated and misbranded. The olive oil was labeled in part: (Can) "Pure Olive Oil Sopraffino Italia Brand * * * Net Conts. ⅛ Gall." (or "Net Contents ¼ Gall." or "Net Contents ½ Gall."). The salad oil was labeled in part: (Can) "Superior Quality Oil Greek Patriot Brand Winter Pressed Cotton Salad Oil Flavored With High Grade Olive Oil A Compound Net Contents 1 Gall."

Misbranding of the olive oil was alleged in the information for the reason that the statements "Net Conts. ⅛ Gall.," and "Net Contents ¼ Gall.," and "Net Contents ½ Gall.," borne on the various sized cans containing the article, were false and misleading, in that the said statements represented that each of said cans contained ⅛ gallon, ¼ gallon, or ½ gallon, as the case might be, of olive oil, and for the further reason that it was labeled as aforesaid so as to deceive and mislead the purchaser into the belief that each of said cans contained ⅛ gallon, ¼ gallon, or ½ gallon, as the case might be, of olive oil, whereas the said cans did not each contain the amount represented on the label but did contain a less amount.

Adulteration of the salad oil was alleged for the reason that a product which contained no flavor of olive oil had been substituted for a product flavored with olive oil, which the article purported to be.

Misbranding of the salad oil was alleged for the reason that the statements, to wit, "Flavored With High Grade Olive Oil," and "Net

Contents 1 Gall.," borne on the label, were false and misleading, in that they represented that the article was a product flavored with high-grade olive oil and that each of the cans contained 1 gallon net thereof, and for the further reason that it was labeled as aforesaid so as to deceive and mislead the purchaser into the belief that it was flavored with high-grade olive oil and that each of the said cans contained 1 gallon net thereof, whereas the article was not a product flavored with high-grade olive oil but was a product which contained no flavor of olive oil, and each of the cans did not contain 1 gallon of the article but did contain a less amount.

Misbranding of both the olive oil and the salad oil was alleged for the further reason that they were in package form and the quantity of the contents was not plainly and correctly stated on the outside of the package.

GODDARD, *District Judge* (charge to jury). Gentlemen of the jury: I think you understand that the Government passed this Pure Food and Drugs Act with several purposes in mind. One of them was to protect the citizens of the country from adulterated foods and short weight and so forth. Most of those adulterations are done to only a slight degree. By that I mean they do not take out a large percentage of the can or bottle or container; it is usually one or two or three percent which is taken out. But the Government intends that every container should contain 100 percent, and the Government has made the law quite clear. These people here are charged with three breaches of that law: One, that the container did not state on the outside how much it contained; again, that it should have stated the exact amount, and also that it failed to contain the amount stated on the outside that it did contain. The third charge against these defendants is that there was no olive oil in this container at all, although it was advertised and sold to the public with the representation that it did contain olive oil. You can realize how important it is for such a statute to be held inviolate.

The Government says to you, "We will not concern ourselves with the intention of the people." It is not a defense to this case, gentlemen, to say that they did not intend that there should be a shortage of weight, or that they did not intend that the label should not fully indicate, or they did not intend to leave out the olive oil. If they in fact did give short weight, or did in fact fail to state on the outside; if in fact they did omit to put the olive oil in, and you find that they did, you should find them guilty.

In a criminal case like this, and this was tried in a short time, I shall not attempt, because I think no good purpose would be served, to restate the facts to you. They are all fresh in your mind. You have seen the witnesses called by the Government, various inspectors, and you have seen the Government chemists; you have seen the witnesses that the other side called, that were called by the defendants, two witnesses, both of whom, as I recall, were customers of these defendants, or who did business with them. You will consider in your mind what interest any witness in this case may have had. Of course, if you find any witness has made a material statement of fact with the intention of misleading you, you have the right to disregard all of that witness's testimony if you see fit.

As I remember, the shortages varied from 3.83 to 4.07 percent in some of the containers. It seems that all of the containers are short weight.

You know, having been in this criminal court a few days, that everyone is presumed to be innocent under the law until shown to be guilty beyond a reasonable doubt. You also know from having been in the criminal court that a reasonable doubt means a reasonable doubt or a doubt which a reasonable man has after hearing all the facts and circumstances in the case.

As I stated to you before, gentlemen, the question of intent does not enter into this case at all. It is whether in fact the Government has proved beyond a reasonable doubt this charge against these defendants.

Now there are 9 counts here, gentlemen. The first 6 counts relate to the various sized cans; the last 3 counts relate to the alleged charge; the seventh count was to the effect that it is charged there is no olive oil at all in the containers.

Now, gentlemen, the case is simple. You are a jury of business men and experienced. You have seen these witnesses. You will retire, and by your verdict you will decide whether or not there was a shortage in the containers and whether or not they failed to put any olive oil in as required under the law.

Mr. WHITTINGHAM. If Your Honor please, I would like to offer a slight correction in Your Honor's statement as to the information. It does not charge there was no olive oil; it charges there was no flavor of olive oil.

The COURT. No flavor of olive oil.

Mr. WHITTINGHAM. If Your Honor please, I ask Your Honor to charge the jury that the test in determining the guilt of the defendants is whether the article was at the time of the sale by the defendants the identical thing that the brand indicated it to be.

The COURT. Yes, gentlemen, that is very true, of course.

Mr. WHITTINGHAM. Also, that the condition of the goods at the time of the seizure by the Government is not conclusive evidence as to their condition at the time of the sale by the defendants.

The COURT. Those circumstances, like everything else, gentlemen, you will take into consideration.

Mr. WHITTINGHAM. Also, that unless the jury are convinced beyond a reasonable doubt that there was misbranding as alleged in the indictment, they must find the defendants not guilty.

The COURT. That is correct. If you have reasonable doubt about it you have not the conviction that is required to convict. I think that covers it, doesn't it?

Mr. COUDERT. Except it might be well to state that they can find the defendants guilty on any one or all of the counts?

The COURT. Gentlemen, you are to understand you will decide and in your verdict state whether you find the defendants guilty on any one or all of these nine counts.

Mr. WHITTINGHAM. May I also ask that you instruct the jury they can have the exhibits with them?

The COURT. The jury may have the exhibits.

UNITED STATES v. 24⅞ GALLONS OF SMACK

(District Court, E.D. Wisconsin, Jan. 21, 1926)

N.J. No. 14416

Libel under section 10 of the Food and Drugs Act. Trial before the court. Decree in favor of claimant.

GEIGER, *District Judge.* The Government seized an interstate shipment of "Smack," a product with respect to which this preliminary statement may be made. It is manufactured synthetic concentrate, which the Government says is, and is intended to be, a base for a beverage imitative of grape juice. Some time prior to the institution of this proceeding, the product had received attention from the Government because it was shipped under labels bearing the name "Grape Smack" associated on the label with a picture of a cluster of grapes. At that time the product was similarly advertised in trade journals. After the condemnation of that label by the enforcement officials in a proceeding in court, the manufacturer, the claimant here or its predecessor, ceased that practice, and the article is now advertised labeled and shipped as "Smack."

Upon the present hearing the Government offered proof of the foregoing—which offer was received subject to later consideration of competency or the like—and also introduced proof tending to show the following:

That an analysis of the product in question discloses the presence of certain ingredients or constituents, among them water, sugar, tartaric acid, ash, vanillin, and others said to contribute severally to physical properties, flavor, color, or the like. The Government witness, upon his direct examination, also testified to the presence of approximately 5 percent of grape juice; but, I believe, upon his cross-examination failed to sustain that position when he admitted that his conclusion was based wholly upon finding in the product certain ingredients also present in natural grape juice, such as tartaric acid and ash. This infirmity of his testimony seemed to me to be conclusive against the Government when claimant denied the introduction of natural grape juice, but asserted that the ingredients testified to by the Government witness arose not upon the introduction of natural grape juice, but through synthetic introduction as a part of the formula for the entire synthetic product. The Government witness likewise testified that the beverage prepared from this base resembled grape juice in its fluid consistency, color, and taste—indicating the particular synthetic elements capable of producing color and taste, respectively.

It was, and it must be conceded that the term "Smack" is arbitrary and not at all representative of any known product, its consistency, ingredients, its food or other qualities, place of manufacture, or the like. It is distinctive within all the positive and negative tests recognized in the administration of the food law, and in its consideration by the courts. *United States* v. *Coca Cola Co.*, 241 U.S., 265, p. 286.

The name, so the lexicons tell us, has as its synonyms taste, savor, flavor, tang, tincture; also touch, tinge, dash, spice, infusion, sprinkling, little, small quantity.

Therefore, the name at most would indicate that the product contained a "smack" of something. This thought, however, need not be pursued because the Government does not contend that the name or the label, as now constituted, is misrepresentative in having a tendency to deceive or to inculcate the belief that any particular known article of food is comprehended. Nor in the proofs adduced is there any basis to find that the product, since the condemnation of the former label, has been sold or offered for sale as "any other food product, mixture, or compound." In other words, the case is not within the doctrine of *Weeks* v. *United States*, 245 U.S. 618. Therefore, the Government's case, in its most favorable light, is reduced to this: May an article put out, offered, or shipped, under a name arbitrary, not in the slightest degree representative or misrepresentative, be excluded from interstate commerce because in its color, aroma, taste, and fluid consistency, it or the product developed from it, may prove, is, or may be designed to be, imitative of other known products? Clearly, if the Government's position can be maintained, then the name or branding can be eliminated from consideration in every instance where synthetic products having truly arbitrary, nonrepresentative names, may be the subject of shipment. Nonbranding may become misbranding. This strikes me as being true both of food and drugs. The susceptibility of being found to have color, taste, or consistencies like that or those of known food products would not only bar arbitrarily distinctive names as affording protection, but would require, if the articles are to be shipped at all, a statement not only accurately designating the product imitated, but also assurances possibly of the perfection and either the singleness or the scope of imitation. If a synthetic product could disputably be urged to have the flavor, or a smack of more than one known product, fairness to the law should require statement of the justifiably possible range of imitation. The thought was suggested upon the trial of this case when, after hearing the Government's proof, claimant's representative, during recess, purchased several bottles of different kinds of grape juice on sale at drug stores, and in court pointed out a range of colors and other attributes upon comparison with each other and with "Smack" as developed from claimant's concentrate.

It is well known, for example, that different varieties of the same fruit have different flavors, consistencies, and other properties or attributes, either in their natural state or upon being subjected to varying processes in preparation for consumption. It is likewise well known that as between different varieties of fruits, flavors, colors, and the like seem to appear in common. It is difficult at times to distinguish jellies. Juices expressed from grapes vary as widely and as fundamentally in the attributes of color, taste, and aroma as the grapes themselves; and, as is well known, some of them in their natural state approach very closely to and are quite indistinguishable from the natural juices of other fruits. As above indicated, if a distinctive name given to a wholly synthetic product must still have added to it some statement or legend because of the susceptibility of its being mistaken for some natural product, the query arises respecting the reduction of this legal obligation to concrete terms. Counsel for the Government insisted in argument that claimant here would not be satisfying the law if in addition to the word "Smack," it added "A Wholly Synthetic Beverage," and it seemed to think that the law

would be satisfied if the product were marked "Imitation." Manifestly, this could serve no purpose unless a further statement indicating the subject of imitation were added. And if such statement were added, the producer and seller would still be obliged at his peril, against his will, and perhaps, contrary to the fact, to represent what might be said to be the genuineness and the perfection or the scope of his imitation.

In the *Coca Cola case, supra,* the court clearly points out the considerations involved in determining distinctiveness of name, saying:

> Thus, soda water is a familiar trade description of an article which now, as is well known, rarely contains soda in any form. Such a name is not to be deemed either misleading or false, as it is in fact distinctive. But unless the name is truly distinctive, the immunity cannot be enjoyed; but it does not extend to a case where an article is offered for sale "under the distinctive name of another article." Thus, that which is *not* coffee, or is an imitation of coffee, cannot be sold as coffee; and it would not be protected by being called "X's Coffee." Similarly, that which is not lemon extract could not obtain immunity by being sold under the name of "Y's Lemon Extract." The name so used is not "distinctive" as it does not properly distinguish the product; it is an effort to trade *under the name of an article of a different sort.* So, with respect to mixtures or compounds, we think that the term "another article" in the proviso embraces a different compound from the compound in question. The aim of the statute is to prevent deception, and that which appropriately describes a different compound cannot secure protection as a "distinctive name."
>
> *A "distinctive name" may also of course be purely arbitrary or fanciful and thus, being the trade description of the particular thing, may satisfy the statute, provided the name has not already been appropriated for something else so that its use would tend to deceive.*

Therefore the clause of the statute, "If it be an imitation of or offered for sale under the distinctive name of another article," seems to me to deal first with imitations, that is, things patterned after, or a copy of, or made in simulation of another article and, as such, offered or put out as the genuine; second, articles, whatever they may be, whether imitation or not, which are put out under the distinctive name of another article. The statute condemns the use of means which being used arouse the belief that one thing is really another.

It is my judgment that the limitations of the statute are such that the case before us is not comprehended; and this view necessarily excludes from the case the testimony dealing with the former practices of the claimant.

A decree dismissing the libel may be entered.

UNITED STATES v. 897 CASES OF CANNED CHERRIES

(District Court, E.D. Pennsylvania, Feb. 16, 1926)

N.J. No. 14339

Libels under section 10 of the Food and Drugs Act. Trial before the court. Judgment in favor of the United States.

The United States attorney filed libels for the seizure and condemnation of 897 cases of canned cherries, alleging that the article had been shipped and transported from the State of New York into the State of Pennsylvania and remained in the original unbroken packages,

and that it was adulterated and misbranded in violation of the Food and Drugs Act.

Adulteration of the article was alleged in the libel for the reason that it consisted in whole or in part of a filthy, decomposed, and putrid vegetable substance; and for the further reason that cherry pits had been mixed and packed with the article, and had been substituted in part for the article.

Misbranding of the article was alleged for the reason that the statement "Red Sour Pitted Cherries", borne on the label, was false and misleading and deceived and misled the purchaser, as applied to the product containing an excessive quantity of pits.

The Fredonia Salsina Co., Fredonia, N.Y., having appeared as claimant of the goods and filed an answer denying the material allegations of the libels, and the cause having come on for trial before the court, the following opinion was handed down by the court:

DICKINSON, *District Judge*. We frankly confess our utter inability to find any wholly satisfactory ground on which to base a ruling in this cause or any standard by which to judge it.

The libels are based upon the Food and Drugs Act, which provides that any food which enters into interstate commerce may be confiscated if it is adulterated or misbranded. This double charge is made in this case. The act defines "adulteration" in respect to food, and "any animal or vegetable substance" for use as a food which is "filthy, decomposed, or putrid" is adulterated within the meaning of the act. These cherries are not animals, although they are charged to be the abode of animalculae in the form of worms. We are relieved of the task of deciding whether a cherry is a vegetable substance because no point is made of this as it is agreed that it has been ruled that fruits are vegetables within the meaning of this law.

The only fact left to be found is whether they are "filthy, decomposed, or putrid" within the meaning of this act. We could not honestly find that they are either filthy or putrid as we use these words in common speech. They are certainly not decomposed or they would not be in existence as cherries. We assume the fair meaning of this word to be whether they are so far what is called "afflicted with rot" as to be unfit for food. A fair general finding would be, under the weight of the evidence, that some of them are. They are put up in can containers of the no. 10 size, each holding in round numbers 1,000 cherries. How would it be practically possible with the utmost practicable care to get 1,000 cherries together without the presence of some bad ones? The problem then becomes how many bad ones would give such character to the whole as to condemn the lot? This is not a mathematical question and yet numbers and percentages enter into it. Before numbers can be found or percentages figured it must be determined what a bad cherry is. We had a concrete illustration of the difficulty of even this easy part of the general problem. There is a defect in the appearance of a cherry known as a limb bruise. Some crops for obvious reasons, would show more of such cherries than others. No commercial man would call such a cherry bad. All would agree, however, that it would depend upon the depth of the bruise, and that rot would more speedily attack such cherries than it would others. When such a cherry was submitted to the witnesses, as any one would have known beforehand, all those

who are commonly called technical experts pronounced it a bad cherry and all the commercial experts called it a limb-bruised cherry. Numbers and percentages follow the classification adopted.

What we have said about bad cherries applies to wormy cherries, with this difference. You can tell by ocular inspection whether a cherry is rotten. You cannot be sure of the absence of a worm without opening the cherry. In consequence, all that is practicable to do is to select what might be called a fair sample of the lot and assume that what the sample showed the whole lot would show. Here again numbers and percentages enter into the general finding. How many worms would condemn the lot or how many wormless cherries would save it? The only historical guide we know of is that applied by the angel to the cities of Sodom and Gomorrah. We would hesitate to accept this standard because we suspect that the angel knew what the count would disclose before he agreed to abide by it or he would not have been so liberal. If this general question were being submitted to the unerring—because inscrutable—wisdom of a jury, the task of the trial judge would be easy. The task of the jury would likewise be relatively easy because they would not be called upon to give any reasons for their decision. It would be easy to decide this cause and perhaps decide it right, at least to the satisfaction of one of the parties. It is well-nigh impossible to give reasons for the ruling without probable error and giving dissatisfaction to both parties and to everybody else who was interested enough to care. The motive back of the general purpose of this act is to assure the supply of wholesome food to the people. This law and all like laws command the sympathy and support of everyone in their motives. The real situation might as well be faced. Such laws, aside from the beneficent results intended to be reached, touch two important classes. One is the commercial class and the other those who wield what are called the political forces of a self-governing people. The commercial class of necessity have but one test for everything, and that is salability or the money test. With those who deal in food products the sale test is: Will the product sell at a remunerative price? Wholesomeness enters into it only secondarily although importantly. If the dealer can earn a reputation for his product as being what they advertise it to be, "absolutely pure", the product will sell readily and for a good price. Two results follow. One is they will spend money and go to any trouble to have their product good and wholesome to the point of a return in remunerative sales and prices but at this line they will stop, not because they want to stop there but because commercially they must. The other result is that, generally speaking, they will all welcome and abide by a law of this kind, and those of them whose products are wholesome wish, for obvious reasons, to have the law rigorously enforced. One reason is that they by this law add to their own advertising claim of purity the "guarantee", as it is termed, of the United States Government that the food has been inspected and found to be pure. Just here caution should enter into the establishment of any standard. As was pointed out by the exceptionally intelligent inspectors who testified in this case, there must in the practical workings of this law be allowed a zone of tolerance. This must of necessity be more liberal than the general commercial standard. The moment, however,

it becomes known to the dealers it is inevitable that some of them will "edge up" to the more liberal standard, and the moment some do all must or be undersold. The political consequences seem to receive little attention from anyone but they are very grave. We are speaking of it, of course, in a wholly impersonal sense. Subject anyone, as nearly every trade and all business is now subjected, to the control of officials appointed by an executive and what becomes of our boasted self-government? The only haven of refuge is to give to business people the assurance that they are subject to the personal control of no one but to the rule of law alone. We have spoken in no spirit of criticism of either the commercial class or of the politicians. They both run true to form, and great numbers of each are as much better than their customers and constituents permit them to be as they find they dare be. All these considerations bear upon the duty of the courts in construing these laws, but it makes that duty an especially delicate one. The courts must protect the dealer from any unjust, undue, or arbitrary exercise of power or our Government ceases to be one of law. The officials must be supported in the performance of their lawful duty or these laws become a mockery.

We put on record our finding that the officials charged with the execution of this law have exhibited a spirit of fairness and of consideration of the interests of everyone affected, and have acted through out with a good sense in the discharge of their difficult duties which is highly commendable.

To bring this long discussion to a close, with one further comment before announcing the conclusions reached. The comment is that this case as a case has already cost more in its investigation than the product concerned is worth, and we have no wish to prolong it or to add to the expense, but we do wish to accord to both parties all their rights, and among these the right to decide for themselves how far to push the litigation.

As our conclusions are both of findings which we cannot make and of those which we do make, we will state the former first. We are unable to find that these cherries are "filthy or putrid" in the ordinary meaning and acceptation of those words in common speech, and refuse to so find. We further refuse to find that the cherries were misbranded.

The conclusions reached are as follows:

1. As the act of Congress gives to the claimant the right to a jury trial, we accord to the claimants here that right, and if exercised within 15 days from the filing of this opinion the entry of any judgment hereon is to be withheld.

2. We find the condition and state of these cherries to have justified their stoppage and seizure, and that they were and are adulterated within the meaning of this act of Congress.

3. A formal order or judgment sustaining the libels may be submitted if no jury trial is asked for within the time above limited.

4. We retain jurisdiction of the cause for the purpose of making formal and, so far as concerns this court, final disposition of it.

UNITED STATES v. 100 BOXES OF BOWMAN'S ABORTION REMEDY

(District Court, N.D. Ohio, May 5, 1926)

N.J. No. 14373

Libel under section 10 of the Food and Drugs Act. Trial before the court. Decree in favor of the United States.

JONES, *District Judge.* The libel in this case is filed under act of Congress of June 30, 1906, known as the Food and Drugs Act, against 100 boxes of Bowman's abortion remedy. The Erick Bowman Remedy Company, Inc., of Owatonna, Minn., has intervened as claimant and makes defense. Condemnation is sought on the ground that these boxes of Bowman's abortion remedy are misbranded, contrary to and in violation of section 8, paragraph 3 under drugs, of said Food and Drugs Act. The jury being waived by written stipulation of the parties, the case was tried to the court.

A motion for continuance of this case was filed by claimant on the day of trial. This motion was overruled. Further motion was made by the claimant for leave to withdraw the intervening petition, and to permit a default decree to be entered. On representation of the United States attorney that the Government was ready for trial and had procured a number of witnesses from different parts of the country at considerable expense, and that the Department of Agriculture was particularly desirous of having this case heard on its merits, this motion was also overruled. The claimant raised two principal questions during the trial and at the close of the Government's case. First, that there was no misbranding within the meaning of the act; second, that the so-called Bowman's abortion remedy, sought to be condemned, was not a false and fraudulent substance, under section 3 in the case of drugs.

The portion of the act which defines misbranding is as follows:

> The term "misbranded", as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.
>
> That for the purposes of this act an article shall also be deemed to be misbranded:
>
> In case of drugs:
>
> Third. If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent.

Claimant admitted the allegation as to interstate shipment at the outset of the case, and no evidence was adduced on this point.

The Government introduced a number of exhibits taken from the shipment in question. The boxes or cartons containing the Bowman's abortion remedy contained two individual pasteboard packages each. These individual pasteboard packages were wrapped in light yellow paper. Three sides were pasted to the package, and the fourth side was not pasted. Under this side, which would of necessity be torn

open by the consumer, appear the directions for the use of the so-called Bowman's abortion remedy. Under the flap at the top appeared the printed statement "Bowmans Abortion Remedy. This package contains one 9½ pounds treatment of Bowman's Abortion Remedy. Read the directions carefully before administering." A copy of a pamphlet sent out by the Bowman Company to the dealer in this case, was also introduced. This pamphlet was designated as "Bowman's Bulletin", and was a form of collateral advertising matter sent interstate to agents or customers by the Bowman Remedy Company. In this pamphlet the statement was made that the directions for use of the remedy would be found inside the package. On this evidence the court finds that the printing and labeling are a branding within the meaning of the act, which reads "If the package or label shall bear or contain any statement, etc." The effort to conceal the label by wrapping in light yellow paper is clearly and patently an effort to circumvent the law. It is in the opinion of the court a subterfuge. If anything, it is evidence to be considered in connection with the latter portion of paragraph 3, section 8 of the act, to wit, that it is "false and fraudulent."

Any product of this nature, which is in truth a remedy for contagious abortion in cattle, would not have to be concealed and shipped in secret.

The remedy itself has to do with what is known as contagious abortion in cattle. This is a serious disease, one which live stock dealers and veterinarians have been contending with for a long period of time. The disease is caused by infection in cattle by micro-organisms. It is highly contagious, and may be transmitted in a number of ways. The germ apparently attacks the uterus at a point where nourishment passes to the fetus, with the result that this portion of the anatomy is destroyed. When the passage of food to the unborn calf is stopped, the fetus dies, and is thereupon expulsed, as a natural process of nature. Specimens and exhibits clearly indicating this process were exhibited by the Government. It was shown that no remedy, medicine or drug taken by the cow in the ordinary manner into the stomach could in any possible way reach the source of the trouble, or have any effect upon the germ. This fact was testified to by any number of specialists and veterinarians.

The analysis of the so-called abortion remedy indicates that it is composed of 85 percent brown sugar and 15 percent wheat. No trace of any chemical or drugs was found in the remedy. No evidence was introduced by the claimant controverting this testimony. The Government experts were of the unanimous opinion that no possible combination of these two substances would have any effect upon the disease. It must therefore be concluded that the remedy is false and fraudulent, and is a pure deception upon the farmer. Expert testimony was introduced by the Government to the effect that a number of tests had been made on Government owned cattle. All indicate clearly and conclusively that Bowman's abortion remedy neither prevented the disease, cured it after inception, or in any manner retarded its effect. Germs of the disease placed in a strong solution of Bowman's abortion remedy, thrived, prospered, and multiplied without any check whatsoever.

The subject of misbranding is treated by the following authorities: *United States* v. *95 Barrels Apple Cider Vinegar*, 265 U.S. 438; *United*

States v. *Oil of Wintergreen*, 268 Fed. 866; *United States* v. *Hog Food*, 276 Fed. 34; *United States* v. *Tea & Spice Co.*, 286 Fed. 475 (6 C.C.A.), *Goodwin* v. *United States*, (6 C.C.A.) 2 Fed. (2d) 200.

Judgment of condemnation will be entered with costs against claimant.

UNITED STATES v. 200 SACKS OF WHEAT MIDDLINGS

(District Court, E.D. Michigan, May 20, 1926)

N.J. No. 14371

Libel under section 10 of the Food and Drugs Act. Case submitted to court on agreed statement of facts. Judgment in favor of claimant.

SIMONS, *District Judge.* This is a libel filed by the Government against 200 sacks of middlings in statutory proceedings pursuant to section 10 of the Food and Drugs Act (act of Congress of June 30, 1906, ch. 3915, 34 Stat. 771), for the seizure and confiscation of such middlings on the ground that they are adulterated within the meaning of section 7 of said act. The libel as originally filed alleged that said middlings, which were there referred to as "alleged middlings", were also misbranded within the meaning of section 8 of the act, but by amendment that charge was later withdrawn, and it is now conceded by the Government that the articles in question are in fact as they were labeled, middlings, as hereinafter more fully described. The sole statutory basis for the claim of adulteration advanced by the Government is that said middlings were mixed and powdered in a manner whereby * * * inferiority is concealed.

After seizure of these middlings on the libel, the Ismert-Hincke Milling Co., a Kansas corporation, filed its intervening petition herein as claimant and its answer denying both the misbranding and the adulteration alleged. The case is now before the court for final decree upon the pleadings, an agreed statement of facts, and depositions taken in accordance therewith. The jurisdictional allegations of the libel, including that concerning the requisite interstate shipment of the products involved, are not disputed and have been proved. The Food and Drugs Act, already cited, prohibits, by fine or imprisonment or both, the interstate shipment of any article used for food by man or other animals, which is adulterated within the meaning of the act. Section 10 authorizes confiscation of such adulterated food. Section 7 of the statute provides in part as follows:

> For the purposes of this Act an article shall be deemed to be adulterated:
> In the case of food:
> First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.
> Second. If any substance has been substituted wholly or in part for the article.
> Third. If any valuable constituent of the article has been wholly or in part abstracted.
> Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.
> Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health: *Provided*, That when in the preparation of food products for shipment they are preserved by any external application applied in such manner that the preservative is necessarily removed

mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the covering or the package, the provisions of the Act shall be construed as applying only when said products are ready for consumption.

Sixth. If it consist in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter.

As already stated, the only charge made by the Government with respect to the middlings in question is that they are mixed and powdered in a manner whereby * * * inferiority is concealed. The agreed statement of facts is, in full, as follows:

The United States of America by United States attorney for the Eastern District of Michigan, and Glen A. Wisdom, Kansas City, Mo., attorney for Ismert-Hincke Milling Company, claimant, hereby stipulate that the foregoing action be submitted to this honorable court on the following agreed statement of facts together with depositions to prove issues agreed upon herein:

1. That "Wheat middlings with mill-run ground screenings not exceeding 8 percent has been generally known as any one of the by-products of the milling of wheat flour, exclusive of bran, which resulted after the major flour-recovering processes and consisted of wheat offal which would pass through a screen having 18 or more meshes per linear inch, to which was added ground mill-run screenings not exceeding 8 percent. An 18-mesh screen will allow larger particles to go through than a 22-mesh. Middlings being ordinarily used as a hog feed, the quality and market value thereof is usually judged by its fineness of texture and lightness of color, which to the feeder are indicative of low fiber content and high feeding value. Therefore, the quality of middlings produced as above described was for all practical purposes dependent upon the fineness of mesh employed, since a finer mesh excluded more of the undesirable fibrous bran particles, and thus the remaining material contained a greater proportion of the desirable particles of the wheat berry known to be of high feeding value.

2. That the aforesaid 200 sacks of alleged middlings seized in this action is one of the by-products of the milling of flour which results after the major flour-recovering processes and consists of wheat offal which was passed through a screen having 18 meshes per linear inch, to which was added mill-run screenings not exceeding 8 percent. It is agreed that this product is wheat middlings with mill-run ground screenings not exceeding 8 percent. This mixture is then passed through a grinder wherein it is pulverized. The composition, color, and texture of the resulting product is practically identical with a product manufactured by a process not including a grinder and wherein a screen of sufficiently finer mesh had been employed, except that it contains that additional amount of bran coat which would have passed through a screen having 18 meshes per linear inch, and which would not have passed through a screen of finer mesh, the entire product having been reduced to fine particles by the grinder. Running the product through the grinder does not change the composition except to evaporate the moisture from 1 to 2 percent; but does improve the color and texture.

3. The libel contains the charge that the product seized in the foregoing action is mixed and powdered in a manner whereby inferiority is concealed. Therefore, the issue in this case is, whether the use of the grinder mixes and powders the product in a manner whereby inferiority is concealed or whether it increases the feeding value to such an extent that the product is not inferior to a product of like appearance manufactured by a process without the grinder.

As already observed, the single, decisive question here involved is the question of fact as to whether the process described in the stipulation of facts conceals any inferiority in the middlings thereby produced. After careful examination and consideration of the depositions and of the entire record, I am fully satisfied, and I find, that the question just stated must be answered in the negative. There is no necessity nor occasion for here reciting or reviewing the testimony in detail. It is sufficient to state that not only does such testimony

fail to sustain the burden of the proof resting upon the Government in this regard but that the record is affirmatively clear and convincing to the effect that the middlings produced by the process in question are, in appearance, texture, composition, digestibility, and in all other respects equal, if not superior, to middlings produced by any other known process; that said process reduces the moisture in such middlings and thereby increases their feeding value for the purposes for which they are intended; that said process produces a more finely ground product and thereby increases its digestible quality; and, in general, that the process complained of by the Government does not conceal, and is not in any way connected with or related to any inferiority in, or in respect to, such middlings.

In accordance with the request of the Government, the foregoing views and conclusions may be treated as formal findings of fact and of law, respectively. No applicable decisions have been cited by either party nor discovered by the court in its independent search of the authorities. It is admitted by the Government that there are no such decisions. The single case cited by the claimant (*Lexington Mill & Elevator Co.* v. *United States*, 232 U.S. 399), while not fully in point, is at least more helpful to the claimant than to the Government.

For the reasons stated the claimant is entitled to a decree dismissing the libel and such a decree will be entered.

UNITED STATES v. 4½ CASES OF CREME DE MENTHE

(District Court, E.D. Missouri, Nov. 9, 1926)

N.J. No. 14767

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict for the claimant.

The United States attorney filed a libel praying seizure and condemnation of 4½ cases of creme de menthe, remaining unsold in the original unbroken packages at St. Louis, Mo., alleging that the article had been shipped by the L. E. Jung & Wulff Co., Inc., New Orleans, La., on or about January 23, 1926, and transported from the State of Louisiana into the State of Missouri, and charging adulteration and misbranding in violation of the Food and Drugs Act. The article was labeled in part: "Creme De Menthe Flavor. Non-Alcoholic Cordial L. E. Jung & Wulff Co. Incorporated New Orleans, La."

It was alleged in the libel that the article was adulterated, in that a substance, creme de menthe flavor nonalcoholic cordial containing added caffeine, had been substituted wholly or in part for the said article.

It was further alleged in the libel that the article was misbranded, in that the statements "Creme De Menthe Flavor Non-Alcoholic Cordial", borne on the label, were false and misleading and deceived and misled the purchaser when applied to creme de menthe flavor nonalcoholic cordial containing added caffeine, a drug recognized in the U.S. Pharmacopœia, and in that the article was offered for sale under the distinctive name of another article.

The court delivered the following charge to the jury:

FARIS, *District Judge.* Gentlemen of the jury: Now it falls to the lot of the court to give you in charge the law that will govern you in your deliberations in your verdict in this case. This, gentlemen, is a civil suit, not a criminal suit but a civil suit; it is to be tried by you, decided by you, just as is done in any other civil suit.

The United States, under the statute to which I shall presently call your attention, has brought this action, known in the practice as a libel, against 4½ cases, more or less, of a liquid compound called creme de menthe. The Government seeks by this suit to condemn and cause to be destroyed by the marshal the 4½ cases of creme de menthe in dispute here. If you shall find for the Government, then the court will be warranted in entering a judgment of destruction and order thereupon the marshal to destroy all of these 4½ cases creme de menthe. That is all this suit is about. You have nothing to do with the sentimental reasons or as to what may hereafter be the policy of the Government or the policy of the defendant, should your verdict be this way; in other words, for the claimant.

You are to decide, of course, upon the law and upon the facts as shown by the evidence * * * it makes no difference whether you believe it to be the law or not, whether you think it ought to be the law or not; it is enough to believe, under your oath of office, that it is the law, and if it is you have nothing further to do with it. If I misstate the law, that is my fault, and not yours. The burden or blame of such misstatement falls upon me, and not upon you. I shall endeavor, as best I can, to state what the law is in this sort of a case. I am frank to say there are not many cases of this sort; this is the fourth one that it has fallen to my lot to try since I have been on this bench, now more than seven years. They are always difficult; they are always troublesome to the court; they are always troublesome to the jury; but I think I shall be able, before I get through with it, to iron out some of the apparently troublesome questions in the charge touching the law which I shall make. Now, I may as well say, in order to get it off my hands, that while I am the sole judge of the law and you are absolutely to be bound by what I tell you the law is, whether you believe it or not, you, and not the court, are the sole judges of the credibility of the witnesses and of the weight and value to be given their testimony, and you are warranted in reaching a conclusion as to what weight you should attach to the testimony of any given witness, the manner and appearance of the witness on the stand, his manner of testifying, the probability or improbability of the testimony which he gives, his situation to see and observe, his experience and his capacity to relate truthfully and accurately those things which he saw and observed. You are warranted in taking into consideration the relations to or feelings for the Government upon the one hand, and the claimant on the other, in reaching a conclusion as to the weight you should give to the witnesses for the Government or the witnesses for the claimant, respectively.

Taking these matters into consideration, it is within your province, and yours alone, to give to the testimony of each and every witness such weight as you think it is entitled to. Now some gentlemen have been called before you, some two or three perhaps, who fall into the category of opinion witnesses or expert witnesses. I mean by that,

men perhaps who had no interest or took no part in dealing with the matter taken in controversy in a commercial way, but merely what they know about it, as experts having knowledge of a particular branch or science—in this one, the science of chemistry, more particularly, food chemistry, because I believe there is now a special branch known as food chemistry. The testimony of witnesses known as expert witnesses who give what is called "opinion evidence" is of course entitled to consideration by you; you ought to listen to it and give it weight and, generally speaking, you should weigh the testimony of the expert witnesses by the same general rules by which you weigh the testimony of other witnesses, but since these witnesses are expert witnesses, since they do not * * * in some cases, at least in this particular hearing, but testify from their expert knowledge of a particular science, that is to say, chemistry, you are warranted in bringing to your consideration all the weight and value that you ought to give to them from your own ordinary experiences and the experiences of men in the common walks of life. You are not bound absolutely by what they say; you may consider what they say, you ought to consider it, but you are not absolutely bound by it; should you [it] run contraband [contrary] by [to] your own experiences then you are not absolutely bound; they are merely for the purpose of assisting you in reaching a conclusion and not necessarily for the purpose of binding * * * this applies, of course, to witnesses on both sides of this case. Now there are, or may have been more gentlemen who fall into this category of witnesses, but there are at least one on each side—Mr. Sale for the Government, and Mr. Leipsner for the defendant.

Now, the burden of proof in this case is upon the Government. This burden the Government must meet by bringing forward evidence which satisfies you of the truth of the Government's contention; you are to be satisfied, not beyond a reasonable doubt because while the Government is the plaintiff, this is not a criminal case and the rule of reasonable doubt does not apply. The extent to which you are required to be satisfied with the testimony of the Government is simply by a preponderance or greater weight of the evidence, and not necessarily by a greater number of the witnesses but by weight of the credible evidence in the case. You are not to say that the Government had six or eight witnesses upon a given point, and the defendant had three or four, therefore, the Government must be right about it. You can apply the number, of course, if it becomes necessary but that should not outweigh the evidence. Then, the question of mere numbers cuts no figure in the case.

This suit may seem to you a peculiar one on another ground—you will see that this is a case of the United States, libelant, against 4½ cases creme de menthe—that is the style of the case. Now that style of the case has been modified by there coming into it as the claimant for the 4½ cases creme de menthe, or what I may call the actual defendant in the case, L. E. Jung & Wulff Co., Inc.—they are here as claimants, and of course, the controversy is now between the Government on the one hand and L. E. Jung & Wulff Company, as the defendant, on the other.

This suit is brought under the act of Congress passed on the 30th day of June, 1906, and amended several times, and the last time

amended on July 24, 1919. Congress saw fit to pass what is called the Pure Food and Drugs Act. So far as the issuances here are concerned and so far as you and the court are concerned, the act is a good and valid one. No attack on the constitutionality is before you nor before the court, and until its constitutionality is attacked you nor I shall consider whether it is good or bad; we are bound by the text, so you needn't bother yourselves in this case whether the Government had a right to pass it or not; it has passed it and no attack is made on it, and that settles that point for you and for me. The point in which we are interested here is a part of section 2 and a part of section 7 of this act. So much of section 2, with which we are interested, is contained in this, I quote it,

> That the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this Act, is hereby prohibited.

I merely repeat that having forbidden and having prohibited it, the Government went further by other provisions, and in case it was found, either by trial before a jury or trial before a court, that a misbranding of food did exist the Government had a right to have that food condemned and destroyed, and that is what we have before us here. You will see that that section forbids what I may call "interstate traffic" of any misbranded food; that is about all the section says, that the introduction, that is, the carrying from one State to another, or the shipment from one State to another of any food which is adulterated or misbranded within the meaning of this act is hereby prohibited. Now, so much for that; that is very simple—it means, I take it, what it says—there is no question before you because it is frankly admitted that this creme de menthe was shipped from New Orleans, Louisiana, to St. Louis, Missouri; therefore, the shipment constituted an interstate shipment. If, then, you shall find * * * that it was misbranded, you needn't trouble yourselves whether it is an interstate shipment or not; it is frankly admitted it is an interstate shipment, so that settles that question—you needn't trouble yourselves about that, that is admitted.

Now, further, the section provides, touching the question of adulteration, that a food is deemed to be adulterated if any substance has been substituted wholly or in part for the article. Now that is very plain, that means, of course, if there has been put in it some substance that did not belong in it as the article of food is commonly known, and commonly sold, and commonly used, then it is adulterated. There are many other provisions, some six or more, touching the adulteration of foods, contained in this act, but with those others you have nothing to do. Some of them forbid the introduction into articles used as food of deleterious or poisonous substances. With these you have nothing to do because that is not the point in this case, that is not the ground upon which the Government attempts to libel, condemn, and have destroyed these 4½ cases creme de menthe.

Now, there is another provision here which the district attorney or assistant district attorney insists is involved, and which perhaps is involved under the plaintiff's libel—under the plaintiff's written libel, I mean. The counsel for the claimant seems to admit that, and without passing upon it we will accept the contention of the Govern-

ment, as made by the assistant United States district attorney, and the contention as made by counsel for the defendant. Another provision of this law provides that food shall be deemed misbranded if it be labeled or branded so as to deceive or mislead the purchaser. Now we can get rid of that provision, so far as it is in this case, very easily and very simply. That charge depends, of course, upon the one which I have just mentioned to you and depends upon your finding under the law upon the other one, and not upon this one, and we will get rid of it right now.

I repeat, the Government insists through the assistant district attorney that if this creme de menthe—one bottle, a true type as it is admitted of the 4½ cases, which has been offered in evidence, had contained on the label thereon the statement, in fit terms—it matters not what sort of terms or what sort of language—that this creme de menthe contains caffeine, there would then have been no misbranding. Of course you saw the exhibit, and you heard read what is contained on it. It contains no statement or intimation that there was, or is, any caffeine in this particular creme de menthe. Of course we all know what creme de menthe is; it is a French term, all three words are French, as spelled, and simply means "creme of mint"; that is all, but we will call it creme de menthe, as the French would perhaps call it, and let it go at that. Now, you will see, gentlemen, that the question of whether it was labeled or branded so as to deceive or mislead the purchaser is scarcely in the case because it is conceded it was not branded so that the public who desired to consume it, or desired to buy it, could tell by looking at the label that it did contain caffeine—and because it did not contain that, the purchaser wouldn't know that caffeine was in there, but, yet, if caffeine had the right to be there then it was not misbranded because the label did not show it was there, so you see that clause depends upon the other one.

The troublesome question in this case then arises from that one sentence that I have read you from the act, and which I read again, "if any substance has been substituted wholly or in part for the article." Now, if there has been no substance substituted wholly or in part, then of course it wasn't necessary to indicate by the label anything about caffeine on it. The word "substitute" there of course means "put in" or "added to" it; it does not necessarily mean you had to take out something else, but you had to put something in there that did not belong there—and now how are we to test what belongs there. If you shall find and believe there existed a standard form for the making of creme de menthe, and that that form consisted of a standard formula, qualitative, and not necessarily quantitative, because counsel for the defendant or claimant, Mr. Nelson, stated to you frankly that he was making no point on the question of quantitative contents. Of course we all know what qualitative means; shortly speaking, qualitative means what, quantitative means how much. What I mean to say is, the question here is not one touching quantitative formula; it is simply one touching qualitative—*what* was in it, not *how much* was in it. * * * So if you shall find there was, and has been since the prohibition act was passed, a well-known standard formula of the articles that ought to go into the making of standard creme de menthe, and that something else has been put in there by the claimant in this case that did not belong to that formula, ther there has been a substitution of some substance,

in part at least, for the article, and that substitution is forbidden by this statute.

We might say, for the sake of argument, that the Government might have raised the question of whether caffeine is a deleterious substance, or whether it is a poisonous substance, when put in food; it is enough to say that question is not raised and that question is not in this case so you need not consider that at all.

The whole question is whether there has been some substance substituted in part for creme de menthe, which substance now substituted does not belong there and ought not to be in there under a standard formula for making creme de menthe. If there is a standard formula as to the nature of the things that should go into creme de menthe, that is, qualitative, and if caffeine is not one of those things, then there has been a substitution here in part of a thing that does not belong there.

Now of course this is a peculiar case. It may seem to you that, since the well-known formulæ for creme de menthe, as those formulæ existed before the passage of the National Prohibition Act, completely differentiates creme de menthe as known 7 years ago from creme de menthe that is now known, nobody ought to be permitted to sell it at all, because it is misbranded or there has been a substitution of water and sugar for alcohol, which was a settled and well-known constituent of the product before the act took effect, but that is not the case. The Government here contends, and it bottoms its right to the judgment on the ground that creme de menthe may now and yet be sold since the Volstead Act took effect, notwithstanding its chief constituent has been eliminated by the passage of that act. So we are to consider it, then, not as it existed before the Volstead Act passed, because if we did we would say it is not creme de menthe because it has no alcohol. It seems it is still being made and sold, and largely sold * * * it seems to be a little sweetened water with peppermint and some other flavors in it, but we have to take the case as we get it; we cannot take it otherwise.

So the question is, assuming that it can still be legally sold, and we must assume that because there is no contention made against the sale of it and we know it is sold and still being sold although we know when we buy it that we are not getting much of anything, we must consider it upon the hypothesis of whether it is a standard recognized formula, and whether that recognized formula carries with it the putting in it of caffeine; if it does, you ought to find for the defendant; if it does not, then you ought to find for the Government. That is all there is in this case. First, if there is a standard formula without regard to color—color cuts no figure in the case, none whatever, so you needn't consider color at all; everybody believes it has all sorts of color, and has no color * * *. You needn't consider the amount of sugar—everybody agrees it had some sugar in it—everybody agrees it had some water in it—everybody agrees it had some flavor in it—everybody agrees it had some oil of peppermint in it; so, I repeat, you must find, is there a standard formula for its manufacture since the Volstead Act took effect. Having found that, then the next question is, does the liquid in question here, the contents of the 4½ cases, of which the bottle offered in evidence is a type, conform to that standard, or has there been an addition of

something in there that ought not under the standard formula be put in it? It is not a question of what Tom, Dick, or Harry put in there, because Tom, Dick, or Harry may be violating the law themselves, but the question is, whether it is a standard formula and whether this conforms to it. It very often happens in many things that things that do not hurt a food are added to it, and yet those things are forbidden; for example, if you were to buy flour, deeming it to be an ordinary wheat flour, for the purpose of making light bread or biscuits in your home, and it should turn out that dried Irish potatoes which had been grated were added to it, then that flour would be deemed to be misbranded because we all know what flour is and what potatoes are, and we should not be given potato meal or potato flour for wheat flour, and we are not supposed to know we are getting dried potatoes when we are buying flour.

I think I stated to you the relative amounts of water, of sugar, of peppermint, and of color, cut no figure in the case. There is simply a question here whether there is a standard, and whether this standard was met by the shipper in this case.

You won't be troubled, of course, by the question whether there was caffeine in this, or not. That is admitted; the testimony shows, and the chemist found that there was in the sample examined by him, which is admitted to be part of this shipment and type of all the other bottles in the shipment, twenty-five one-hundredths of a grain in each fluid ounce; that equals, of course, one-fourth grain in each ounce; it equals 4 grains of caffeine in each pint; and in the bottle which is shown to you and which is offered as evidence, wh ch s stated to be a pint, there were 4 grains of caffeine. i

I shall not at this hour go over the evidence; you heard it as well as I. You are to determine from it but two questions, and I repeated those 2 or 3 times. One is, whether there was a standard of manufacture, and whether there is now a standard for the manufacture of creme de menthe, leaving out, of course, any question as to the different quantities because it will not do to require that standard of manufacture to go so far as to prescribe the number of ounces of water, the number of ounces of sugar, the number of grains or spoonfuls of peppermint, or the number or kind of flavor; those things are not in the case, of course, because we all know that some whisky has more water in it than other whisky. That does not keep it from being whisky, because someone sees fit to put a little more water or color in it. It may have more or less of alcohol, it may have more or less of color, but it is whisky. That illustration I think will make clear the point I have in mind. When you have decided that question in this case I think you have decided the case. I think that is all.

Assistant District Attorney (Mr. Claude Crooks). I suggest, Your Honor, the jury be instructed that the amount of caffeine contained in each bottle is immaterial. It won't make any difference whether 4 grains, 100 grains, or 1 grain, is contained in it.

Judge Faris. Yes, I think you need not go into that. The evidence did not go into that except to the extent to show what was in it, and that question is akin to whether it is poisonous or deleterious, and that question of whether it is poisonous or deleterious is not in the case, so I don't think the question of the quantity is in this case. If you should find caffeine is a flavor—because the evidence shows some 10 or 15 flavors are used, and if it was put in there as a flavor,

the question is whether one is entitled to use a different flavor from the standard flavors.

Mr. NELSON (attorney for claimant). Your Honor, please, I would like to request that you charge the jury that the article referred to in the libel and testimony is a nonalcoholic cordial with a predominant flavor of peppermint—that is the article which is charged to be adulterated and misbranded. I also request, Your Honor, you charge the jury that the mere fact that the witnesses have never heard of caffeine being used in the production of a nonalcoholic creme de menthe cordial is not of itself sufficient evidence upon which to find either adulteration or misbranding in this case.

Judge FARIS. I refuse so to charge.

Mr. NELSON. On both grounds. We except to the court's refusal to charge the jury on the two matters mentioned.

Judge FARIS. The article here is creme de menthe, and if creme de menthe, as known, is what you say, then it is creme de menthe.

Mr. NELSON. I object and except to the charge of the court in identifying the article creme de menthe; it is our theory it is an imitation cordial, the qualifying words "creme de menthe" as the flavor, and I think the court, unintentionally, of course, has confused the jury throughout the case in identifying it as creme de menthe. I think it gives a little erroneous impression.

Judge FARIS. Creme de menthe is a word to express, I take it—in the dictionary it is the name for a well-known cordial, just as Shipman whisky is a name for a well-known whisky, so I don't think the jury will be troubled about that.

Mr. NELSON. I want to except. The article is a cordial, nonalcoholic cordial, but the court charged that creme de menthe is of itself an article.

Judge FARIS. Yes, I repeat that creme de menthe is the name of a well-known cordial * * *.

Mr. NELSON. There is no evidence in the case that caffeine is deleterious * * *.

Judge FARIS. I have charged that 2 or 3 times and considered that was not an issue in the case; it cuts no figure in this case because this libel is not brought on that clause of this act. * * * I took the view earlier in the case that this case was not that kind of a case.

Mr. NELSON. I object also to the issue in the case that something has been put into the product that does not belong there. My theory is that it is a substitute of one article for another, and I have fought all the way through that the mere introduction of caffeine is not an issue in this case. The court disagrees with me, but I want to make that point an exception. I request the court to charge there was no evidence to show there is any standard formula for a nonalcoholic cordial or even a creme de menthe flavor * * *.

Judge FARIS. You have asked me twice, and I refuse to charge. I leave that to the jury as one of the decisive questions in the case.

Mr. NELSON. We object and except to that part of the court's charge that one question of the case is, does the liquid conform to the standard, or has there been an addition of something that should not be in there. We don't think that charge is correct. We think if the court is going to refer at all to that issue it ought to tell the jury and charge the jury, does the standard formula provide an introduction of that added substance. That is the way we think it should be charged.

Judge FARIS. I think, gentlemen, that I shall not let the case go to you tonight because we are now within a very few minutes of the hour to adjourn. It would entail unnecessary labor on you. I shall finish the formal part of the charge however, so all that will be necessary in the morning is to take the papers and retire to your room.

I have caused to be prepared for you a blank form of verdict * * *. It requires a concurrence of your entire number. Each of you, 12 in all, must concur in any verdict you may render. I mention this to you because in a State court in a civil case 9 jurors may find a verdict; of course, 10, 11, or 12 may find it, but as few as 9 may find a verdict in a civil suit in a State court. Your verdict must be unanimous, 12 in all must concur. When you have agreed in a verdict one of your number will sign as foreman * * *. I shall now let you go until morning, and in the morning I shall have the clerk hand you the papers and you may consider the verdict.

In the meantime, I caution you, as heretofore, that you are not to discuss this case with anybody * * *.

UNITED STATES v. 3,192 BOXES OF APPLES AND 532 BOXES OF PEARS

(District Court, N.D. Illinois, Nov. 20, 1926)

N.J. No. 15350

Libels under section 10 of the Food and Drugs Act. Jury trial. Verdict in favor of the United States.

CLIFFE, *District Judge* (charge to jury). Gentlemen of the jury: I shall now endeavor to give you what I deem the law to be in these cases. You understand, it has been explained by counsel that there are three cases in the files of the Government before me, one case of 798 boxes more or less of apples, one of 2,394 boxes more or less of apples, and one of 532 boxes more or less of pears. These cases, the same evidence is adduced in each case. The cases have all been tried together and consolidated, but separate verdicts will be returned in each case.

I shall now endeavor to give you what I deem to be the law in these cases. This proceeding is a civil action which commences with what is called a libel. The Government has seized under the Food and Drugs Act, commonly called the Pure Food Act, articles of food known as apples and pears, for alleged failure to comply with the provisions of the statute. The purpose of the Food and Drugs Act, or the Pure Food Law so-called, is to conserve the public health by preventing interstate commerce in food containing an added poison which may render the food injurious to health, and in order that this may be effected, the offending food is subject to seizure, as it is here.

Congress on June 30, 1906, acting upon the theory that the evil of adulterated food was of national concern, enacted this statute under which these cases are now being tried, to protect the public health and to keep the purchasers from being defrauded. This statute provides that should it be determined by you that the food in question violates the law, then the Government has the right by a decree of court to

have that article either condemned and destroyed or to have it salvaged and reconditioned under a bond which the claimant is required to give, conditioned that the articles be by such salvage or reconditioning put in a condition to conform to the statute.

I charge you further, gentlemen, that pears and apples are food within the meaning of the Food and Drugs Act. It makes no difference under this act whether the shipper or claimant knew or did not know that the food containing the added poison might injure the health of the consumer. The act forbids the channels of interstate commerce to such adulterated foods. Under the Food and Drugs Act the time when you are to consider whether these apples and pears are in violation of this act is the present. What happened to them before the apples or pears came within the jurisdiction of the Food and Drugs Act when they were introduced into interstate commerce is not of your concern in these cases.

I charge you that the Food and Drugs Act has no control over the growing of apples or pears. Your duty in this case is simply to pass upon the single question of whether the apples and pears seized do or do not comply with the provisions of this Pure Food Act in the manner that I shall hereinafter mention to you.

The suits are brought by the United States against the food itself, but the owner may come in and become a claimant, that is a sort of defendant in the case, and ask that it be not condemned, that the food be returned to him, denying any claim of the Government that it is adulterated. The claimants in these cases that I have mentioned are the Suncrest Orchards, Incorporated, so we have the issues here, the Government alleging certain things, and the claimants having taken the place of the food, becoming in effect a defendant.

The statute forbids adulteration of a food product, and the articles shall be deemed to be adulterated in case of foods for a number of reasons that are set forth in the statute, but the reason in this case is under section 5 of the pure food—of the Food and Drugs Act, which statute is sometimes called the Pure Food Law, and I read as follows from section 5 of the act: "For the purpose of this act an article shall be deemed adulterated in the case of food (5) If it contains any added poisonous or other added deleterious ingredient which may render such article injurious to health."

Now that is the statute that is in issue in this case, and raises the question you are called upon to decide, and that question is simply whether the apples and pears in controversy here contain any added poisonous or other added deleterious ingredient which may render such article injurious to health; so if you find that the articles of food contain added poisonous or other deleterious ingredient which may render such articles injurious to health, you are warranted in finding the issues for the Government and against the defendant.

You are further instructed, gentlemen, that this case must be decided by you on the evidence under the instructions of the court and not upon the statements of counsel outside of the evidence, and unsupported by the evidence, if any such statements have been made. The evidence and the law alone must govern your verdict.

It is not required that the article of food containing added poisonous or added deleterious ingredients must affect the public health, and it is not incumbent upon the Government in order to make out a case

to establish that fact. The act has placed upon the Government the burden of establishing, in order to secure a verdict of condemnation under this statute, that the added poisonous or deleterious substance mentioned must be such as may render such article injurious to health. The word "may" is here used in its ordinary and usual signification, there being nothing to show the intention of Congress to affix to it any other meaning. In thus describing the offense, Congress doubtless took into consideration that foods may be used in many ways. It may be consumed when prepared as a food and as has been spoken of here, by the strong and weak, the old and the young, the well and the sick, and it is intended that if any food because of any added poisonous or other deleterious ingredient may possibly injure the health of any of them it shall come within the ban of the statute. If it cannot by any possibility, when the facts are reasonably considered, injure the health of any consumer, such food may not be condemned under the act.

There is also the question of interstate shipment, but I charge you that the interstate shipment has been admitted in the pleadings and is not controversy.

If you find from the evidence that the apples or pears under the seizure do not contain any poison or other deleterious ingredient that may render the apples or pears injurious to health, the apples and pears will be returned to the claimant.

I charge you that the Government must prove this case by a preponderance of the evidence. When you come to the evidence, you and not the court, are the sole judges of the credibility of the witnesses and the weight and value to be given to the testimony of the witness. You are warranted in taking into consideration their manner and appearance upon the stand, their manner of testifying, the probability or improbability of the testimony which they give, and their opportunity to see and observe and profit by and their ability to correctly relate what they did here or attempted to relate. You may take into consideration their interest in the case for the plaintiff or the claimants.

If you find for the Government it does not necessarily mean that the apples and pears will be destroyed. Under this act if the claimants file a bond that they will clean the apples and pears so that they may not be injurious to people who eat them, the court upon application of the claimants may order these apples and pears returned to the claimants to be cleaned so that they may not be injurious to anyone who eats them.

As I said before, gentlemen, you are to return a different and separate verdict in each case. If your verdict shall be for the plaintiff your verdict shall be, "We, the jury in the above entitled cause find the issues herein in favor of the United States." If your verdict shall be for the claimants, your verdict shall be "We, the jury in the above entitled cause, find the issues herein in favor of the claimants, Suncrest Orchards Company, Incorporated." There are three forms of verdict, and when you arrive at a verdict in either and all of the cases, all of the jury will sign them, returning them into court.

Any exceptions to the charge?

Mr. Adams. May we have the following exceptions to the charge, Your Honor?

The Court. Yes, sir.

Mr. ADAMS. We request that the court instruct the jury that in all cases in this charge that he has just given where he has used the words "added poison" or "added substance," he means by that that the article of food must contain or does contain an added poisonous or other deleterious ingredient. The word ingredient has sometimes been used in the charge and at other times has been spoken of very lightly.

The COURT. The court feels it has been practically covered, but you may preserve an exception.

Mr. ADAMS. Thank you. The next exception which we ask Your Honor for the purpose of saving our record is a charge to the effect that pears and apples shown to have upon them a substance in the manner in which these pears are alleged to have a substance upon them, are not within the meaning of this act.

The COURT. Preserve the exception.

Mr. ADAMS. The next exception and request is that we object to the court's instruction that what happened before these fruits came into interstate commerce is immaterial.

The COURT. Preserve the exception.

Mr. ADAMS. The next request that we desire to make is that the court instruct the jury in words or in substance as follows: That the law does not prohibit the spraying of apples or pears with lead arsenate, and a jury cannot find or should not find for the Government or against the claimant, Suncrest Orchards, Incorporated, even if it be shown that lead-arsenate spraying residue was upon the apples and pears or is upon the apples and pears in question, unless they believe from a preponderance of the evidence that such addition, if any, is an added poisonous or other deleterious ingredient contained in such food, such that it would render such apples or pears injurious to the health of those—or that might be injurious to the health of those——

The COURT. That was all covered, all covered. Save an exception. And now, how many more have you got? I don't like this way of presenting them.

Mr. ADAMS. There are just two or three. I will try to make it as brief as possible, Judge.

The COURT. I don't want any pettifogging here.

Mr. ADAMS. I don't intend to pettifog.

The COURT. Go on, go on.

Mr. ADAMS. I would like an instruction, if the court please, to the effect that the mere fact that the Federal Government has instituted libel proceedings against the apples and pears in question in the case before the jury and that the said apples and pears have been seized under such proceeding, is not to be considered as any indication whatever that the Government is right in its contention.

The COURT. I don't think that is necessary here. Save an exception.

Mr. KELLY. If Your Honor please——

The COURT. Never mind. Go on with your exceptions.

Mr. ADAMS. Now, I would like to ask an instruction to this effect, that if upon any disputed fact or state of facts the evidence in this case, considered in the light of the court's instruction, is evenly balanced or in such a state of uncertainty that the jury are unable to determine in whose favor the evidence preponderates, they have no right to give the benefit of the doubt to the Government.

The COURT. I instructed them on the preponderance of the evidence.

Mr. ADAMS. I have done my best to follow the court's instructions, and I fail to hear that.

The COURT. Save an exception.

Mr. ADAMS. Mr. Kelly has one more.

Mr. KELLY. May I offer this exception, Your Honor: That the claimant excepts to the instruction of the court to the effect that the verdict of the jury against the fruit does not mean that the same will be destroyed but that the same may be cleaned, for the reason that there is no evidence to support such an instruction and no evidence to show that the same may or may not be conditioned to the satisfaction of the Government or the Department.

The COURT. Overruled and exception. Retire with the jury.

UNITED STATES v. BOISE VALLEY COOPERATIVE CREAMERY CO.

(District Court, District of Idaho, Dec. 23, 1926)

N.J. No. 15114

Information alleging violation of section 2 of the Food and Drugs Act. Trial before the court. Judgment of guilty.

Per curiam: In three counts the defendant is charged with violating the Pure Food Law, in that it shipped to Los Angeles, in interstate commerce, on three different occasions, butter, some of the packages of which contained an excess of moisture. Jury trial was waived, and the cause submitted to the court upon a very brief statement of facts, including the findings by Government agents. It is not controverted that some of the packages did contain a small excess percentage of water. The only defense suggested is that the defendant is a cooperative concern, and shipped the butter to another cooperative concern, made up of representatives of numerous local cooperative creameries in different parts of the country. The contention in substance is that the consignee was merely an agent of the consignor, thus bringing the case within the principle of *United States* v. *Sixty-five Cases Liquid Extracts,* 170 Fed. 449, 175 Fed. 1022; but I do not think the facts warrant the conclusion that the consignee was a mere agent. Both consignor and consignee are corporations, and when a shipment was made, such as is here involved, by the defendant to the Los Angeles concern, it was received and commingled with shipments from other concerns and sold upon the market in regular course. Payment for all shipments was made at the end of each week. There was no report of sales, and no accounting for any particular consignment. The butter was paid for at scheduled price, and defendant was never asked to return any of the money so paid and the consignee never accounted for any moneys received for butter in excess of the schedule price paid by it to the defendant. The mere fact that ultimately if any net profit was realized from the conduct of the business by the Los Angeles concern there was to be a ratable distribution of it to the customers of the concern, does not

materially alter the case. I think the shipment of the butter by the defendant, its receipt by the Los Angeles concern, and payment therefor at schedule price, in effect constituted a sale. The shipment was not made by a principal to a mere agent, or by a mere agent to a principal, as was true in the case referred to. It will be necessary, therefore, to find the defendant guilty. As to the amount of punishment, the excess of moisture was very small, and there is no suggestion of any other violation of the law by the defendant, nor is there any evidence of bad faith or willful misconduct. I am therefore inclined to think that justice requires very little more than a nominal fine.

Judgment will be that the defendant pay a fine of $25 upon each count.

UNITED STATES v. 49½ CASES OF BRED SPRED

(District Court, E.D. Michigan, Jan. 6, 1927)

N.J. No. 17351

Libel under section 10 of the Food and Drugs Act. Motion to dismiss libel sustained.

The United States attorney filed a libel for seizure and condemnation of 49½ cases, each containing a number of jars of "Bred Spred", alleging that the article had been shipped and transported from Chicago, Ill., to Detroit, Mich., and remained unsold in the original unbroken packages, and that it was adulterated and misbranded.

The libel alleged that the article was adulterated in that a substance, pectin, had been mixed and packed with the said article so as to reduce, lower, or injuriously affect its quality or strength; in that a substance, pectin, had been substituted wholly or in part for the article; and in that it had been mixed in a manner whereby inferiority was concealed.

Misbranding was alleged for the reason that the article was an imitation of jam; for the further reason that it was offered for sale under the distinctive name of another article; for the further reason that the retail packages containing the article bore labels upon which the statement, "Bred Spred Strawberry [or "Raspberry"] Flavor," appeared, which statement was false and misleading and deceived and misled the purchaser, in that it represented the product to be a pure jam, whereas it was not, but was a compound of pectin, fruit, and sugar; and for the further reason that there appeared on said labels pictorial designs or devices of fruit which deceived and misled the purchaser into the belief that the article was strawberry or raspberry jam, whereas it was not.

SIMONS, *District Judge*. I confess I have been looking at the language of this section 8 here off and on for the last day and a half, and I have not at times been clear as to just what it did mean—whether it meant under the first paragraph "If it be an imitation of another article" or whether it meant, "If it be an imitation of another article under a distinctive name." It would seem to me that, depending somewhat on the attitude of mind you brought to an interpretation of that first clause, you could read it either way.

Reading it, however, in connection with the proviso, it might seem as though the Congress intended that articles that were not labeled with the distinctive name of some other article would come within the exception of the proviso. Now, that is undoubtedly the conclusion that Justice Hughes came to in *Savage* v. *Jones*, and while, of course, this case was not a case involving directly the pure food and drug law, it was a case in which there was considered the constitutionality of a local statute of the State of Indiana, the question there being raised as to whether the State statute invaded the field already occupied by the Federal food and drug law; and in order to determine whether it did invade that field it became necessary for Justice Hughes speaking for the court, to map out or chart the field over which Congress took jurisdiction insofar as interstate commerce was concerned, by this particular section 8 of the Federal statute on behalf of the court. So it is rather more than dictum. Wasn't it necessary to decision that he lay out, define, the limits of the field in which Congress undertook to legislate with respect to interstate commerce, in order to determine whether or not the State statute of Indiana, which was in question, invaded that field? Because the Supreme Court has held that where Congress has taken jurisdiction over commerce that is interstate, so far as it has undertaken to regulate that commerce, its authority is exclusive. That is true.

And so, whatever Justice Hughes had to say on behalf of the court with regard to the interpretation of this section 8 was not dictum, but was necessary for the decision of the case of *Savage* v. *Jones*.

It seems to me that this court is bound to follow the interpretation put upon the section by the Supreme Court of the United States, and even if it be conceded that the interpretation is dictum it is dictum that is certainly highly persuasive as to the real meaning of Congress in the language contained in section 8 of the food and drug law.

Perhaps, in view of what I have said, it would be unnecessary to spend the time to formulate a more formal opinion. The libel and amended libel will be dismissed, the petition of the claimant for the return of the seized property will be granted—the prayer of the petitioner granted. You may take your exceptions.

UNITED STATES v. 630 BASKETS OF APPLES

(District Court, D. Kansas, Mar. 21, 1927)

N.J. No. 17,274

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict in favor of the United States.

POLLOCK, *District Judge*. Gentlemen of the jury: This case has now proceeded to that point at which it becomes the duty of the court to charge you as to the law that will govern you upon your deliberations upon a verdict in this case. You understand, in our courts of justice in this country, where matters are heard and determined as this case is being tried, the responsibility for the due and proper administration of justice under the law is equally divided between the two bodies. While that responsibility is equal, it is different in kind. It is the duty of the court to declare the law and the duty of the jury to take

the law precisely as declared by the court, and the jury does and must trust the court to correctly declare the law. If any mistake is made in a matter of law, that is the mistake of the court for which the jury is not responsible. On the other hand, the jury and the jury alone is the sole judge of the weight of the evidence, the credibility of the witnesses and what facts are proven in the trial of the case from the evidence that is offered and received in evidence. And, so long as in our courts of justice, the jury takes the law as declared by the court, and takes and finds the true facts in the case and unite the same in their verdict returned, just so long do we have a proper administration of justice under the law.

Again, it is the duty of the court to define the issue or issues in a case being tried. By that I mean to state so clearly that no juror can fail to understand precisely what it is that is to be determined by the verdict when rendered in the case. Now, what is this case? The Government here is proceeding under what is known as the Pure Food and Drugs Act enacted by the Congress of the United States, and enacted, like so many laws are, in pursuance of what is known as the commerce clause of our Constitution. That is, Congress has taken to itself, or was really given by the States in constitutional convention, the power to regulate commerce among the States and with the Indian tribes. Now, the Government contends in this case that the defendant, Judge Martin, shipped from Colorado a certain carload of apples which he had raised out there in his orchard, in interstate commerce into Kansas from the State of Colorado, and that these apples had been by addition thereto of arsenic [arsenate] of lead, I understand a poison, that these apples had been adulterated in such manner that they might be deleterious to human health if consumed as found [food?]. Now this proceeding is what is known under the Pure Food and Drugs Law as a libel. Suit is brought for the purpose of determining whether these apples shall be condemned and destroyed as a food product.

It is under section 10 of this act, as follows:

> That any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this Act, and is being transported from one State, Territory, District, or insular possession to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, or if it be sold or offered for sale in the District of Columbia or the Territories, or insular possessions of the United States, or if it be imported from a foreign country for sale, or if it is intended for export to any foreign country, shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation.

And that is what we will inquire into here. These apples were found in the jurisdiction of this court and by the Government were libeled for the purpose of having them condemned. Now, the object and purpose of Congress in the enactment of this Pure Food and Drugs Act was the preservation of the health of people, and a very right kind of an act. The defendant in this case admits that he raised these apples in the State of Colorado; that in that climate the apple trees—bearing trees—must be sprayed with some poisonous solution in order that apples may be grown that are fit for use at all. He admits that he did use the material, a liquid compound that is used in that section of the country, sold and used for the purpose of bringing these apples on the trees to maturity, and that he did after these apples had matured on the trees, up until picking time, that he picked them, caused them to be picked, and shipped them to himself in

Hutchinson, Kans., to his warehouse there, and he contends that at that time they were not ready for use as apples. That those apples which he did ship for use or sale that he caused them to be wiped or washed, washing all possible part of this poisonous solution of arsenate of lead off of them so there could be no question in that regard. Now, you will note that the section under which we are proceeding here conditions that these shipments made in interstate commerce shall be for sale, and if there was sufficient poisonous material upon these apples when they were shipped in interstate commerce that it might become deleterious to human health in eating them, if they were shipped for sale or by the shipper intended for sale, or offered for sale, then they ought to be condemned and destroyed. However, there is a provision in regard to this act which has just as much application as the part which I have quoted, and that is what this adulteration is.

Section 7 of the act provides: "That for the purposes of this act an article shall be deemed to be adulterated: In case of drugs" so and so; this is not drugs, not have to read that. "In the case of confectionery, candy" and so on, this has nothing to do with that; but—

> In the case of food: First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength. Second. If any substance has been substituted wholly or in part for the article. Third. If any valuable constituent of the article has been wholly or in part abstracted. Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

Evidently it was not under those. But it is, I suppose, the Government proceeding on the idea it was adulterated as provided in the fifth.

> Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health: *Provided*, That when in the preparation of food products for shipment they are preserved by any external application applied in such manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the covering or the package, the provisions of this Act shall be construed as applying only when said products are ready for consumption.

Now, it is the contention of Judge Martin, while admitting the spraying of these trees with this arsenate of lead, and the statement, that he was not shipping these apples to market, that they were not ready for food; but his contention is that he was shipping them to his own warehouse and to be there kept until they reached that condition when they could be put upon the market for food, and at which time the law, as he says, would apply, but they were not at this time ready for food as an edible.

This is a very practical world. We have to live a practical life. And amidst all of these numerous regulations we have to still live a practical life. If Judge Martin did anything in this case with these apples whereby the health of individuals might be deleteriously affected, then the apples ought to be condemned. But, while these apples were handled in interstate commerce, if they were so treated not as a food product or not with any intent of offering as a food product, if he kept them under his control so they could not go into the hands of others to be used, and affect them injuriously, then he had a right to deal with them in that practical way. For, suppose the Government should admit here that the purpose of shipping them—not only in interstate commerce—that they not only were shipped in that manner but suppose he were shipping them to feed his hogs; it

was not hogs the Government was looking after when it enacted this law and the Government wouldn't have any concern whether they were good for individuals or not if they are shipped and fed to hogs, that would be the individual's business and not the Government's. But if anything is the matter, if it was not in good faith intended that these were not ready for the market and should not go on the market, then you would find the defendant guilty, if you believe the amount of poisonous products added in this case was deleterious to human health. So that is the way I am going to leave that question to you in this case, of which fact you are the sole and exclusive judges. You will take the matter and determine it in the light of the law as I have given it to you.

Mr. McFarland. Your Honor, I would like to make one correction; I think the jury probably gets the wrong interpretation; as I understand, Judge Martin is not the defendant, but the claimant of the apples.

The Court. That is true; for all purposes he is the owner of the apples. This is a proceeding against the apples themselves. There is, I may say, a criminal provision of this law under which, if the Government is correct, defendant Martin might have been prosecuted and punished as a criminal, but that is not relied on in this case.

Mr. McFarland. I would like to save an exception on the instruction, if they were so treated as a food product and remained in the hands of Judge Martin, he would have the right to deal with them in a practical way. And I would like to request Your Honor to give the instruction no. 10 mentioned in my request here.

The Court. I forgot to mention, there have been some requests to charge, but I have embodied what I deem to be the law in what I have given, and therefore have refused the requests made.

Mr. McFarland. Your Honor refuses our requests in toto?

The Court. Yes.

Mr. McFarland. I want to save an exception on that. I think it should be shown to the jury in the event they do find these apples are adulterated, there is a proceeding where——

The Court. The question now is, whether we are going to condemn the apples because adulterated and injurious to human health.

Mr. McFarland. I thought Your Honor's instruction they might be destroyed might be prejudicial. I would like to save an exception on that.

UNITED STATES v. 315 BOXES OF ORANGES

(District Court, Massachusetts, Apr. 6, 1927)

N.J. No. 15199

Libel under section 10 of the Food and Drugs Act. Trial before the court. Decree in favor of claimant.

The United States attorney filed a libel for seizure and condemnation of 315 boxes of oranges, alleging that they had been shipped and transported from the State of Florida into the State of Massachusetts and remained in the original unbroken packages, and that they were

adulterated in that they consisted in whole or in part of a decomposed vegetable substance.

MORTON, *District Judge.* I think I will, after all dispose of the case now, while everybody is here.

As to the question of fact which is involved, it is this: What was the condition, the actual condition, of this car-load of some 300-odd boxes of oranges? As the sampling which is relied upon in the forfeiture proceedings consists of two oranges taken from each of 50 boxes—that is 100 oranges—out of the 300-odd boxes, I think it is a sampling which would hardly be regarded as a sufficient sampling to deal with the shipment as between buyer and seller, and I think it is rather insufficient sampling to deal with the matter on a forfeiture proceeding.

Then there were some samples taken—a very small number too—56 oranges were taken on behalf of the owner of the shipment. Those were taken by Mr. Nevins, who was more or less interested—he said not greatly interested—but representing the owners of the oranges—they certainly did have more or less commercial interest. On those the gentlemen in the fruit business said they found them fit for commercial shipment in general.

At the eleventh hour Mr. Steinbauer comes in, and knows more about it than anybody who has testified. He is a Government inspector. He went over 800 of these oranges, taking 10 half-boxes, and going right through each half-box. I think that is altogether the best evidence there is as to the character of this shipment. If you take his statement, the boxes differ very much. Some were certainly good, and some ran pretty bad. But I don't think that on his testimony the shipment itself is so defective that you can say that the car-load as a whole is subject to forfeiture, and on that ground I dismiss the information.

And I find it unnecessary to pass upon the question of law; but I should perhaps say that I am glad I do not have to pass upon that question, because I think it extremely doubtful whether that statute in fact gives the Department authority to forfeit for a defect of this sort. It is a matter in which as one of the public my sympathy is with Dr. Adams and his officials, but I think the word "decomposed" is a word that is hardly met by a change in condition caused by frost bites; but there is however an opportunity for a difference of opinion on that, because undoubtedly the chemical contents of the oranges change by frost bite. But that I find it unnecessary to decide.

UNITED STATES v. SEACOAST CANNING CO.

(District Court, S.D. Texas, July 27, 1927)

N.J. No. 15342

Suit for forfeiture of a bond given to insure compliance with terms of the decree in a proceeding under section 10 of the Food and Drugs Act. Judgment for the United States for the amount of bond.

HUTCHESON, *District Judge.* This is a suit on a bond given in a forfeiture case authorizing the defendants under certain conditions to take the sardines on their making bond.

The bond was made and the conditions of the bond were violated by putting the sardines into the trade before they had been inspected, and the good ones, if there were any, segregated from the bad. The defense is that there was a misunderstanding on the part of the defendants, they believing that when the marshal delivered the sardines to them, they had been inspected.

I agree with the Government in its position that the terms of the bond are absolute, and whether the defendants acted mistakenly or intentionally is immaterial. They took the sardines under an absolute agreement not to sell them in their adulterated state, and they did sell them. No amount of mistakes can save the fact.

It is my opinion therefore, that judgment should go for the United States for the amount of the bond.

UNITED STATES v. MOREHOUSE

(District Court, N.D. California, Jan. 10, 1928)

N.J. No. 15548

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

The United States attorney filed an information against Louis H. Morehouse, a member of a partnership trading as Morehouse & Co., Oakland, Calif., alleging shipment by said defendant from the State of California into the State of Washington, of a quantity of prepared mustard which was adulterated and misbranded.

Adulteration of the article was alleged for the reason that mustard hulls had been mixed therewith so as to lower, reduce, and injuriously affect its quality and strength, and had been substituted in part for mustard, which the said article purported to be. Adulteration was alleged for the further reason that the article was a product inferior to mustard, to wit, a product composed in part of mustard hulls, and was colored with turmeric, so as to simulate the appearance of mustard and in a manner whereby its inferiority to mustard was concealed.

Misbranding was alleged for the reason that the statement "Mustard," borne on the barrels, was false and misleading in that the said statement represented that the article was composed wholly of mustard, and for the further reason that it was labeled as aforesaid so as to deceive and mislead the purchaser into the belief that it was composed wholly of mustard, whereas it was not so composed, but was composed in part of mustard hulls.

The case having come on for trial before the court and a jury, the court, after the submission of evidence and arguments by counsel, charged the jury as follows:

KERRIGAN, *District Judge*. Gentlemen of the jury: The information in this case, as you already know, is based upon what is called the Pure Food and Drug Act of June 30, 1906. You have already been made familiar with the contents of the information, and it will be unnecessary for me at this time even to state the substance of it. I might, however, in this connection, state that at the time of the arraignment the defendant pleaded not guilty, thus putting in issue all the material

elements or allegations of the information, and casting upon the Government the duty of establishing its case against the defendants to a moral certainty and beyond a reasonable doubt. The information will be handed to you by the bailiff when you retire to deliberate upon your verdict.

Under the Pure Food and Drug Act it is provided that any person who shall ship or deliver for shipment from any State or Territory to any other State or Territory, or foreign country, any article of food or drug so adulterated or misbranded within the meaning of this act shall be guilty of a misdemeanor, and the maximum punishment is a fine of $200; and—

> That for the purposes of this act, an article shall be deemed to be adulterated:
> In the case of food:
> First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.
> Second. If any substance has been substituted wholly or in part for the article.
> Third. If any valuable constituent of the article has been wholly or in part abstracted.
> That the term "misbranded," as used herein, shall apply to all * * * articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular.
> That for the purpose of this Act, an article shall also be deemed to be misbranded:
> In the case of food:
> First. If it be an imitation of or offered for sale under the distinctive name of another article.
> Second. If it be labeled or branded so as to deceive or mislead the purchaser.

The Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this act, including the collection and examination of specimens of food and drugs manufactured or offered for sale in the United States. Regulations made by an executive department, in pursuance of authority delegated by Congress, shall have the force and effect of law.

In prosecutions for adulterating and misbranding of food products shipped in interstate commerce under the Pure Food and Drug Act, the knowledge or intent of the shipper is not an element of the offense.

If you find that the food products with which this case is concerned were adulterated or misbranded within the meaning of the Pure Food and Drug Act, and were shipped in interstate commerce by defendant, it is immaterial whether the defendant had knowledge that the particular food or drugs were adulterated or misbranded.

When construing and enforcing the provisions of this act, the act, omission, or failure of any officer, or agent, or other person acting for or employed by any corporation, company, society, or association, within the scope of his employment or office, shall in every case be also deemed to be the act, omission, or failure of such corporation, company, society, or association, as well as that of the principal.

A great deal of stress has been laid upon the age of the case. To my mind, and you are so instructed, that is immaterial to any issue that you are to pass upon in this case. You are to decide upon the evidence in this case whether the defendant is guilty or not guilty, whether the defense stated by him is genuine, or, as has been said, whether it is a fictitious defense. The age of the case, as I say, has no

bearing upon any issue which is to be considered or passed upon by you. It may be true that on account of the long time that this case has been pending, that the facts may have grown dim in the memory of the witnesses; and, of course, in passing upon the question whether or not a witness has told the truth, you have a perfect right to consider the long time that this case has been pending.

This being a criminal case, the defendant is presumed to be innocent. This presumption has the weight and effect of evidence. It may operate to acquit the defendant, and will operate to acquit the defendant unless it is overcome to your satisfaction to a moral certainty and beyond a reasonable doubt.

A reasonable doubt means just what the term implies. It is a doubt based upon reason. It has been defined to be that state of the case which, after an entire comparison and consideration of all of the evidence in the case, leaves the minds of the jurors in that condition that they cannot say that they have an abiding conviction to a moral certainty of the truth of the charge.

UNITED STATES v. ONE BALE OF ALETRIS ROOT

(District Court, E.D. Pennsylvania, Mar. 9, 1928)

N.J. No. 15538

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict for claimant.

The United States attorney filed a libel for seizure and condemnation of one bale of aletris root, alleging that the article had been shipped and transported from the State of North Carolina into the State of Pennsylvania and remained unsold, and that it was adulterated in that it was sold under a name recognized in the National Formulary, but differed from the official standard of strength, quality, and purity, as determined by the test laid down in said Formulary. The case having come on for trial, after the submission of evidence and arguments by counsel the court delivered the following instruction to the jury.

THOMPSON, *District Judge.* Ladies and gentlemen of the jury: This is a case in which the United States, under the provisions of the Pure Food and Drug Act, seized a quantity of aletris root, which was in the possession of H. K. Mulford Company.

The Pure Food and Drug Act is intended to protect the public against having adulterated drugs transported from one State to another, and it provides standards by a formulary, in accordance with which it may be determined whether or not such drugs are adulterated.

In this case the formulary set 16 percent of ash as the highest quantity of ash which, under that law, could be contained in this drug represented by these roots. In other words, if the aletris roots in the bale, shipped from North Carolina into Pennsylvania, contained over 16 percent of ash on test, then the drugs, under the act, were adulterated. If the roots, as transported, did not contain that much ash upon analysis or test, then it was not adulterated, and the Govern-

ment had no authority or right to seize it; so that it becomes a question of fact for the jury, taking into consideration all the testimony in the case on both sides, as to whether this bale or package of these drugs was adulterated in the sense that the quantity that was transported contained more than 16 percent of ash.

You have heard the testimony of the Government analyst, who testified that from samples taken by the Government inspector he made an analysis from those samples, that it was found in one case the ash content was 23 percent and in the other case 21 percent.

The defendant in the case has called as one of its witnesses its chemist, who testified that he made an analysis or test of samples taken from these roots, and that, under that test, they only showed 5 percent of ash, so that you have here a difference in these tests.

There was a quantity of 416 pounds, I think it was—418 pounds of this root that remained in this bale, and it is a question for the jury to determine whether, taking that whole quantity, the roots or drugs were adulterated in that they contained more than 16 percent of ash.

Of course, you heard the testimony as to the fact that these roots are dug out of the ground, and that the earth necessarily adheres to them, and that they are shipped in interstate commerce without being washed, so that the question would be whether there was enough other matter in those roots at the time they were shipped and while they were being transported, to conclude that the whole quantity was adulterated, or that the whole quantity was not adulterated.

Those are the outstanding points, upon which the jury will have to consider the case.

If, after taking into consideration all the testimony, you believe that when this bale of these roots was transported, they were adulterated in the sense that upon test the quantity transported would have shown an adulteration or an ash of over 16 percent, then your verdict should be in favor of the Government.

If, however, you do not believe the testimony shows that the bale of roots transported did contain on test ash equal to 16 percent or above 16 per cent, then your verdict should be for the defendant.

I do not think that there is anything further I can say to you in the case. You will have to consider the case on all the evidence presented, and determine whether or not the quantity transported, taken from North Carolina and delivered here in Philadelphia in the package, was adulterated when it was transported and delivered.

UNITED STATES v. 3,998 CASES OF CANNED TOMATOES

(District Court, Delaware, June 19, 1928)

N.J. No. 16649

Libels under section 10 of the Food and Drugs Act. Jury trial. Verdict in favor of claimant.

The United States attorney filed libels for seizure and condemnation of 3,998 cases of canned tomatoes, alleging that the article had been shipped and transported from the State of Maryland into the

State of Delaware, and that it was adulterated and misbranded in violation of the Food and Drugs Act.

Adulteration of the article was alleged in the libels in that a substance, water, had been mixed and packed with the article so as to reduce, lower, and injuriously affect its quality and strength. Adulteration was alleged with respect to a portion of the article in that a substance, water, had been substituted wholly or in part for said article.

Misbranding of the article was alleged in that the statement "Tomatoes", and the representation of a red ripe tomato, borne on the labels, were false and misleading and deceived and misled the purchaser; and in that the article was offered for sale under the distinctive name of another article.

MORRIS, *District Judge* (charge to jury). Gentlemen of the jury: After two days I suspect that you need very little instruction from me. However, I shall try to help you somewhat in the analysis of the testimony, but at the outset I want to say to you now that I have no views as to whether your verdict should be for the plaintiff or for the defendant. That is for you to determine. I have no views with respect to the weight to be given to one man's testimony as against another man's testimony. That is your province and not mine. I mention that now so that you will bear that fact in mind with respect to any facts that I may give to you or that have been given in evidence. The facts given to you by me will be merely illustrative in an attempt to help you see, if possible, how to get at and measure the evidence in this case, so as to enable you to return a right and proper verdict.

In the first place, the Government contends, and the defendant concedes, that your verdict may be that the tomatoes in question were adulterated and were misbranded if you find that water was added thereto. Consequently, the only question of fact necessary for you to find is whether the Government has established to your satisfaction by a preponderance of evidence that water was added to any one or more of the four lots in question.

There are two kinds of evidence before you upon which the Government relies to enable you to find a verdict in its favor. The most direct evidence is that given by its inspectors with respect to the trough leading from the bottom of the exhaust box, which is conceded. The Government says it led to the juice tank. The Government inspector said that the trough led to the juice tank. Mr. Cannon told you, and I think Mr. Morrell told you, that the trench from such trough would contain a substantial amount of water. If you are satisfied with that statement by Mr. Cannon and by Mr. Morrell, and you likewise find that the Government's evidence is the correct evidence, namely, that the exhaust, the condensation from the exhaust box, was returned to the juice tank, and if you find that that exhaust, that condensation, was substantial in amount, then your finding may be that water was added to the tomatoes in question, and consequently your verdict may be that the tomatoes were adulterated and/or were misbranded. As to how you shall reconcile that conflicting testimony I cannot help you. It is for you to reconcile it if you can. If you cannot, you are to believe those persons that you deem most worthy of belief and disregard the testimony in whole or

in part of those persons that you deem not so worthy of belief. In determining that question you may take into consideration the opportunity to know the facts and the frailties of human memory and arrive at a conclusion that is satisfactory to yourself.

The other branch of the evidence upon which the Government relies to establish its contention that the goods in question were misbranded and/or adulterated is circumstantial evidence as I understand evidence, and it may be that you understand it better than I do. In any event you are to be bound by your understanding of it. I am going over a portion of it merely to indicate to you how, it seems to me, you can expedite your work or better analyze that testimony.

The Government used the refractometer method of ascertaining the content of the juice of the tomatoes which they examined. You have heard what several witnesses had to say about that method. Let us lay that aside for a moment and deem it for our immediate purposes a proper method. The use of that instrument results in a reading, which reading may be used directly or through the soluble solid content to determine what is the minimum soluble solid content of the material examined.

We have from the testimony of Dr. Tiffany in this case, as I recall it—and whenever I say we have such testimony I am giving my recollection, because I have to use some facts to illustrate. You are not to be bound by my recollection but solely by yours. We have the testimony of Dr. Tiffany in this case that he found no content, solid content, by the refractometer method, as disclosed by the refractometer readings of the Government, less than 3.5 percent. His maximum was 4.38 percent of soluble solids, or an average of 4.02 percent. Now, then, we have the testimony of one of the witnesses for the Government, who was recalled, who has used 5 percent as the minimum content, and on his recall said that the 3.50 percent was the minimum solid for Eastern Shore tomatoes. Consequently, as it seems to me, the Government's contention here is not that the tomatoes here in your charge fell below the minimum for Eastern Shore in soluble solid content for Eastern Shore tomatoes. Let me repeat that so that you may get it as I understand it. You are not bound by that understanding, but, as I understand the case, it is this: Unless you find from the readings of the refractometer, which will go before you—I don't know whether there is in the case a table from which you may convert these refractometer readings into soluble solid content or not—if not, you must take those readings. Dr. Tiffany tells us that those readings do not disclose a solid soluble content for any case of less than 3½ percent. The Government witness tells us that the minimum solid content for Eastern Shore tomatoes is 3 percent to 3½ percent. Consequently, the Government's contention, as I see it, is not that the soluble solid content of these tomatoes falls below 3½ percent, but it is that the soluble solid content of these tomatoes falls below authentic samples at the particular district at about a particular time. Now, unfortunately I don't remember—you may remember—that there is in this case any translation of the refractometer readings of that so-called authentic sample by which you may determine what the solid content of that was. But there is in this case evidence that the Government chemists deduced

from the facts before them that there had been added 10 percent to 15 percent of water. You can't base a verdict upon that deduction. You must base it upon the facts. You may be aided in making use of the facts by the expert testimony, but you cannot take the opinion of another person alone and arrive at a finding of fact upon it that is honest. So that unless you recall some testimony which I do not, though you may, because I freely confess that I might overlook it, you have got to compare and interpret the readings of the refractometer of that sample—of that authentic sample—with the readings of these others, the goods now in your hands, to determine to what extent the solid content of the tomatoes—soluble solid content of the tomatoes now in your hands—is less than the solid soluble content of the authentic sample. If you find that it is any less, your work on the circumstantial part of the case is ended. If, however, you find that the solid soluble content by the refractometer readings of the tomatoes which are now in your charge is less than the solid soluble content of the authentic sample, then your work has probably just begun, because then you must determine as to whether that soluble solid—whether that authentic sample—is a sound basis from which to measure the soluble solid content of these cases, or whether there is a reason to believe that it is not a foundation upon which may be predicated a verdict of adulteration or misbranding, even if the solid soluble content of the tomatoes in question is less than that of the sample.

You may, if you find that the circumstances were identical, and that the probabilities—strong probabilities—are that the solid content of the tomatoes in question may be no less than that of the sample and you can find what the solid soluble content of the sample was, then you may make a finding of the additional water from such circumstantial evidence.

In this case you are to be governed by the preponderance of the evidence. Your findings, as I said at the outset, must be predicated upon your recollection and not upon mine.

The Pure Food Act is not in question. It is an act that has been long in effect; and whether it is good or bad or indifferent, we have to take it as it is. The sole question for you is whether or not that act has been violated by these tomatoes by the addition of water which came from sources other than the tomato.

The jury returned a special verdict that water had not been added to the product.

UNITED STATES v. 94 DOZEN, MORE OR LESS, HALF-GALLON BOTTLES CAPON SPRINGS WATER

(District Court, E.D. Pennsylvania, Jan. 18, 1929, Mar. 11, 1930, Dec. 8, 1930)

48 Fed. (2d) 378 (in part); N.J. No. 19236

Libels under section 10 of the Food and Drugs Act. Demurrer and motion to quash overruled. Trial before the court. Decree in favor of claimant.[28]

[28] Affirmed, *United States* v. *94 Dozen, More or Less, Half-Gallon Bottles Capon Springs Water*, p. 1278, *post*.

The United States attorney, on January 28, 1928, filed a libel for seizure and condemnation of 94 dozen half-gallon bottles, and on November 23, 1928, a libel for seizure and condemnation of 450 five-gallon bottles and 124 cases each containing 12 half-gallon bottles, of Capon Springs water, alleging that the article had been shipped and transported from Capon Springs, W.Va., into the State of Pennsylvania, and remained in the original unbroken packages, and that it was adulterated and misbranded in violation of the Food and Drugs Act.

The Capon Water Co., Capon Springs, W.Va., intervened as claimant and owner in both cases, and filed a motion to quash and a demurrer as to both libels.

DICKINSON, *District Judge.* There are several of these cases but the questions raised are two. One of the questions is the lawfulness of the issue of and return to a search warrant issued by a justice of the peace under the State law; the other is a demurrer to a libel (in the form of a motion to dismiss) upon which an attachment issued and a seizure was made of the property of the claimant under the Pure Food and Drugs Act.

We will dispose of all of the cases by the finding of answers to the two questions raised, leaving to counsel to submit an appropriate order in each case in accordance with the rulings made.

The motion to quash. This is based upon the averment that a search warrant was issued by a justice of the peace under the State law which was irregularly issued, served, and returned. The search warrant was in truth a mere subterfuge device to enable the representatives of the Department of Agriculture to get samples of what the claimant was selling in order to found the libel proceedings next discussed.

We do not see what this court has to do with this search warrant proceeding. If the district attorney seeks to use evidence obtained in an unlawful way, the question whether such evidence can be admitted may be determined when raised in the proper way and at the proper time, but we are unconvinced that we can quash the process of a State court issued under a State law.

The motion to quash is denied.

The demurrer. There are a number of grounds of demurrer specially set forth but we see no need to discuss more than two. The cause is before us following the filing of a libel by the district attorney under the Pure Food and Drugs Act of 1906 (21 U.S.C.A.S. 1, et seq.); the issuance of a writ of attachment thereon; and the seizure of property to which the Capon Water Co. has laid claim. One of the grounds of demurrer is that possession of the property is jurisdictional and that without a prior seizure no libel can be filed. Here the libel was first filed and a seizure under the judicial process of attachment followed. The claimant cites, among others, the two cases following to sustain this ground of demurrer: *The Brig Ann*, 13 U.S. 289; *Brewing Co.* v. *United States*, 8 F. (2d) 1.

It may be premised that the instant cases being in rem possession of the rem is essential to the exercise of effective jurisdiction by the court. The word "jurisdiction" is, however, used in many different senses. Among them is jurisdiction of the subject matter and also

jurisdiction of the person or of the rem. The first is granted by law; the second is acquired by the service of judicial process.

There are likewise two kinds of seizures. One is an executive seizure which is extra judicial or at least the most quasi judicial; the other is a seizure by judicial process. A revenue officer, for illustration, may be authorized to seize for some infraction of the revenue laws, or an officer for a violation of the national prohibition law, and in either case with or without the authority of a search warrant issued by some magistrate. In such cases jurisdiction may be granted to a court to determine that the property thus seized may be confiscated or condemned. Here the seizure is jurisdictional in the sense of the court having jurisdiction of the subject matter. A court may have judicial power over all cases of a given character as, for instance, courts of admiralty over causes maritime. This power can be exercised, however, only when the court has acquired jurisdiction of the person of the defendant or the rem. This it does by issuing its judicial process in the form of a writ of summons or of attachment or otherwise, as the case may be. Here the service or the seizure is not jurisdictional in the sense of the subject matter but only of the person or the rem.

The cited cases belong to the first class. In the *Ann case* a vessel had been seized by a revenue officer and sought to be condemned by a decree of the court. The seizure was abandoned and possession thereunder given up. The court in consequence was without jurisdiction.

In the brewery cases the trial court had held that they belonged to the second class and had proceeded to a decree following a seizure under the judicial process of a writ of attachment based upon a libel. The Circuit Court of Appeals reversed, holding that the trial court had no jurisdiction to proceed by libel unless there had been a previous seizure under a search warrant as the cases were of the first class.

In maritime cases the admiralty courts have jurisdiction of the subject matter and always proceed by issuing a writ of attachment based upon a libel. There is never a first seizure.

The Pure Food and Drugs Act clearly contemplates two things. One is a proceeding in personam under section 2; the other a proceeding in rem under section 10. The latter confers upon the court jurisdiction of the subject matter and hence power to issue judicial process. The procedure is likened to that of proceedings in admiralty.

The pertinent provisions declare that any article of food adulterated or misbranded within the meaning of the act and entering into interstate commerce "shall be liable to be proceeded against in any district court, &c., and seized for confiscation by a process of libel for condemnation." This surely means the conferring of jurisdiction upon the court to entertain condemnation cases upon the filing of a libel and to acquire jurisdiction of the rem by attachment process, as is done in admiralty cases.

The demurrer in consequence cannot be sustained on the ground that a previous seizure under a search warrant is necessary.

The remaining ground of demurrer, which we will discuss, is the broad one that the libel sets forth no cause for the condemnation of the property of the claimant. This is the equivalent of a like demurrer to a statement of claim in an action at law on the ground that no cause of action is disclosed. This calls for a general survey of the act of

Congress. It denounces the manufacture of any article of food or any drug which is adulterated of misbranded, so far as Congress possesses the power to legislate on the subject, and declares any violation of the act to be a misdemeanor. It further provides for the condemnation of the article itself by a proceeding in rem such as the instant proceedings. The term "food" is defined to include drinks and drugs to be "anything intended to be used for the cure, mitigation, or prevention of disease, &c." Any drug is adulterated if in strength or purity below the quality it is represented to have, and any food if it "consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance." Any article is misbranded if statements of what it is are "false or misleading in any particular."

The libel is meant to consist, as stated, of what may be called two counts. The first is that of misbranding and the second of adulteration. The misbranding charge is owing to typographical errors rendered unintelligible. The adulteration charge is simply, in the words of the act, that the said product "consists in part of a filthy, decomposed, and putrid animal and vegetable substance." It is often difficult to differentiate an ultimate fact finding from a conclusion of law. An offense consists in the commission of an act and ordinarily would not be sufficiently pleaded in the words of the statute defining the offense without the addition of a statement of the act which is charged to constitute the offense. Here, however, the act is the adulteration which is charged and the words of the act are as descriptive of in what the adulteration consists as any added description could be. There may, it is true, be no information in the libel of the specific act of adulteration meant to be charged but this can be supplied, if need be, through a bill of particulars.

We do not find the libel in this respect to be insufficient in law. Leave is granted the libelant to amend the libel in respect to the charge of misbranding. Assuming this to be done, we are unable to say that the libel does not state a cause of action as a matter of pleading. It may be, for illustration, that the act of Congress condemns only manufactured products and does not apply to natural waters which are in no sense manufactured products. It may likewise be that the label quoted is not false or misleading or that the water is not sold as medicinal. It may of course be also true that the water is not as described in the libel and that there is not even anything to condemn the water as unwholesome or render it unfit for drinking. The water none the less is stated to be in fact a misbranded and adulterated product and a trial must determine the truth.

Upon the allowed amendment of the libel being made orders denying the motions may be entered, the other grounds of demurrer not discussed being overruled.

The libels were amended on January 22, 1929, and on February 28 and March 18, 1929, further amendments were made by stipulations.

The libels as amended charged that the article was adulterated in that it consisted in part of a filthy or decomposed animal or vegetable substance, to wit, organisms of the *Bacillus coli* group of bacteria, to wit, more than one out of five 10 cc portions of samples examined showed (by method of the Public Health Service) the presence of organisms of the *Bacillus coli* group.

It was further alleged in the amended libels that the article was misbranded in that the statements,"'Ca-Ca-Paon' Healing Water", appearing on the labels, were false and fraudulent, since the article would not produce the curative or therapeutic effects which purchasers were led to expect by the said statements, and which were applied to the article with a knowledge of their falsity for the purpose of defrauding purchasers thereof.

The claimant filed a motion to strike the evidence obtained under the seizure of November 23, 1928, and also a motion applicable to both cases, to strike out the testimony of experts as to the composition of the samples of water examined by them, and a motion to dismiss the libels, the first of which was allowed and the second and third of which were denied in the following opinion handed down March 11, 1930:

DICKINSON, *District Judge*. The danger we before remarked of the issues in this cause becoming confused has increased. Paper books pro and con the allowance of the motion first above listed had been submitted and the motion disposed of on opinion filed. Counsel for libelant then called our attention to the expectation of counsel that oral argument would be heard upon the motion. We accordingly withdrew the ruling made, and the oral argument has been had. At the argument the two further motions were made. We discuss them in the order listed.

We feel impelled to apologize in advance for the inordinate length of the discussion in which we have indulged. The only excuse we have to offer arises out of the fullness of the discussion by counsel for the libelant. We have been favored and aided not only by the United States attorney but also by special counsel for the Agricultural Department, whose wide and long experience in cases of this type qualifies him to speak as an expert.

We are proceeding not quite upon the forlorn hope of convincing counsel for libelant that they are wrong but from the motive of offering evidence that all they have had to urge has had our consideration.

The unlawful seizure. In view of the opinion filed the discussion naturally assumed the form of a re-argument. We understand there is now agreement upon the proposition that the allowance or refusal of the motion turns upon a single question. This is whether the right protected by the fourth amendment can be invoked by defendants in other than criminal prosecutions. It is admitted that if the claimants had been indicted, as they might have been and may yet be, the evidence here in question would properly be suppressed and could not be used against them. The proceeding here is however a libel proceeding under section 10 of the Food and Drugs Act and not an indictment for the crime denounced by section 1. Counsel for libelant very earnestly press the argument that notwithstanding that the search and seizure by means of which the evidence in question was obtained was one which would be in violation of the claimants' rights if such rights were asserted in a defense to a criminal indictment, no such rights belong to the claimants here because these proceedings are not criminal but civil, and these rights which arise wholly out of the fourth amendment cannot be invoked because that amendment is limited and restricted to criminal prosecutions. There are, as we think, several subtle fallacies hidden in the argument by which this

proposition is sought to be supported. One is that the right of a person to enjoy freedom from unlawful searches and from seizures of his property by Government officials has its genesis and origin in the fourth amendment. It might as truthfully be said that his right to life, liberty, and property arises out of the fifth amendment. The legislature, it is true, might give legality to an otherwise unlawful search and seizure unless restrained by a Constitutional provision, and the reason for the fourth amendment was not to create or confer the right but to make its violation legally impossible in any manner short of a change in the Constitution.

It is confidently asserted that there is no adjudged case which rules that citizens have the right to be secure in their persons, houses, papers, or effects from unreasonable searches and seizures by Governmental agents. If so, it may be because there was never before need for any such ruling. All the instruments which we venerate, Magna Charta, the Petition of Right, the Declaration of Rights, the Declaration of Independence, and the Bills of Rights made part of our Constitution alike claim and proclaim these rights as preexisting. The right to life, liberty, and property antedates the fifth amendment, and the right to be secure against unreasonable searches and seizures did not begin with the adoption of the fourth amendment.

There is a distinction between power and right. We know that Governments elsewhere having the power have violated these rights. All our constitutions do is to put it beyond the lawful power of our Governments to violate them. The rights are undoubted. All that is needed is to have a judiciary willing and able to enforce them. There is no more warrant for the proposition that the right to protection against unlawful seizures can be invoked only in criminal prosecutions than there would be to assert that the protection of the right against the taking of private property for public use could only be asserted by defendants in criminal cases. There would be no difficulty in finding an expression which refers to the right of protection against unlawful seizures as if it were a right to be invoked in criminal cases, as it surely may be. Judicial opinions, as has often been remarked, can only be intelligently read when read in the light of the fact situation to which they relate. Almost always there is in search and seizure cases the element in practical effect of compelled confession of guilt. The compulsion is as real as that which resulted in the good old days from the rack and the boot. Indeed, the modern methods are but a softened form of the latter, and when to the search and seizure methods are added, as often occurs, the methods of the third degree, the difference is not great.

Underlying the thought urged upon us is one which is an offshoot of that which has a fact basis of truth. This truth is that these safeguards are used to hide guilt and protect malefactors. Such is beyond doubt one result but such is not their purpose. The right to the undisturbed possession of one's property, except only as the right is held in subjection to law, is a near neighbor to the right of personal protection because one cannot be long enjoyed without the other. There is little difference between confiscating a man's property and compelling him to give it up by the imposition of a fine. When, however, as in all the cases cited to us, the feature emphasized is the right to withhold self-incriminating testimony, of course it must be held that this right can be invoked only in criminal prosecutions.

Compelling a witness to give testimony against his own interests is a different thing from compelling him to testify against himself. In a civil proceeding a party defendant may be put upon the rack of cross-examination and subjected to a torture in comparison with which the thumbscrew is a mild instrument without any violation of any of his legal rights. This cannot be done in a criminal case. Why the difference? The answer is that in the latter case he has a right to protection; in the former he has not. *Ita lex scripta est.* Because, however, this particular right recognized by the fifth amendment belongs only to defendants in criminal cases is no reason for concluding that another right recognized in the fourth amendment and declared to be inviolable is likewise so restricted. The notion that is, we suppose is due to the reference in the fourth amendment to the issuance of search warrants following the clause which recognizes the right to protection against unreasonable searches.

We have already pointed out that the first clause condemns unreasonable searches and seizures; the succeeding clause in no respect modifies this condemnation. Why was it added? The condemnation is visited only upon unreasonable searches and seizures; a search and seizure, as we have before remarked, made in obedience to the mandate of a search warrant could not be said to be either unlawful or unreasonable but it might be unjustified in fact, hence the limitation upon the issuance of search warrants. Surely a provision which was clearly intended to buttress a declared right should not be construed to limit or lessen it.

As before stated, *Boyd* v. *United States*, 116 U.S. 616, as we view it, settles the question of right. In that ruling four propositions may be found.

1. Unreasonable searches and seizures are unlawful.
2. A search in aid of a lawful seizure is not unlawful or unreasonable.
3. An exploratory search in the hope or for the purpose of the discovery of evidence upon which criminal guilt may be found or confiscation of property be based is unreasonable and hence unlawful.
4. Congress is without Constitutional power to make a search and seizure of the latter type lawful and an act of Congress which purports to give it the sanction of law is a nullity.

We further think it follows that if an act of Congress could not make lawful what the agents here did, a fortiori, what they did of their own authority without the sanction of a law is likewise unlawful. This, as before stated, settles the question of right. That of which we are in search here is really not the existence of a right but the existence of a policy of the law and a legal method of enforcing that right. It is admitted that in criminal cases there is a recognized practice of refusing to the Government the use of evidence obtained through a violation of the rights of the defendant. This presents the question first propounded. Should the like policy be enforced in forfeiture cases? If the right is restricted to criminal cases, that of course answers the question in the negative, but if there is no such limitation, as we think we have found, then the question recurs. The right is one of protection against the assertion of governmental powers. The policy has for its basis the principle that the Government should not be permitted to take advantage of its own wrong and its own violation of law to enforce another law to the prejudice of one whose rights have thus been violated.

We would keep very far from accusing the agents of the Agricultural Department of indulging themselves in the luxury of the joys of a tyrant because we have always found them to be considerate of the rights of others, but the suggestion that this law can be enforced only by upholding them in the [un]lawful power to search and seize comes perilously near a plea of necessity. Proverbially necessity knows no law, constitutional or otherwise.

We are here and in this case unable to recognize the necessity so urgently pressed upon us. Under section 10 of this act this averred offending shipment might have been confronted with a libel; upon that libel an attachment might have issued; under that attachment these bottles of water might have been lawfully seized, and the condition and composition of the water tested and determined. In truth these very things have been done. The suggestion that a sufficient safeguard of the right in question is afforded by the personal responsibility of the individual agent who abuses the power to seize is not an appealing one. The right is essentially one to protection against the assertion of unlawful power by governmental agencies. As a rule people can protect themselves against trespasses committed by other individuals. They are helpless against inroads upon their rights by Government. They can only look to the law for protection, and that law is a poor protection which the courts do not enforce.

The cases to which we have been referred of the policy enforced in civil cases between private litigants and in deportation cases do not strike us as being in point. We are brought back every time to the question several times presented. Is the right of the people recognized in the first clause of the fourth amendment to be "secure" (mark that word) from unwarranted searches and seizures by governmental agents, limited and restricted to criminal prosecutions, or does it extend to forfeiture cases? The right was enforced in the *Boyd case* (*supra*) in a case which was not a criminal prosecution, and we think a justified corollary is that the same practice which prevails in criminal cases should be extended to forfeiture proceedings.

The motion to strike out the testimony to which the motion is addressed is allowed.

The second motion. It may be when this cause comes to be determined that it will be found that the samples tested by the experts are not shown to be samples of the water sought to be condemned. The condition and qualities of the water tested in that event will be no evidence of the filthiness of the water sought to be condemned.

We are unable to find at this time, however, that the evidence should be struck out.

The motion is denied.

The third motion. This is an effort to import into the trial practice of cases tried under a law of the United States, the statutory compulsory nonsuit practice which pertains in the Pennsylavnia State courts. What it comes to is that a defendant may test the judgment of the trial court upon the question of whether the libelant has by its proofs made out a case. If the judgment is favorable to the claimant he offers no evidence for the defense; if adverse, he then goes into his defense. Whatever may be said (and much may be said) in favor of the State practice, we have two comments to make. One is that this might require us to take two sips of this water; the other is that under the State practice the defendant would be fully protected against the

at least possible error of the trial court because the judgment would be one simply of nonsuit, whereas here the judgment would be one for the defendant. A consequence is that if the judgment were reversed on appeal, final judgment would then go against the defendant. The defendant must decide for himself whether he will offer evidence.

The motion is denied.

On January 8, 1930, it was stipulated by the Government and claimant that a jury trial be waived and the case, involving 94 half-gallon bottles involved in the first libel filed, was set for trial by the court. Evidence was introduced and oral argument heard on behalf of the Government and claimant, the final hearing being had on October 16, 1930. On December 8, 1930, the court handed down the following opinion dismissing the libel:

DICKINSON, *District Judge*. This record will be found to be in a more or less confused state. This is due to the fact that the libel proceedings are directed against a few bottles of no special value in themselves either commercially or with respect to the public interest. The issue in the case is what the condition of the contents of these few bottles were at the time of shipment in interstate commerce. If, for illustration, the wholesomeness of Capon Springs water is not questioned, the fact that a particular shipment of a few bottles of water might be questioned would be of little concern to anyone, especially in view of the fact that even if the shipment was open to complaint at the time it was made, the lapse of time would have a correcting effect so that the shipment would be wholesome at the time of hearing, and indeed before the time the shipment would reach the market. The trial judge in consequence suggested that the issue be broadened so that the question of what we will call the wholesomeness of Capon Springs water as it came from the springs and reached the market might be determined instead of the narrow issue of the wholesomeness of the particular shipment. This suggestion was tentatively accepted and the trial proceeded for a time upon this broader issue, but the tentative acceptance of the suggestion was afterwards withdrawn and the issue confined to the narrow one indicated. The result of it has been that there is in this record evidence bearing upon what we will call the general issue of the wholesomeness of Capon Springs water, with which issue we have in strictness nothing to do. There is an unavoidable embarrassment in dealing with a narrow issue, such as that indicated, because of the indirect consequences and effects of a finding.

The grown or manufactured product of a dealer in a food, for illustration, might be wholesome and nutritious and yet a particular shipment have become unfit for food through what might be called accidental circumstances. The condemnation of the particular shipment might none the less have the effect of the inference drawn by consumers that the consumption of any of the product was harmful and the whole trade of the dealer be thus ruined. There might be no justification for the inference, and yet everyone knows that to condemn any part of what a dealer is shipping causes the inference to be drawn by the consuming public, the prospective purchasers of the product, that it is all bad.

The Food and Drugs Act has a very beneficent purpose, and it is without doubt the duty of the courts to lend their aid to its efficient enforcement. At the same time it would be an unfortunate and unjustified consequence to have the value of the trade in a product wholly destroyed because a small shipment of that product had in some way become contaminated. We are all more or less finicky about the things we take into our stomachs. The slightest suspicion of careless or unsanitary methods in production or distribution might absolutely destroy the value of a large and important trade. The moral to be drawn from this is that a court should declare no condemnation without careful thought being given to the consequences which we have indicated. The wholesomeness of a food or drink cannot even be made the subject of a discussion without the possibility of consequences which would be deplored.

There is one part of the complaint made against this particular shipment which may, however, be freely discussed. The claimant here deals in a drinking or bottled water, which is also possibly bought with the thought that it has likewise some medicinal qualities. The water is known as Capon Springs water, which is taken from a spring in West Virginia. It is charged that the water as put upon the market is misbranded, evidenced by the labels on the bottles in which the water is marketed.

Section 8 of the act defines the meaning of the term "misbranded." The article is misbranded if the package or label "shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular."

It is charged that Capon Springs water is marketed under a label which describes it to be "Healing Water", thereby implying that the drinking of it will have curative and therapeutic results, when in fact the water is more accurately described as drinking water having only the properties of what might be called ordinary spring water.

There is no meaner or more despicable fraud than than that of persuading those afflicted with a disease to buy something on the promise that it will cure them or help them when the hope aroused is wholly delusive and the statements made fraudulently misleading. Anyone would feel the call to aid in the suppression of frauds of this character. There is nothing in this case which would justify the finding that Capon Springs water is medicinal in the sense indicated. When one is speaking of a drinking water it is difficult to draw the line between an effect which is merely beneficial and one which is medicinal. Anyone may have a prejudice in favor of the water from some favorite well or spring and believe they are benefited by drinking it. So believing they would not be condemned for recommending it to others nor do we think the commercial exploitation of it would come within the condemnation of this act of Congress so long as the line of fraud was not crossed. One has only need to recur to the literature of his youth to recall the incident of the visit of Leather Stocking to the spring from which the famous Saratoga water is now taken, and to the tribute which is paid in *Westward Ho* to tobacco. There is scarcely any locality in the country in which there is not a spring, about the waters of which there are traditions

more or less well authenticated, that the waters of the spring were a favorite drink of the Indians. The languages of the different tribes of American Indians had this in common that they were figurative and abounded in metaphors. The names given to individuals ascribed to these high sounding qualities. There is said to be such a tradition connected with the Capon Springs. This water was so highly valued by the Indians that it was given the name "Capon", which in the language of the particular tribe which inhabited the surrounding country, is said to have had the meaning of healing or healing water. There is an advertising value in such a tradition, the benefit of which the claimants have undoubtedly sought to get. For some reason, which is inscrutable, many people attach a value to Indian medical lore. Anyone who has a nostrum, for which he desires to create a commercial demand, can do so successfully by panoplying some one in red paint and feathers and proclaiming the nostrum to be a favorite medicine among the Indians. This may be done in such a way as that it is clearly a fraudulent imposition and denounced as an offense against this act of Congress. On the other hand, it may be taken in such a way as to negative the thought of a real fraud and be nothing more than an advertising device to call attention to the thing which is offered for sale.

We see nothing in the label in this case which would justify a finding that it was fraudulent. The form of the label is: "Capon Springs Water, Known to the Catauaba Indians as 'Ca-Ca-Paon' Healing Water, 2 Quarts Net—Bottled at the Springs." [Then follows an analysis in type too small to be conveniently read.] "Natural Mineral Spring Water Famous for Two Centuries. Capon Water Co. Capon Springs, W.Va."

There is doubtless an advertising value in the stuttering orthography given to the words "Catawba" and "Capon", but this label is as close an adherence to the truth as is customary in commercial labels and speaks the truth as nearly as would be expected of any advertiser of a commercial product. We would not find as a fact in what measure of esteem the Capon Springs water was held by the Indians, but there is that in the record of this case which would support the statement that the word "Ca-Ca-Paon" means in the Indian dialect healing water. Whether it does or not we would not find from the evidence, but we do find that there is evidence that the word is said to have this meaning.

The count in the libel of misbranding is not sustained.

Some of the literature put out by the claimants may be characterized as not only florid but is almost laughable in its overstatements. Everyone has heard, however, of extravagant claims made by the advocates of a liberal use of ordinary drinking water. This is epitomized in the slogan "flood your kidneys." This has no reference to any particular drinking water but applies to any water. All the extravagant claims made for drinking Capon Springs water are made for the liberal use of any drinking water. There is no reason to doubt that those who advocate the liberal use of drinking water honestly believe the practice to be beneficial. We are not prepared to make any finding that it is not, and we are far from finding that all the benefits claimed will be conferred. The point we have in mind to make is that the act of Congress does not interdict anyone from advocating the liberal use of drinking water nor from enforcing the

advocacy of it by the extravagant predictions of the benefits which will follow. If this can be done in the case of water as water, we do not see how the claimants can be interdicted from saying the same thing about Capon Springs water.

The next count in the libel is based upon the sixth clause of section 7 of the act. As before stated, this feature of the libel cannot even be discussed without consequences which, although unintended, might none the less be very harmful to the trade of the claimants. As before also stated, we are restricted in any findings which we may make to the few bottles of water which were seized.

We make the finding that this water at the time of the trial was free from the criticisms made of it and will continue to be free. We make this finding because the claimants have introduced evidence through the testimony of experts to this effect, which is uncontradicted, and also because the offer was made by the claimants to submit the water to analysis and microscopical examination for the Government. This offer was declined, and the testimony itself objected to because the question is asserted to be not what the condition of the water now is but what it was at the time of seizure, and it would seem to be an admitted truth that the water would clear itself after a comparatively short time. The claimants assert that in order to assure the wholesomeness of the water it was their practice to keep it in storage for such a length of time as would leave no doubt of its wholesomeness before it was put upon the market. Whether this practice was in all cases followed it would not clear the claimants of the charge of shipping unwholesome water, if it was at the time of shipment unwholesome, even if the unwholesomeness were afterwards removed. Congress evidently had in mind the injustice which might be done through a charge of unwholesomeness of a particular shipment by being extended in the public mind to a condemnation of the entire product. The regulations are also mindful of this. It is, because of this, provided that, before any proceedings of condemnation are instituted, the interested persons shall be notified and given the opportunity to "show cause why the matter should not be referred for a prosecution as a violation of the Federal Food and Drugs Act." The purpose of this procedure is manifest. It was, however, for reasons which, in the opinion of the officers of the Bureau, justified the omission, not followed in the instant case. We think this should have been done, and because of the omission to do it, that this count of the libel cannot be sustained. The purpose of the regulation in consonance with the intent of Congress is that the reputation of a food product shall not be blasted by the institution of proceedings without a full opportunity afforded to the parties concerned to convince the Department, if they can, that such proceedings should not be instituted. If the product be one, the shipment of which in interstate commerce, should be interdicted, proceedings may be instituted and the shipment stopped, but if the condemnation of the product is due to something which may be corrected, and the product itself does not call for condemnation, the proceedings need not be instituted.

This leads to a comment, in the making of which we may be going beyond our judicial duty, but which nevertheless we feel impelled to make. The comment is that the difficulties in which the claimants find themselves are largely of their own making. Apparently, they have failed to appreciate the gravity and importance of the duties which

the officials of this Bureau are called upon to perform. Instead of recognizing that the activities of the officials are not only justified but demanded of them in furtherance of the protection of the public health, the claimants seem to have resented the intervention of the officials as an unwarranted intrusion into the private business of the claimants. Realizing, as of course the claimants did, how much harm to their trade a charge of unwholesomeness against the Capon Springs water would have, whether the charge was well founded or ill founded, they resented the acts of the officials as if this injury was intended. This attitude on their part was wholly unjustified.

The Department needs no vindication at the hands of this court, but we feel free to express our absolute confidence in the good faith of the action taken and that it was done solely in the performance of duty and for the protection of the public health.

The resentment of the claimants against the intervention of the Department and the general attitude of the claimants was interpreted as meaning a defiance of the Department and a challenge to them "to do their worst." Because of this, the authorities felt justified in proceeding without any preliminary hearing. This feeling is natural enough and excusable in itself, but is far from justifying any refusal or failure to give the claimants the preliminary hearing called for by the regulations, and should have induced a careful regard to all the rights of the claimants. The Department doubtless viewed the provision for a preliminary hearing as applying only to criminal prosecutions, but there is the same reason for extending it to proceedings in rem.

Another comment is, we think, likewise within our province to make. It is that many of the claims made of benefit from the drinking of Capon Springs water are so extravagant as to justify the characterization of being ridiculous. No trial judge is in a position to pit his judgment of the benefit to the seller of certain commercial practices against the judgment of commercial men. We venture, however, the statement that those who buy Capon Springs water or other spring water do so because they wish a water to drink which is what is called "pure" and which is palatable. Very few, if any, users of any of the spring waters would be induced to buy them in the hope that they will prove to be the panacea, which in the literature put out by the claimant company, this water is claimed to be.

We are not prepared to say that the tradition that this water was highly regarded by an extinct tribe of Indians in the far distant past may not have some real advertising value, and as we have already observed, we think the claimants can avail themselves of the statement of what some Indian, now dead, for many generations, may have thought of the water from this particular spring, but extravagant claims to a panacea should be dropped.

A final comment is that the parties to this cause, as if upon the preliminary hearing provided by the regulations, should meet and reach a working agreement such as would assure to the authorities a compliance with the law and leave the claimants free to conduct their business undisturbed by any complaints from the Department. We see no difficulty in reaching such a working agreement. The claimants are bound to comply with all the requirements of the law and we know that all the authorities wish is assurance that there will be such compliance. What is called for is a get-together attitude.

The conclusion reached is that the libel should be dismissed, and a form of decree in accordance herewith may be submitted.

We make the following specific findings of fact and conclusions of law:

Findings of fact. 1. The Capon Springs water is a natural water obtained from springs near Capon Springs, W.Va.

2. There is evidence, sufficient to justify the claimants in making reference to it, of a tradition in the neighborhood of the springs that the word "Capon" is a corruption of the word "Ca-Ca-Paon", meaning in the dialect of the Catawba tribe of Indians, "Healing Water." There is no evidence, however, that the word ever had this meaning in spite of the tradition to that effect.

3. No hearing in the nature of a rule to show cause called for by the regulations was given to the claimants, but on the contrary they refused all information and opportunity to correct the information upon which the libelant had based its libel.

Conclusions of law. 1. The label used in this case by the claimants is not a misbranding within the meaning of the act of Congress on the subject.

2. The count in the libel based upon clause 6, section 7 of the act of Congress, is dismissed because of the failure to grant the claimants the preliminary hearing allowed by the regulations.

3. The libel should be dismissed.

UNITED STATES v. JOHN J. FULTON CO.

(Circuit Court of Appeals, Ninth Circuit, July 1, 1929)

33 F. (2d) 506; N.J. No. 16387

Appeal from District Court for the Western District of Washington. Judgment reversed.

Before, RUDKIN, DIETRICH, and WILBUR, Circuit Judges.

DIETRICH, *Circuit Judge.* Appellant filed a libel of information against 48 bottles of an article of drugs labeled in part "Fulton's Compound RX 1", and 24 bottles of another article of drugs labeled in part "Fulton's Compound RX 2", which it alleges were shipped in interstate commerce from San Francisco to Seattle and which it charges were misbranded, in violation of paragraph 3 of section 8 of the Food and Drugs Act, as amended (21 U.S.C. sec. 10). By that provision it is declared that an article of drugs shall be deemed to be misbranded,

> If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent.

In the libel are exhibited the labels, wrappers, and attending circulars, followed with the averment that the bottles were so misbranded in that the labels, wrappers, and circulars "are false and fraudulent since the articles contain no ingredient or combination of ingredients capable of producing the effect claimed." Sustaining an exception to the libel upon the ground that it failed to state

sufficient facts to constitute a cause of action, the court below entered a judgment dismissing it, and libelant appeals.

The point ot the exception is that nowhere in the label, wrapper, or attending circular does the proprietor or shipper make any direct statement or representation that the drugs are of curative or therapeutic value. In each case there is the statement "We have received many letters from physicians reporting", followed by what is represented to be the substance of such "reports", which admittedly would tend to engender a belief to persons suffering from diabetes or Bright's disease, that the use of the drugs would likely afford them relief. Unless we discredit their mental competence, such, we must presume, was the intent and expectation of the proprietors. Their contention is that they have such letters or reports and that that fact constitutes a complete defense whatever may be the character of the drugs. But if, as is alleged, the drugs are worthless the proprietors cannot escape responsibility by hiding behind the phrase "the doctors say." Couched in such language undoubtedly the printed matter makes a more persuasive appeal to the credulity of sufferers from these diseases than if the representations thus implied were made directly upon the authority alone of the proprietors, and for that reason they are not less but more obnoxious to the law. The charge is that they are not only false but fraudulent, thus implying bad faith on the part of the appellee, and of course we are presently concerned only with the sufficiency of the charge and not at all with the character or degree of proof required to substantiate it. The point does not require extensive review of the decided cases, for conclusive, we think, is the principle of construction set forth in the following quotation from the opinion of the Supreme Court in *United States* v. *95 Barrels of Vinegar*, 265 U.S. 438:

> The statute is plain and direct. Its comprehensive terms condemn every statement, design and device which may mislead or deceive. Deception may result from the use of statements not technically false or which may be literally true. The aim of the statute is to prevent that resulting from indirection and ambiguity, as well as from statements which are false. It is not difficult to choose statements, designs and devices which will not deceive. Those which are ambiguous and liable to mislead should be read favorably to the accomplishment of the purpose of the act.

Reversed.

NATIONAL REMEDY CO. v. HYDE, Secretary of Agriculture, ET AL.

(Supreme Court of District of Columbia, Aug. 19, 1929)

N.J. No. 16780

Suit by the National Remedy Co. to enjoin the Secretary and officers of the Department of Agriculture from prosecuting libels pending against, and from instituting further libels or seizures of, plaintiff's remedy, under the Food and Drugs Act. Motion to dismiss bill sustained.[29]

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[29] Reversed, *National Remedy Co.* v. *Hyde et al.*, p. 1272, *post.*

GORDON, *Judge.* This is a suit by the National Remedy Co., a corporation organized under the laws of the State of Massachusetts, and having its principal place of business in Boston, against William M. Jardine, Secretary of the Department of Agriculture, Walter G. Campbell, Director of Regulatory Work of the Food, Drug, and Insecticide Administration of the United States Department of Agriculture, seeking an order to restrain and enjoin the defendants from prosecuting any of the libels mentioned in the bill, except one as a test case as suggested by the plaintiff, and from instituting any further libels or seizures by defendants, and requiring them to dismiss the several seizures and libels as being res adjudicata.

The bill alleges that the plaintiff is the owner of the business and goodwill of the manufacture and sale of a certain proprietary remedy known as B. & M. external remedy as well as the formula and method of preparation thereof, which was purchased in 1913, and has continuously manufactured and sold said medicine to jobbers, to the retail trade, and to consumers for a number of years, and that at the present time the business and goodwill of said corporation is valued at about $100,000; that the statements and representations concerning said medicine in labels upon the bottles containing the same and the cartons, pamphlets, booklets, and circulars accompanying and circulated with respect thereto are made in good faith, and that nothing contained in any of them has been false or misleading; that the medicine is manufactured in Massachusetts and is distributed by the plaintiff not only in said State, but also in interstate commerce to all the other States, the District of Columbia, and to foreign countries; that in the year 1919 the Department of Agriculture filed libels against the plaintiff, the said B. & M. external remedy, and seizures were made in various places, among them at Concord, New Hampshire, where packages of said remedy were seized and a libel filed in the United States court for said district in October 1919 wherein it was charged said remedy was misbranded and that the representations in the circulars and booklets relative thereto contained false and fraudulent statements, and at the trial of which a verdict and judgment were rendered in favor of the claimant January 23, 1923; that since then, until about the time of this proceeding, the said B. & M. external remedy has been distributed in interstate commerce openly and without question, molestation, hindrance, or criticism by the United States or any of its agents or officials; that in December 1928 and January 1929 the Department of Agriculture, acting by and through the defendants, and without notice or hearing, as provided in the said Food and Drugs Act, caused libels to be brought against the B. & M. external remedy, and seizures thereof have been made in New York City, N.Y., Pittsburgh, Pa., Baltimore, Md., Oakland, Calif., Portland, Maine, Albuquerque, N.Mex., Miami, Fla., and elsewhere; and that said defendants are purposing and intending to institute and prosecute libels in numerous other places in the United States; that the statements contained in the labels, booklets, pamphlets, and circulars under investigation in 1919 by the Department of Agriculture are substantially the same as those contained in the present literature accompanying the medicine; and that the allegations of the libel filed in the District Court of New Hampshire aforesaid contained in substance and effect the same or practically the same allegations or

statements set forth in the libels herein mentioned, and that the charges in said last-mentioned libels are of adulteration and misbranding of the B. & M. external remedy; that the several libels already instituted by seizures, as aforesaid, and those threatened are identical and are for the purpose of testing the alleged adulteration and misbranding of said B. & M. external remedy, and that there are no separate issues of fact or of law which necessitate such numerous libels in the several States and that no necessity exists for harassing the plaintiff with these numerous libels and suits; that in spite of the provisions of the Food and Drugs Act the plaintiff has been given no opportunity for a hearing before the Department of Agriculture, and did not prior to the institution of said libels have notice or knowledge that said Department contemplated action against the plaintiff concerning any adulteration or misbranding of the B. & M. external remedy; that the several libels were filed upon reports issued by said Jardine, Secretary of Agriculture, and were not filed or instituted upon information furnished by any health, food, or drug officer or agent of any State, Territory, or the District of Columbia; that the matters and things alleged in the libel in New Hampshire in 1919, are substantially the same as the matters and things set out in the several libels filed in the several States in December 1928 and January 1929 and that the parties are the same and that the verdict of the jury of the Federal District Court of New Hampshire and the judgment entered thereon are conclusive on the present issues and all of the several issues are res adjudicata; that the business and goodwill of the plaintiff are very valuable and threatened with total destruction by the arbitrary and illegal action of the Department of Agriculture acting through the several defendants; and that numerous customers are refusing to buy its product; that if the libels are prosecuted in widely separated parts of the country the plaintiff's business will be wholly broken up, its goodwill and its financial success blasted and its property destroyed; that the plaintiff is willing that a trial of the disputed issues contained in the libels be tried in the State of New York, which is near plaintiff's place of business and the plaintiff should not be compelled to try a test case in a court far removed therefrom; that under the Constitution the Secretary of Agriculture has not the unrestrained right claimed by him to make multiple seizures of shipments made in interstate commerce after investigation and finding by his Department that articles of food and drugs are adulterated or misbranded; and that the plaintiff has no plain, adequate, and complete remedy at law, and that its property, business, and goodwill will be ruined and destroyed unless the defendants are restrained or enjoined; and that the plaintiff will suffer great and irreparable loss, injury, and damage unless the defendants are restrained and enjoined from prosecuting said libels or instituting others.

The case was heard upon a motion of plaintiff for an injunction pendente lite and a motion of the defendants to dismiss the bill.

It is the duty of the defendants to administer the Food and Drugs Act. Under section 4 thereof they are authorized to investigate articles of food or drugs which are being shipped in interstate commerce, for the purpose of determining whether they are adulterated or misbranded within the meaning of other sections of the act. If they

find that such articles are adulterated or misbranded they are required to certify the facts to the proper United States attorney, who is required to institute appropriate proceedings in the proper court of the United States for the enforcement of the penalties prescribed by the statute. By section 2 it is made a misdemeanor for any person, firm, or corporation to ship or deliver for shipment in interstate commerce any article of food or drugs that is adulterated or misbranded.

Section 10 of the act, the interpretation of the provisions of which are directly involved in the present proceeding, is as follows:

> SEC. 10. That any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this Act, and is being transported from one State, Territory, District, or insular possession to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, or if it be sold or offered for sale in the District of Columbia or the Territories, or insular possessions of the United States, or if it be imported from a foreign country * * * shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. And if such article is condemned as being adulterated or misbranded, or of a poisonous or deleterious character, within the meaning of this Act, the same shall be disposed of by destruction or sale, as the said court may direct, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States, but such goods shall not be sold in any jurisdiction contrary to the provisions of this Act or the laws of that jurisdiction: *Provided, however*, That upon the payment of the costs of such libel proceedings and the execution and delivery of a good and sufficient bond to the effect that such articles shall not be sold or otherwise disposed of contrary to the provisions of this Act, or the laws of any State, Territory, District, or insular possession, the court may by order direct that such articles be delivered to the owner thereof. The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States.

It is clear from a careful reading of said section that there is no limitation upon the defendants certifying for seizure more than one shipment of an article of food or drugs found by them to be adulterated or misbranded. On the contrary the section directs them in the discharge of their duty to make a certification to the proper United States attorney of any and all shipments found in interstate commerce, which they find to be adulterated or misbranded. The statute is plain in its requirements that any article or shipment thereof shall be liable to be proceeded against wherever found, upon a finding by administrative officers that the same is adulterated or misbranded whether in single or multiple consignments. The purpose of the statute would be frustrated if power to make multiple seizures of different consignments in various sections of the country were denied. Under such a construction the public could be injured and defrauded at will by numerous shipments of adulterated and misbranded articles made after one consignment had been libeled, and litigation with respect thereto delayed or prolonged, for the purpose of enabling the shipper or manufacturer of such adulterated or misbranded articles to distribute them in interstate commerce. Such articles, after investigation by the defendants, that have been found to be either adulterated or misbranded are outlaws of commerce and may be seized wherever found. The number of seizures would necessarily depend on the number of consignments and their location. There is nothing in the act that indicates that one seizure by the Federal authorities

exhausts their power to make other or contemporaneous seizures of the same articles when circumstances require such action in order to prevent traffic in adulterated or misbranded articles.

It is averred in the bill and urged in argument that the seizures now in question are illegal in that the plaintiff before the institution of the proceedings was not afforded a preliminary hearing as provided by the statute.

Section 4 of the act provides for a hearing to the persons from whom a sample has been procured. This provision, however, does not require that a hearing be given to the shipper or manufacturer such as plaintiff before the bringing of seizure proceedings. The provision of section 4 as to hearings has been under consideration by the Federal courts and prior to the decision in *Morgan* v. *United States*, 222 U.S. 274, the decisions of the lower Federal courts were divided upon the question as to whether a preliminary hearing was necessary before the bringing of seizure proceedings under section 10 of the act. But in the *Morgan case* the Supreme Court held that it is not a condition precedent for the prosecution of a violation of the Food and Drugs Act that an investigation be had in the Department of Agriculture and the defendant afforded an opportunity to be heard as provided by section 4 of the act, and that the provision for a hearing was administrative merely and not a jurisdictional requirement for the institution of proceedings under the statute.

The validity or constitutionality of the Food and Drugs Act are [is] not questioned by the plaintiff, and in cases in which the question of whether articles are misbranded or adulterated is raised, such question is for determination by a jury, or by a court if a jury is waived, and not to be determined in equity if the statute is valid, and in such a situation an equity court should not restrain multiple seizure proceedings under the Food and Drugs Act. *Shawnee Milling Co.* v. *Temple et al.*, 179 Fed. 517, 519.

The question as to whether a particular product is or is not subject to the provisions of the Food and Drugs Act should be raised in a proceeding provided for by the statute itself and not in equity.

The allegation in plaintiff's bill that its product is not adulterated or misbranded is in effect a defensive plea in bar. That question ought to be determined in the libel proceedings where they have been instituted against its product and do not seem to me to constitute an equitable cause of action.

It would seem that the defendants in making the seizures and instituting the proceedings complained of exercised a lawful duty in the performance of the ordinary functions committed to them in the administration of the Food and Drugs Act. It seems clear, as herein pointed out, the statute does not limit defendants' actions to one or any other number of seizures, but reposes in them not a mere discretion but a direction to proceed when and where misbranded or adulterated articles are found. The act plainly commits this function to the executive branch of the Government and not to the judicial branch. The judicial function is provided for when proper proceedings are brought to determine the issue of misbranding or adulteration, and the plaintiff's recourse is to test those proceedings where they are brought.

It is pleaded in the bill and urged in argument by plaintiff that the New Hampshire judgment is res adjudicata with respect to the pend-

ing libel proceedings. The averments in the bill are that the libel which was involved in that proceeding is substantially the same as those contained in the present literature accompanying the shipments recently proceeded against. This averment would indicate that the labels were in effect the same, but they were in fact different. Furthermore, according to the averments of the bill, the issue in the New Hampshire case involved only the misbranding of plaintiff's product, whereas the recent libel proceedings and those threatened involved the additional charge that plaintiff's product is also adulterated within the meaning of the Food and Drugs Act.

Furthermore in *Plews* v. *Burrage*, 266 Fed. 347, it was held that a defendant in an action in a Federal court relying upon res adjudicata as a defense has a complete and adequate remedy at law and cannot maintain an action in equity based thereon to enjoin the law action.

It is the view of this Court that this bill in equity cannot be maintained and should, therefore, be dismissed.

UNITED STATES v. B. & M. EXTERNAL REMEDY

(District Court, S.D. New York, Oct. 23, 1929)

36 Fed. (2d) 53

Libel proceeding under section 10 of the Food and Drugs Act for forfeiture of certain bottles of drugs. On motion by the Government for leave to take samples from goods seized, for purpose of making tests. Motion granted.

COLEMAN, *District Judge*. The Government has seized certain bottles of medicine pursuant to the National Food and Drugs Act (21 U.S.C., secs. 1–15), alleging adulteration and misbranding, and the goods are now in the custody of this court in the present condemnation action. The Government desires to take a few small samples for the purpose of making actual tests on animals in order to get evidence to prove the allegations of adulteration and misbranding. The claimant opposes on the ground that it would be deprived of its property without due process of law and that it would be subjected to unreasonable search and seizure and compulsory self-incrimination, contrary to the fourth and fifth amendments.

I am unable to see the slightest merit in the contention that the tests would be compelling claimant to incriminate itself or would subject it to unreasonable search and seizure, even though it be assumed that this is a penal action. The goods are now in the custody of the court, and no complaint is made about the seizure which placed them there. To permit the tests would not require claimant to do anything, nor to suffer any search or examination.

As to its being deprived of property without due process of law, the amount involved is so trivial as to come within the de minimis rule. However, in order to prevent any possible injustice, I will require as a condition to granting the permission that the Government pay the value of the samples taken in case the goods are not condemned. Furthermore, I think it proper to require that claimant be given samples from the same containers and that it be permitted to be present at all the tests. Settle order on notice.

UNITED STATES v. 15 CASES OF BRED SPRED, ETC., ET AL.

(Circuit Court of Appeals, Seventh Circuit, Oct. 25, 1929)

35 Fed. (2d) 183; N.J. No. 17352

In error to the District Court for the District of Indiana. Judgment affirmed.

Before ALSCHULER, EVANS, and PAGE, Circuit Judges.

PAGE, *Circuit Judge*. The Government (appellant) libeled, in the United States District Court for the Southern District of Indiana, under the Food and Drugs Act, a food product called "Bred Spred," manufactured by claimant (appellee) at Chicago, and shipped into Indiana. Appellant abided by its overruled demurrer to each of the two paragraphs of appellee's answer, and the libel was dismissed.

The first paragraph of the answer sets out, as an estoppel by judgment, the complete record, other than the evidence, of a case in a Federal District Court of Michigan, wherein a judgment, unappealed from, was adverse to the Government.

Concerning the second paragraph of the answer, appellant in its brief, makes the admission that it "consists of specific denials of the various averments of the libel and explanations, constituting together a plea of confession and avoidance." It is not a plea of confession and avoidance, but we find that it is a good and sufficient answer to the libel, and that as to that paragraph the court properly overruled the demurrer and dismissed the libel. The propriety of the court's action in that regard is not discussed or questioned by appellant. On the contrary, after the above admission, appellant abandoned the issue on the second paragraph and said: "The contested issues here, then, arise upon the views held and ruling made by the judge of the District Court upon the questions of former adjudication and estoppel raised by the first paragraph of amended answer." That must end the case. With a good defense upon the merits admitted, it cannot matter how many errors may be committed by a trial court on any issue upon which a case cannot be reversed. If we should hold with the contention of the Government on the first paragraph, we could not, for that reason, reverse the judgment. The judgment is affirmed.

AMBRUSTER v. MELLON, SECRETARY OF THE TREASURY, ET AL.

(Court of Appeals of District of Columbia, May 5, 1930)

41 Fed. (2d) 430

Appeal from a decree of the Supreme Court of the District of Columbia dismissing a bill for injunction to restrain the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce from permitting importations of certain kinds of a drug. Affirmed.

Before MARTIN, Chief Justice, and ROBB and VAN ORSDEL, Associate Justices.

MARTIN, *Chief Justice.* An appeal from a decree of the lower court dismissing the amended bill of complaint of the plaintiff, upon motion of the defendants.

The plaintiff below sought an injunction to restrain the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce, from permitting the importation into this country of certain kinds and conditions of ergot of rye, which plaintiff claims to be under the legal standard, and dangerous to the public health when used, claiming also that such importations resulted in irreparable injury to plaintiff as an importer and owner of large stores of ergot of rye, already imported into this country, of standard character and usefulness.

It is recited in the bill that ergot of rye is a crude drug consisting of grains of rye which have been peculiarly altered in substance by a certain fungus growth. From the crude article is manufactured what is known as "fluid extract of ergot", which is a valuable preparation extensively used by physicians for emergencies in obstetrical cases. Both the crude drug and the extract are listed and described in the United States Pharmacopeia and National Formulary, as well as other works on materia medica. There is practically no crude ergot produced in this country. Importations of a superior class arrive here from Spain, while inferior products come from certain other foreign countries. The latter importations frequently arrive in bad condition and are unfit to be used in the manufacture of the medicinal extract. The plaintiff charges that the defendants, the Secretary of the Treasury and the Secretary of Agriculture, have since September 1, 1927, in violation of section 7 of the Federal Food and Drugs Act (34 Stat. 768 (21 U.S.C. sec. 8)), and of regulation 30, subsection B, of the regulations for the enforcement of the Federal Food and Drugs Act, knowingly admitted through the customs house crude ergot of rye of inferior quality and condition and not fit for use in the manufacture of medicinal extract of ergot; and that the defendants have knowingly and willfully permitted various quantities of substandard crude ergot thus imported, to be sold and shipped in interstate commerce in this country under false and misleading brands, without causing them to be seized by the proper officers for condemnation, destruction, or export. Plaintiff also states that he has lawfully imported into this country and holds in stock large quantities of pure standard ergot of rye of superior quality and value, and that he will suffer great loss if inferior ergot is allowed to be put upon the market under misleading brands and false descriptions.

The plaintiff prayed that the defendants be enjoined from admitting into this country importations of crude ergot of rye which do not, upon proper examination, meet all the requirements of the Federal Food and Drugs Act and the United States Pharmacopeia, and to recall all stocks already admitted which do not comply therewith; and that defendants be required to enforce the act so as to prevent the entry of crude ergot into this country when impure and beneath the standard, and also "be required to act with all due and prompt

diligence in the enforcement of the said act, in the public health interest. * * *"

In our opinion the ruling of the lower court dismissing the bill of complaint was right, for the reason, among others, that the proceedings of the defendants which are challenged by the bill were performed by them in the lawful exercise of their jurisdiction under the statute, and their action is not shown to be capricious or arbitrary, and consequently is not reviewable in a suit for an injunction.

Section 2 of the Federal Food and Drugs Act (21 U.S.C. sec. 2) forbids the importation into this country from any foreign country, of any drug which is adulterated or misbranded within the meaning of the act. Section 3 (21 U.S.C. sec. 3) provides that the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce shall make uniform rules and regulations for carrying out the provisions of the act. Sections 7 and 8 (21 U.S.C. secs. 8, 9) define the conditions under which a drug shall be considered as adulterated or misbranded. Section 11 (21 U.S.C. sec. 15) provides for a proceeding whereby the Secretary of Agriculture may examine samples of any drug offered to be imported into the United States, in order to determine whether it is adulterated or misbranded within the meaning of the act, or is otherwise dangerous to health, or is falsely labeled in any respect; and any drug found to be of such description shall be refused admission. In accordance with the provisions of the act the Secretary of the Treasury, the Secretary of Agriculture and the Secretary of Commerce promulgated certain official regulations for the enforcement of the Federal Food and Drugs Act, and the same have been continuously in force under the act.

The statute accordingly invested the appellees with authority to determine whether imported drugs were adulterated or misbranded in the sense of the act, when offered for entry into this country. Such authority is not simply ministerial in character, but calls for a finding of facts and the exercise of judgment upon the facts when found. Accordingly the exercise of this authority by the appellees will not be reviewed by the courts unless it has been capriciously or arbitrarily exercised.

In *Commercial Solvents Corporation* v. *Mellon, Secretary of the Treasury*, 51 App.D.C. 146, 277 Fed. 548, an order of the Secretary was challenged, which provided that fusel oil should not be considered to be a synthetic organic chemical within the meaning of the Dye and Chemical Control Act, approved May 27, 1921 (42 Stat. 18). It was held by the court that the authority given to the Secretary of the Treasury by the act, to administer the same, gave him the implied authority to interpret it, because interpretation was necessary to the performance of his administrative duty; and that the courts cannot review, by mandamus or injunction, a decision of the Secretary of the Treasury, made within his jurisdiction, to interpret the act, if he did not act in a capricious or arbitrary manner. Accordingly the court sustained the dismissal of a bill for an injunction to restrain the enforcement of the Secretary's order.

In support of this ruling, the court cited *New Orleans* v. *Paine*, 147 U.S. 261, 13 S.Ct. 303, 37 L.Ed. 162; *Riverside Oil Co.* v. *Hitchcock*, 190 U.S. 316, 23 S.Ct. 698, 47 L.Ed. 1074; *Ness* v. *Fisher*, 223 U.S. 683, 32 S.Ct. 356, 56 L.Ed. 610; *Duncan Townsite Co.* v. *Lane*,

245 U.S. 308, 38 S.Ct. 99, 62 L.Ed. 309; *Houston* v. *St. Louis Packing Co.*, 249 U.S. 479, 484, 39 S.Ct. 332, 63 L.Ed. 717; *Brougham* v. *Blanton Mfg. Co.*, 249 U.S. 495, 39 S.Ct. 363, 63 L.Ed. 725; *Hall* v. *Payne*, 254 U.S. 343, 41 S.Ct. 131, 65 L.Ed. 295; *Handel* v. *Lane*, 45 App.D.C. 389; *United States ex rel. Ashley* v. *Roper*, 48 App.D.C. 69; *United States ex rel. Hall* v. *Lane*, 48 App.D.C. 279.

In our opinion, the bill discloses that the defendants below were invested with authority to pass upon the admission of the importations complained of, and fails to allege facts from which it can be inferred that their action in respect to the present importations was capricious or arbitrary.

The decree of the lower court is therefore affirmed.

UNITED STATES v. SHREVEPORT GRAIN & ELEVATOR CO.

(District Court, W.D. Louisiana, Sept. 16, 1930)

46 Fed. (2d) 354; N.J. No. 18300

Information alleging violation of section 2 of the Food and Drugs Act. Demurrer to information sustained.[34]

DAWKINS, *District Judge.* This is a criminal information, charging the defendant with misbranding certain corn bran, in violation of the Pure Food and Drugs Act of June 30, 1906 (34 Stat. 768, 21 U.S.C. secs. 1–5, 7–15) in that each sack of said product was branded as containing 100 pounds net, whereas in truth they contained a lesser quantity. By amendment it is charged that some of the sacks contained not more than 85 pounds net, and that the average was about 96 pounds.

Defendant moved to quash the information on the ground that said act violates articles 1, 2, and 3 of the Federal Constitution because it attempts "to grant legislative powers to the judiciary and to the executive departments of the Government"; and it violates the fifth amendment to the Constitution, in that it "seeks to deprive of life, liberty, and property without due process of law", as well as the fourteenth amendment, "for the same reason"; and, further, that it violates the sixth amendment because "it is too indefinite, sets up no ascertainable standard of guilt and defendant cannot be informed of the nature and cause of the accusation against it thereunder."

After declaring that sacks or packages containing articles of food shall have the net weight or measure plainly stamped thereon, the third paragraph of section 8 of the act as amended (37 Stat. 732, (21 U.S.C. sec. 10, par. 3) provides as follows:

> Third. If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count. Reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provisions of section 3 of this title.

It must be remembered that this is a criminal action for the alleged violation of this statute, one of the very few that have been brought

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[34] Reversed by Supreme Court, *United States* v. *Shreveport Grain & Elevator Co.*, p. 1339 *post*.

thereunder, and, while the proceeding is against a corporation, it might easily have been one charging an individual, who in default of payment of fine could be subjected to imprisonment. Hence a much stricter construction is required than if it were merely an act affecting civil rights. I have no doubt that Congress has the power, for the protection of the public, to require that packages containing articles of food shall have stamped thereon the correct weight or number, and that the dealer, without having any fraudulent or criminal purpose, may, in an extensive business, be unable to comply exactly in each instance with this requirement. However, in such circumstances, it would be a question of intent for the court and jury, if there was a variation, but the dealer would have a fixed standard by which to be guided, whereas under the quoted provision of the act, its violation, in large measure, is left either to the discretion of the enforcing department in making rules or regulations, or to the judgment of the court and jury in each instance as to what is reasonable. This might vary according to the views of the particular tribunal, and the dealer could never know whether he was violating the law or not until he was brought into court.

For these reasons, I believe the asserted ground of unconstitutionality under the sixth amendment, is well founded. See *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516, 14 A.L.R. 1045; *Connally* v. *General Const. Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322; *Yu Cong Eng* v. *Trinidad*, 271 U.S. 500, 46 S.Ct. 619, 70 L.Ed. 1059; *United States* v. *Reese et al.*, 92 U.S. 214, 23 L.Ed. 563; *United States* v. *Brewer*, 139 U.S. 278, 11 S.Ct. 538, 35 L.Ed. 190; *Todd* v. *United States*, 158 U.S. 282, 15 S.Ct. 889, 39 L.Ed. 982.

For the reasons assigned the demurrer or motion to dismiss will be sustained. Proper decree may be presented.

UNITED STATES v. 23½ DOZEN BOTTLES, ETC., OF AN ARTICLE OF DRUGS LABELED IN PART "LEE'S SAVE THE BABY"

(District Court, D. Connecticut, Jan. 8, 1930, Oct. 17, 1930)

44 Fed. (2d) 831; N.J. No. 18653

Libel under section 10 of the Food and Drugs Act. Motion to strike out portions of claimant's answer, granted. Trial before the court. Decree in favor of claimant.

THOMAS, *District Judge* (on motion to strike out portions of claimant's answer). The United States filed its libel for condemnation against certain bottles and their contents shipped in interstate commerce and prayed that the same be condemned upon the ground that they were misbranded within the meaning of the Food and Drugs Act. The libel alleges the transportation as of January 15, 1929.

The bottles were labeled "Save the Baby." On the back of the bottle is a label setting forth the following:

For Croup apply with the hand or by saturating * * * cloth and laying it over the throat and chest; also apply over the nose. In severe cases, where relief does not follow in half an hour, give a half teaspoonful internally every half

hour. * * * For Sore Throat apply on the throat; also take one-half a teaspoonful internally. For Coughs * * * apply on the chest, also take one teaspoonful morning and night. For ague in breast, apply to the parts affected. * * *

On the small carton the following legend appears:

Save the Baby * * * croup mixture * * * For Croup, * * * Coughs and Sore Throat * * * used in cases of Grippe, Bronchitis, Laryngitis, Tonsilitis, Pneumonia, etc.

There is considerably more of the same nature on the labels on the large cartons and on the circulars enclosed.

The libel proceeds to charge that the alleged drugs in question were misbranded within the meaning of the Food and Drugs Act of June 30, 1906, as amended, section 8, paragraph third, because they contained "no ingredient or combination of ingredients capable of producing the effects claimed," and that the labels were applied in reckless and wanton disregard of their truth and with intent to mislead purchasers.

The claimant appears to be William W. Lee & Co., a partnership doing business in Watervliet, Albany County, N.Y., in the Northern District of New York. There is nothing to indicate who, at the present time, composes the copartnership. Both the answer and notice of claim are silent on this point.

In their answer the claimants, after entering denial as to the alleged misbranding, set up a separate defense which is contained in paragraph four of the answer to which the motion to strike is addressed, wherein, inter alia, the claimant alleges: That on February 24, 1916, the United States attorney for the Northern District of New York laid an information against this claimant, William W. Lee & Co., and the several copartners thereof, pursuant to the Food and Drugs Act, accusing them individually and as such copartnership of unlawfully shipping and delivering for shipment in interstate commerce articles of drugs identical in kind, nature, and composition with the articles of drugs which are the subject of the present libel, which articles then bore labels, wrappers, and reading matter substantially identical with the labels, wrappers, and reading matter present on the articles seized under this libel; and that said information charged the claimant of violating the identical statute involved in this proceeding in the same particulars as charged in this libel and that thereafter the information was duly dismissed on the merits and an order to that effect entered on or about November 13, 1916, all of which is exhibited in a copy of the information and order annexed to the answer.

The answer then proceeds further to allege that on July 26, 1920, an information was laid by the United States attorney for the Northern District of New York which again charged the claimants with violation of the Food and Drugs Act, in that the claimants shipped, on or about September 17, 1917, articles of drugs identical with those in suit and bearing the identical labels which said articles were claimed to be misbranded, and that on the 16th day of February, 1922, the information was dismissed, or nolle prossed, on motion of the United States attorney, as also appears by a copy of the information and order.

The whole of the information of 1916 is not annexed but merely count 2 thereof, and it discloses that one Charles Samuel Ulcher and Carrie L. Ulcher, trading as William W. Lee & Co., did unlawfully ship and deliver from New York to Boston certain packages labeled

substantially similar to the labels on the packages at bar, and it was charged that those labels constituted a misbranding. The order of the District Court of October 27, 1916, discloses that the defendants then pleaded guilty to the first count of the information (though what that first count was we cannot tell), and were fined on their plea of guilty, $25. The order dismissed the second count.

There is nothing from the nature of the order to indicate just what the reason was for the dismissal. There is no recital that the issues were tried, nor is there anything to indicate whether the dismissal was because of insufficiency in the information or what. I think that a fair interpretation of the order would indicate the second count was dismissed on consent of the United States attorney. Otherwise the dismissal would appear to have been founded on nothing whatsoever. The second information was also against the same defendants and charged a shipment of misbranded articles of the same kind as those involved in the first information and charged the misbranding thereof in the same way. The order which was entered thereon in February 1922 recited the charge involved in the information at length, and that the defendants had entered a plea of former jeopardy and thereupon and on motion of the United States attorney the second information was dismissed.

In the case at bar the Government moves to strike out the matter embodied in the separate defense upon the ground that:

> A, the allegations and matters contained in said paragraph 4 and said annexes do not constitute a valid defense to any matters charged in the libel; and B, the allegations and matters contained in said paragraph 4 and said annexes are incompetent, immaterial, irrelevant, and have no bearing whatever on the issues in this case.

The matters set up as a separate defense can be available only on one theory, and that is, that as to the libel at bar, they are res adjudicata. It is contended by the claimant that the dismissal of the two former informations against them involved an adjudication to the effect that articles so constituted and so labeled, as in the case at bar, are not misbranded and that such an adjudication is binding forever after.

The doctrine of res adjudicata is, like many other legal principles, simple enough in its statement, but difficult, at times, in its application. A former judgment on the merits concludes the parties and their privies as to all matters which were litigated or which should or could have been litigated within the field of the specific controversy. Therefore, in any action between the same parties upon the identical claim or demand upon which a judgment has already been rendered, that judgment is conclusive. Where the action between the same parties is upon a different claim, the former judgment may, nevertheless, operate as an estoppel as to any matter litigated between the parties or actually determined therein.

It is to be noted, then, that a former judgment is conclusive only as to the parties. It binds no one but the parties, or those who derive their interest in the subject matter from the parties. There is nothing in this record which indicates who the claimants are other than that they are persons operating under a partnership name. Whether there are 2 persons or 20 persons, and whether they are the identical persons who operated under the same partnership name in 1916 and 1920 does not appear. While it is true that the United States attorney

has raised no question on this point the court, nevertheless, in its decision on the sufficiency of the answer set forth by defendants, is not restricted to a consideration only of the points made in the brief filed by counsel.

Assuming, however, the identity of the parties, I find no identity of subject matter. In fact, there is no claim that there is an identity of subject matter, except that the claimants allege that the articles charged to be misbranded have the same composition and bear the same labels as the articles charged to have been misbranded in the criminal actions. It is not claimed, however, that the identical articles involved in the criminal proceedings had more than ten years ago are the subject of the seizure in New Haven in 1929. At best they are only similar. They are not the same. It follows, then, that the claim of res adjudicata must rest upon the theory that the dismissals of the two informations involved the determination that articles of the substance of the articles at bar labeled in the same way, are not knowingly misbranded or their transportation in interstate traffic is not made with knowledge that they are misbranded. This brings us to the crux of the matter.

I have been referred to only one type of case where a judgment in a criminal action may, in any sense, be said to be determinative of an issue in a civil action. That is the type of case involved in *Coffey* v. *United States*, 116 U.S. 436. Coffey had been prosecuted on a charge of having manufactured distilled spirits without paying the tax imposed by law. He was acquitted of that charge, and then an information in rem was filed against certain property alleged to have been used by Coffey in the manufacture of the distilled spirits. In his answer in the latter proceedings, Coffey pleaded in bar to the maintenance of the forfeiture proceedings the judgment of acquittal in the criminal case, and it was held by the Supreme Court of the United States that the plea was good. On page 443, Mr. Justice Blatchford, speaking for the court, said:

> Yet, where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit in rem by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit in rem. * * * There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant.

It will be noted that in the *Coffey case* the information in rem involved a claim to the forfeiture of the identical articles that were the basis for the criminal prosecution. We have no such situation in the case at bar. It must be further noted that in the *Coffey case* there had been a trial on the merits and an acquittal, which facts also are not present in the case under consideration. Later on the Supreme Court had occasion to construe its own decision in the *Coffey case* in the case of *Stone* v. *United States*, 167 U.S. 178, and Mr. Justice Harlan, speaking for the court, on page 184 said:

> But this court held that as the demurrer to the answer admitted that the fraudulent acts and attempts to defraud, alleged in the criminal information and covered by the verdict and judgment in the criminal case, embraced all the acts, attempts, and intents averred in the libel for the forfeiture of Coffey's personal property, the judgment of acquittal in the criminal case was a bar to the proceeding by libel.

It must be obvious that the *Coffey case* did not determine that an acquittal establishes immunity against prosecution for subsequent conduct or misconduct upon a similar charge; no judgment can do that. The *Coffey case* held, merely, that just as the Government would be estopped by a plea of former jeopardy from again prosecuting the defendants for the identical acts charged in the first indictment, so it would be estopped from bringing a proceeding in rem upon such indentical facts. And it seems clear enough that a plea of former jeopardy could hardly be sustained against an indictment charging the commission of acts occurring after the first indictment had been dismissed. And if an acquittal could not be pleaded in bar to such an indictment, on what theory can such acquittal be said to be res adjudicata on such an information in rem?

I think that the essential fallacy of the claimants' position lies in the obvious confounding of two wholly distinct conceptions, namely, that of res adjudicata and that of stare decisis. Res adjudicata constitutes a plea in bar founded upon a specific judgment determinative of a specific controversy. Stare decisis is not a plea at all. It is the rule of precedent. A person who has been indicted for buying intoxicating liquor may be acquitted upon the ground that buying liquor is no crime. If he be again indicted for buying the same liquor he may plead in bar the former acquittal. This would be a plea of former jeopardy and in its civil aspect, it is called res adjudicata. But if he be indicted for buying other liquor, he cannot plead former jeopardy, but he may demur to the indictment upon the ground that it fails to charge a crime, and then, proceeding upon an application of the doctrine of stare decisis, he may urge the former judgment of acquittal as a precedent to guide the court in the disposition of his demurrer. And it may well be that the second court, even though it be a court of coordinate jurisdiction, may disagree with the first and not permit the precedent to rule it. Had, however, the plea of res adjudicata been available then the court, whether of coordinate or of higher jurisdiction, would be compelled to give effect to it.

These considerations apply with peculiar force to the case at bar. Let us assume that ten years ago these claimants were tried upon an indictment charging them with the offense of misbranding and that such charge arose out of conditions similar to those set out in the libel. Let us further assume that they were acquitted after a trial on the merits. The most that could be said of such an acquittal would be that the court, composed of a judge and a jury, determined that the product sold by the claimants was not then misbranded within the meaning of the statute. Such a judgment might have value as a precedent, though even in such a case, the value would be highly doubtful as the court could hardly be said to have established a rule of any kind. For, it is obvious, that in a criminal case, a plea of not guilty offers a traverse to every material allegation of the indictment and an acquittal necessarily follows if the Government fails in its proof on any one essential element in its case. Thus in a criminal trial for misbranding, it may be that the Government is unable to establish the interstate character of the shipment; or that it was the defendants who did the misbranding; or that the articles were shipped at the time charged in the indictment. An acquittal eventuating upon the failure of proof beyond a reasonable doubt of any one of these necessary elements could hardly be said to adjudge that the

labels were not false in fact and fraudulent in purpose. But in the case at bar there was never even any trial and acquittal. At any rate the record discloses none. The first information was dismissed, for what reason does not appear. If there was a trial then the judgment is strangely silent concerning the matter. As for the second information the judgment shows that it was nolle prossed by the United States attorney upon the tender of the plea of former jeopardy. It may be that this record exhibits an adjudication on the merits of something, but of what I cannot tell.

It follows, for the reasons herein given, that the motion to strike out the matters alleged in paragraph 4 of the answer and annexes A, B, C, and D should be granted and an order may be submitted accordingly.

On January 8, 1930, formal order was entered by the court striking portions of claimant's answer in accordance with the memorandum decision above.

On June 24, 1930, a jury having been waived, the case came on for hearing before the court on the issues presented by claimant's remaining defense, a general denial that the product was misbranded. Having heard the evidence and arguments of counsel for the Government and claimant, the court took the case under advisement, and on October 17, 1930, handed down the following opinion sustaining claimant's prayer to dismiss the libel:

THOMAS, *District Judge.* This is a proceeding in rem against a certain drug preparation known as "Lee's Save The Baby," which name is and has been registered in the United States Patent Office for many years. The United States filed its libel for condemnation against certain bottles and their contents, shipped in interstate commerce, and prayed that the same be condemned upon the ground that they were misbranded within the meaning of the Food and Drugs Act of June 30, 1906 (34 Stat. 768), as amended by the act of August 23, 1912 (37 Stat. 416).

The libel charges that:

Said article of drugs * * * is and was * * * misbranded within the meaning of the act, * * * in that the following statements regarding the curative and therapeutic effects of the said article are false and fraudulent, (front bottle label) "Save The Baby," (back bottle label) "For Croup—apply with the hand or by saturating * * * cloth and laying it over the throat and chest; also apply over the nose. In severe cases, where relief does not follow in half an hour, give half teaspoonful internally every half hour. * * * For Sore Throat apply on the throat; also take one-half a teaspoonful internally. For coughs * * * apply on the chest, also take one teaspoonful morning and night. For ague in breast, apply to the parts affected," (carton, small) "Save The Baby * * * Croup Mixture * * * For Croup, * * * Coughs and Sore Throat * * * used in cases of Grippe, Bronchitis, Laryngitis, Tonsilitis, Pneumonia, etc.," (carton, large) "Save The Baby for Croup, Coughs, * * * Etc.," (circular) "Save The Baby * * * For Croup * * * Coughs, Tonsilitis, Bronchitis, Sore Throat and similar ailments. * * * What Mother or Father has not been alarmed when awakened in the night by the childish cry of pain and the dread sound of croup? Or who of us has not shuddered when whooping cough, pneumonia or a hard cold has racked our children with pain and coughing spasms. It was because of a child's suffering that 'Save the Baby' came into being * * * a wee girl lay seriously sick with croup * * * he administered a remedy of his own compounding * * * found * * * child completely out of danger. This physician prescribed the remedy * * * in other cases, always with gratifying results. * * * 'Save the Baby.' * * * by that name it had come to be known. * * * 'Save The Baby' for use in

* * * croup, tonsilitis, bronchitis, sore throat and all similar ailments in children and adults. * * * Use It * * * The result will be beneficial. For Adults—'Save the Baby' works * * * with as good results for adults as it does for children. The * * * relief given in coughs, bronchitis, pneumonia and other congested conditions of the head, throat or lungs * * * 'Save the Baby' * * * effective when used Hot. For Croup: * * * In severe cases, where relief does not follow in half an hour, give a half teaspoonful internally every half hour. * * * For Coughs * * * Apply on chest and throat; also take one teaspoonful morning and night. Influenza, Grippe and Pneumonia: * * * use 'Save the Baby' * * * In severe cases give a half teaspoonful internally every half hour. * * * Use 'Save the Baby' * * * For Sore Throat and Tonsilitis: Apply on the throat and along the cord that runs from behind the ear down the neck; also take one half teaspoonful internally. Take from one half to one teaspoonful internally for all chest congestions and gathering of phlegm,"—in this, that the article contains no ingredient or combination of ingredients capable of producing the effects claimed, and that the same were applied to the said article knowingly and in reckless and wanton disregard of their truth or falsity, so as to represent falsely and fraudulently to the purchasers thereof, and create in the minds of the purchasers thereof, the impression and belief, that the article was, in whole or in part, composed of, or contained ingredients or medicinal agents effective in the diseases and conditions named therein.

The jurisdictional allegations as well as the shipment in interstate commerce are admitted, but the essential and last quoted allegations of the libel as to the product are denied. Certain stipulations were filed eliminating the necessity of proving certain facts as to which it is unnecessary to make reference except as to the ingredients of the product. One of the stipulations sets forth that an analysis was made by an analyst of the United States Department of Agriculture of a sample of the shipment seized in these proceedings which shows that the composition and ingredients of the preparation are: Lard (approximately 70 percent), alcohol (approximately 6 percent), canada balsam (approximately 10 percent), volatile oils including camphor, rosemary oil, and origanum oil (approximately 15 percent).

To establish the fact that this preparation is misbranded within the meaning of the Food and Drugs Act, the Government must prove by a preponderance of the evidence: First, that the label, carton, or circular carries some statement, design, or device regarding the contents of the package or the ingredients in the mixture which is false and misleading in some particular, and second; that the statement made or the design or device carried on the label or carton or in the circular regarding the curative or therapeutic effects of the same are false and fraudulent. Such being the case the fraud alleged must be established by competent proof and by credible and convincing evidence.

The sections of the act here applicable provide as follows:

(Sec. 9, title 21, U.S.C.). "Misbranded;" meaning and application. The term "misbranded" * * * shall apply to all drugs, * * * the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular.

(Sec. 10, title 21, U.S.C.) An article shall be deemed to be misbranded: * * * In case of drugs: Imitation or use of name of other article. First. * * * Removal and substitution of contents of package, or failure to state on label quantity or proportion of narcotics therein. Second. * * * False statement of curative or therapeutic effect. Third. If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent.

It appears that the Government contends that this product contains no ingredients or combination of ingredients capable of producing the effects claimed for it and that the claims that are made for it are false and fraudulent and were applied by the manufacturers knowingly and in disregard of their truth or falsity, so as to falsely and fraudulently represent to the purchasers and create in their minds the impression and belief that the article was in whole or in part composed of or contained ingredients effective in the diseases mentioned in the carton and circular.

The claimant denies misbranding within the purview of the Food and Drugs Act and particularly denies that the statements regarding the curative and therapeutic effects of this product are false and fraudulent or were made in wanton disregard of their truth. It then affirmatively alleges that this product is capable of producing and has actually produced the curative or therapeutic effects claimed for it, and has offered credible evidence in support of his contentions.

From the quoted allegations of the libel it appears that certain words and directions contained in the circular were omitted from the libel. Under familiar rules of pleading and evidence the Government is precluded from complaining of the omitted words, but it is only fair, in order to reach a proper conclusion respecting the issues presented, that we consider the entire label and all that is contained in the so-called literature and directions which accompany the bottle as bearing upon the good faith of the manufacturer of the product, because if it appears from all the evidence, and I conclude that the claims made for this remedy are true, then it necessarily follows that they cannot be false or fraudulent.

In the use of the words "therapeutic " and "curative", as set forth in the statute, it seems clear that these words were intended by the Congress to be given their ordinarily accepted meaning and while they have a certain meaning to the expert doctor, nevertheless they are a part of the vocabulary of any intelligent person. Therapeutic to the medical world means to heal; to make well; to restore to health. It is that branch of medicine dealing with the proper use of the right medicines in the treatment of diseases. The medical student studies "Therapeutics" for the purpose of learning about different medicines to prescribe for the many ills to which the flesh is heir, in order to assist nature to make a sick patient well. The ordinary definitions found in the dictionaries are as follows: "Having healing qualities; curative; alleviative; a medicine efficacious in curing or alleviating disease." Webster defines therapeutics as "that part of medical science which treats of the discovery and application of remedies for diseases." The word "curative" is not found in the medical dictionaries. The regular dictionaries define the word as "possessing power or tending to cure; relating to the curing of disease; relating to or employed in the cure of disease; tending to cure." In none of the definitions is there a suggestion that the words "therapeutic" or "curative" convey the meaning of absolute cure. The testimony of the experts shows that a therapeutic or curative agent is something which alleviates or tends to cure a disease, and that, except in a few instances, there is no medicine which, of itself, is an absolute cure for disease.

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With these definitions in mind we turn to section 6 of the act (sec. 7, title 21, U.S.C.) which defines "drug" as follows:

The term "drug," as used in * * * this title, shall include all medicines and preparations recognized in the United States Pharmacopoeia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of * * * man * * *

Therefore, "Lee's Save the Baby" is a drug within the provisions of the statute, which is intended by its manufacturers for use in the "cure, mitigation, or prevention of diseases in man."

Before analyzing the testimony it is important to note what the Supreme Court has held as to what are and what are not false and fraudulent statements within the purview of the act. In *Seven Cases* v. *United States*, 239 U.S. 510, Mr. Justice Hughes said, page 517:

Congress deliberately excluded the field where there are honest differences of opinion between schools and practitioners. Cong. Rec. 62d Cong. 2d sess., vol. 48, part 12, Appx., p. 675. It was, plainly, to leave no doubt upon this point that the words "false and fraudulent" were used. This phrase must be taken with its accepted legal meaning, and thus it must be found that the statement contained in the package was put there to accompany the goods with actual intent to deceive—an intent which may be derived from the facts and circumstances, but which must be established. Id. 676. That false and fraudulent representations may be made with respect to the curative effect of substances is obvious. * * * It cannot be said, for example, that one who should put inert matter or a worthless composition in the channels of trade, labeled or described in an accompanying circular as a cure for disease when he knows it is not, is beyond the reach of the law-making power. Congress recognized that there was a wide field in which assertions as to curative effect are in no sense honest expressions of opinion, but constitute absolute falsehoods, and in the nature of the case can be deemed to have been made only with fraudulent purposes.

In the light of this decision it seems clear that if a drug mixture contains certain ingredients which the evidence shows have a therapeutic or curative value in the treatment of the diseases for which it is recommended, then there is no misbranding within the purview of the statute.

Before beginning an examination of the evidence it is important to note that one of the claims made and the arguments advanced by counsel for the Government, both in their opening statement at the trial and subsequently in their brief, are predicated upon a wrong premise. Whether by mistake or design I do not say, but the result must be the same in either instance. If by mistake, it only shows that the preparation of the case was not careful, and the argument set forth in the brief was advanced only after a cursory examination of the evidence and the carton which is in evidence, the wording of which formed part of the basis for the libel. Attention is now directed to what is actually and fully printed in the literature accompanying each bottle.

On the face of the carton we find the words, "Lee's Save the Baby contains 8 per cent Alcohol U. S. P." On the back of it are the words: "Lee's Save the Baby. An Invaluable Croup Mixture Made of Pure Simple Ingredients. Can Be Used Internally Or Externally. Use It Hot." On one side we find the words: "For Croup, Snuffles, Colds, Coughs and Sore Throat. Frequently Used In Cases of Grippe, Bronchitis, Laryngitis, Tonsilitis, Pneumonia, Etc. Absolutely Safe For Children and Adults." While the word "Invaluable" was left out of the libel, the record shows that counsel for the Govern-

ment, in his opening statement as to what he expected to prove, said, inter alia: "The rear label again has the word or the name, 'Lee's Save The Baby' and a pictorial design of a woman holding a baby and following are the words, an 'infallible' croup mixture, etc."

In their brief, on page 3, counsel again quote as follows: "Rear panel: an infallible croup mixture." Further on, in urging the argument, they say: "The sense of the entire labeling 'sounds' the curative idea and is augmented by the use of such terms as 'infallible,' 'miraculous,' 'remedy,' etc., which are to be found in the general language of the circular."

The label shows clearly that the word used by the proprietors is "invaluable" and not as Government counsel asserted "infallible." Invaluable means of great value, very useful, inestimable, and the testimony of the experts leads to no other conclusion than that this mixture is "an invaluable croup mixture." Infallible, as defined by Webster, means indubitable, sure, certain, not capable of erring, entirely exempt from liability to mistake. If that word was used in the literature the Government's argument on this point would be sound, but, as pointed out, "invaluable" is the word actually used and there is nothing synonymous about the two words.

The testimony is conclusive that thyme, Canada balsam, commonly known as turpentine, camphor, and lard used hot, are comforting and beneficial and that they alleviate the pain and the suffering incidental to the diseases mentioned, and that these ingredients do have therapeutic and curative properties which aid nature in overcoming the disease. While it is true that the act was intended to protect the public from deception and fraud in connection with the sale of proprietary medicines, and while it is true that when a preparation is put upon the market which it is claimed has therapeutic and curative value it is equally true that it must appear from the evidence that the product has some beneficial action upon the disease mentioned. The great weight of the testimony of the medical experts shows that each one of the ingredients in this mixture exerts some beneficial influence upon each one of the diseases specified.

It is generally known and the evidence shows that with very few exceptions there is no known cure, using that word strictly, for any disease. Nature, supplemented and aided by proper medicines, careful nursing, and proper diet does the work of curing. It has been clearly established that camphor, thyme, Canada balsam in a base of lard are remedial agents of value in the treatment of croup, coughs, colds, snuffles, sore throat, tonsilitis, bronchitis, and pneumonia, and are used by reputable physicians in the treatment of these diseases. All the experts testify and the counsel for the Government concede that "Save the Baby," when applied externally acts as a rubefacient or counter-irritant, bringing an increased blood supply to the particular area of application, thereby soothing the patient and making him feel more comfortable; and that a further soothing effect, a symptomatic relief is produced by the inhalation of camphor fumes given off by the preparation; that when taken internally it acts as a carminative, giving a feeling of warmth and well being to the stomach, and the camphor present acts a slight cardiac stimulant.

The labels, cartons, and circulars in evidence recommend the use of this compound in the treatment of diseases of the respiratory

system, indicate how it is to be used and assert that its use has been found beneficial. Nowhere is there any claim made that it will cure. There is no language anywhere which could possibly be understood to convey the idea that it will cure. And what to my mind completely refutes the Government's claim of fraud and falsity is the language used by the manufacturer which is directory to the person disposed to use the remedy and is found in that part of the circular headed "Directions for Use." After giving directions as to its use in cases of croup, snuffles, coughs, and colds it says: "Influenza, Grippe and Pneumonia. For these serious illnesses it is wise to call a doctor soon as possible. Pending his arrival use 'Save the Baby,'" and then follows the directions as to the use of the remedy pending the doctor's arrival. Also the words, "Keep a bottle of 'Lee's Save the Baby' handy for Emergencies."

The proof in this case shows that this compound is beneficial and has therapeutic and curative value in cases of croup, coughs, colds, and snuffles. On direct examination one of the medical experts for the libelant testified as follows:

Q. Prior to being asked to appear as a witness in this case, have you ever heard of the preparation known as "Lee's Save the Baby"?

A. I have.

Q. Did you ever administer it to a child that you have been called upon to treat?

A. I have been asked by mothers whether I would give them permission to use it and I have consented.

Q. Do you know in a general way or specifically, the constituent ingredients of "Lee's Save the Baby"?

A. I do.

Q. Do you have any objection to the use of "Lee's Save the Baby" in your own mind?

A. No.

Q. Are preparations containing camphor, Canada balsam, and volatile oils on a greasy base used by physicians in the treatment of pathological conditions of the respiratory system?

A. They are used in the treatment as a soothing treatment, not as a curative treatment.

In other words, conceded as it is by all that there is no cure for these respiratory diseases the best the doctors can do to restore normal health is to aid nature with nursing, diet, and medication, because it is nature that effects the cure. If the above mentioned medicines are those, or some of those used by doctors in the treatment of respiratory diseases, and they are the same ingredients as are found in the product under discussion, how can it fairly be asserted that there is anything false or fraudulent in the statements made by the manufacturer as appears in the labels, cartons, and circulars in evidence in this case? If a Government expert medical witness treating children with the aforementioned diseases allows mothers to use the remedy, knowing the ingredients, and has no objection in his own mind to the use of this product and testifies that camphor, Canada balsam, and volatile oils on a greasy base are used by him and other physicians in the treatment of these diseases, I conclude that the Government has utterly failed to sustain the allegations of its libel.

As further enlightening, let us turn to the testimony of one of the doctors who testified in behalf of the claimant and one who has had thirty years' experience as a specialist in children's diseases and an expert of learning and long experience in the treatment of the diseases under discussion. From his testimony it appears that practically all

of the ingredients in this compound appear in the United States Pharmacopeia and that camphor has a substantial standing in materia medica and is used quite universally; that balsam and thyme oil are used quite commonly in the treatment of the diseases of the respiratory tract; and that camphor is one of our very valuable therapeutic agents. With reference to the value of camphor it appears from the evidence that its action both internally and externally is beneficial. Externally it is rubefacient and produces, when applied to the skin, congestion, redness, and is like a counterirritant bringing the blood to the surface and gives relief from pain as it has the effect of an anesthetic and such is the recognized action of the drug. Internally, it is used as a stimulant for the heart and it is also used a great deal in nose syringes with a base of mineral oil which gives relief. When used externally according to the directions, i.e., put on hot, the volatile part of thyme oil, camphor, and turpentine are inhaled and this action soothes the mucous membrane of the throat and nose. It is difficult to reach the mucous membrane of the larynx when the symptom of cold or croup originates but by inhaling the volatile oils that are accumulated from the external application of this remedy congestion and irritation are relieved and the patient derives a benefit.

After dividing croup into two classes, true and false, we find that cases of true membraneous croup are now rare because of the introduction of antitoxin, so that false croup is a common complaint among children, and the evidence abundantly justifies the conclusion that the compound complained of is in use by doctors, and in the case of one doctor of wide experience and learning who testified here that it is used in his own household.

Dr. Shaw for the claimant, a witness of extended experience in the treatment of children's diseases, testified as follows:

Q. Now, I have the impression from the Government witnesses that there was some distinction, some distinction in the professional vocabulary between the cure so-called, the specific for a disease and the things that alleviated the thing, and tended to recover from it; has this compound here any therapeutic property which would be of value in cases of false croup?

A. Yes, sir.

Q. What are they?

A. The camphor, the turpentine, the hot application of the lard, which is very penetrating, the fumes that come from it.

Q. Have you ever seen or heard of this being used as an emetic in case of false croup?

A. I have.

Q. What was the reaction there?

A. The child would promptly vomit after two or three doses of an internal dose.

Q. And that would be the combination of hot lard and thyme oil and the turpentine, and all that?

A. Yes.

Q. And that vomit tends to bring that gathering or phlegm from around the throat?

A. It relaxes the muscular spasm.

Q. And then the croup is over?

A. Yes.

Q. About the use of this in snuffles in small children, it is recommended for snuffles, I think that is one of the words that are on there. Have you ever had any experience with the product in that way?

A. I never have, although I prescribe a preparation that contains a little menthol and camphor and a little iodine for the inhalation in the nose. It is something I have used for years and years.

Q. And camphor, for instance, rubbed on has a certain therapeutic value for the treatment of colds in the head?

A. Yes.

Q. Not only from the fumes that it gives, but the direct action of the drug on membrane; is not that true?

A. Yes, sir.

Q. And thyme oil and some combinations of turpentine products are recognized in the United States Pharmacopeia, are they not, as therapeutic agents for whooping cough?

A. Yes, sir.

Q. Also for the common cold?

A. Yes, sir.

Q. Taking up the question of pneumonia, pneumonia appears on that. What do you say as to the value of this particular product in the treatment of pneumonia, in the kind of pneumonia 1, 2, 3, and 4?

A. I will answer that negatively. It can do absolutely no harm. It is a self-limiting disease.

Q. And it would not do any harm to put a hot pack on the chest?

A. No.

Q. And that tends to relieve the patient's suffering; is that true?

A. If there is pain, and pleurisy is associated with pneumonia, the use of the counter-irritants, such as mustard or turpentine applied externally, produces this redness of the skin that is spoken of, and that does give decided relief.

Q. Of course, if you can relieve the painful symptons, you are helping the patient to fight the disease, are you not?

A. Yes, sir.

Q. Influenza and grippe are two of the claims here. Does anybody know what influenza is?

A. I do not.

Q. Does anybody know what grippe is?

A. I do not.

Q. But in cases of influenza and grippe, would the turpentine products, Canada balsam, for instance, would that have a tendency to relieve the congested condition of the lungs or the throat or the nose, as the case may be?

A. I believe it would.

Q. Would you call that a therapeutic action or a mechanical action?

A. Therapeutic.

Q. You think it would be therapeutic?

A. Yes.

Q. What do you say in that regard as to camphor, in those diseases; has that any therapeutic value on the painful symptons which accompany what we call influenza and grippe?

A. It would.

Q. Am I right in saying that when I say a thing has a therapeutic value, it means that it relieves some present inward condition?

A. Or symptom, yes.

Q. I want to get straight on the word. Now, what is the usually accepted treatment in pediatrics, for, we will say, a child who shows symptoms of discomfort, which, when you arrive there, you diagnose and say, "I think this child has an attack of the grippe, or 'flu'," or something of that kind. What is the usual treatment in such cases as that?

A. That was outlined very well this morning by—absolute rest in bed, drinking fluids and treating any symptoms as they arise, giving comfort and inhalations and the use of other remedies that are not to be considered here.

Q. And in your opinion, would the use of this compound here tend to mitigate the conditions that are present in these cases?

A. I believe it would.

Q. Or any similar compound or drug?

A. Yes, sir.

Q. Have you ever seen it used when you get to a patient, when you are called; have you ever found this product having been used in cases of "flu"?

A. Very frequently.

Q. What do you find the condition to be when you get there? That is, how were they using it?

A. Usually heavily rubbing on the chest, I think usually the external use is more prevalent than the internal use of it. That has been my experience; that they rub the preparation on the chest or else put a little on a flannel and put it on the upper part of the chest, and put it around the throat and other places.

Q. If they have used this preparation internally, of course a certain amount of camphor has been absorbed into the patient's system?

A. A small amount.

Q. What effect does camphor have on a child's condition; what is the effect of the drug itself; does it stimulate?

A. It is a stimulant. The word as used this morning is a carminative and relieves intestinal conditions.

Q. What about thyme oil present in the origanum oil; is that indicated as a therapeutic agent in some cases?

A. Thyme oil is an antiseptic. It is rather soothing if taken internally and inhaling it relieves the congestion of the mucous membrane on account of its soothing effects.

Q. Now, the Canada balsam, we will call it turpentine for short; has that a certain well-recognized therapeutic value in cases of that kind?

A. Yes, that comes under the term of turpentine. There are two classes of that, and that is recognized, and it is the basis of a good many remedies.

Dr. Schroeder, of New York City, who prior to this case had never heard of this remedy, has had a large and extended practice for many years in the treatment of children's diseases and occupies a prominent place in the medical profession. After learning of the ingredients and the proportions he testified that it

Is a very good remedy. * * * There is not a substance in it which is not used in medicine or which is not recognized, and you not only find it in the American Pharmacopeia, but find most of them in the French and Italian and German. The Canada balsam or turpentine has long been recognized as being distinctly helpful in all respiratory infections. * * * A great many cough expectorants have Canada balsam in them and it is distinctly useful as an expectorant. So far as camphor is concerned, everybody knows it is valuable. It depends chiefly on this fact, that it is volatile, and everything that can diminish the choking up of the nose so that you breathe more easily, makes you feel better and when you feel better you cure your disease faster.

Regarding the therapeutic effect of this remedy the doctor testified as follows:

Q. Of course this compound here in and of itself is not a cure for anything, there is no such claim; but I want to know from you whether it has the ingredients in it which will have some curative effect and some therapeutic effect on the condition that you describe as the inflammation of the larynx?

A. There is not a single solitary thing in that mixture that does not serve a useful purpose, so far as I can judge from its make-up, and everything in there seems to have been worked out with a nicety. Since I have learned how long this stuff has been used, that is quite amazing to me. I think it is an unusually nice preparation; and I am particularly pleased to see lard used as a base, because most people use petroleum, which is the basis of Vick's, and lard is the best emollient we have. You have gone all over various substances which have in them thyme; and of course so far as whooping cough is concerned, I do not believe anybody in New York City at least has not used or uses mixtures for whooping cough, diatussin pertussin, and both of these are extracts from thyme or oil of origanum; so nobody claims that thyme is a specific for whooping cough; but so far as anybody can judge, it will serve a very useful purpose, and I have been absolutely amazed at some cases that were very much helped.

Doctor Mullins, another expert, confirms the views expressed by Doctors Shaw and Schroeder, and testified that he has used this product in his own family and on his own children for 14 years, and that in his opinion, "Its use shortens the course of some of the respiratory diseases," and that "It might shorten the course even of pneumonia by using the percent of thyme oil, being a respiratory antiseptic; by its carminative action and the sterling effect of the camphor."

In addition to all this, a number of nurses testified to its use over a period of years with successful results.

I see no merit in the attack on the trade name. There is nothing misleading about it. The title is "Lee's Save the Baby." Its use is not limited to babies. Reading the labels and circulars and directions it is clear that the remedy is equally beneficial for adults as for

children or babies. The descriptive matter says so. Its use is recommended for any person young or old who may be afflicted with any of the diseases of the respiratory tract. The picture on the label and the carton offend no Federal statute. While it is true that the mere fact of trade mark does not take the product out of the operation of the act, nevertheless, when it appears that the product does not in any way violate any of the provisions of the statute, the rights of the owners of the trade mark must have consideration and they may not be deprived of their property rights in order to meet some untenable position taken by some one in authority to whom is delegated the power to invoke the aid of the statute.

In conclusion we revert to the allegations of the libel. They charge that there is a misbranding in that this article

> contains no ingredient or combination of ingredients capable of producing the effects claimed, and that the same were applied to the said article knowingly and in reckless and wanton disregard of their truth or falsity, so as to represent falsely and fraudulently to the purchasers thereof, and create in the minds of the purchasers thereof, the impression and belief, that the article was, in whole or in part, composed of, or contained, ingredients or medicinal agents effective in the diseases and conditions named therein.

The Government has failed to prove that the allegations of its libel are true. On the other hand the evidence abundantly shows that every ingredient in this mixture has some therapeutic or curative value in connection with the treatment or mitigation of the ailments and diseases in which the use of this remedy is indicated or recommended on the label and in the circular contained within the package. Nor is there proof that the package or circular contains any statement, design, or device regarding the curative or therapeutic effect either of the compound itself or any ingredients therein contained which is false or fraudulent. As the name is distinctive and not descriptive it does not offend the statute.

While not exactly in point, the opinion written by Judge Denison, speaking for the Circuit Court of Appeals of the Sixth Circuit in *Raladam Co.* v. *Federal Trade Commission*, decided June 28, 1930, is interesting and bears out in a general way the argument herein advanced and the conclusions reached.

The libel is dismissed and the seized goods are ordered returned.

Submit decree accordingly.

On February 21, 1931, a decree was entered by the court ordering the libel dismissed. On April 19, 1931, the court made the following findings of fact and conclusions of law:

THOMAS, *District Judge.* After filing the opinion deciding this case adversely to the plaintiff, both sides submitted requests for special findings of fact and conclusions of law in accordance with the new admiralty rule 46½.

On February 6, 1931, this court filed a memorandum of decision denying the requests for special findings of fact and conclusions of law for the reasons therein stated.

While this court was sitting in New York City in March 1931, counsel for the Government, together with special counsel for the Department of Agriculture, appeared ex parte before the court and strenuously urged that this court file special findings of fact and conclusions of law because of the importance of the case, and assured the

court at that hearing that the plaintiff intended in good faith to appeal to the Circuit Court of Appeals from the decision of this court handed down on October 17, 1930.

Therefore the court has consented to file special findings of fact and conclusions of law, and they are as follows:

1. That the subject matter of this proceeding is a number of bottles of a preparation known as "Lee's Save The Baby", which is a mixture or compound manufactured, sold, and distributed by William W. Lee & Co., a copartnership composed of Samuel C. Ulcher and Carrie L. Ulcher, residing and doing business in Watervliet, Albany County, N.Y., all of whom intervened as claimant of the seized goods and defended against the libel.

2. That said bottles were, on or about the 15th day of January, 1929, shipped by William W. Lee & Co., from Troy, State of New York, to New Haven, State of Connecticut, and while they remained unsold and in the original unbroken packages in the possession of the Charles W. Whittlesey Co., at New Haven, Conn., 31½ dozen small-size bottles and 12⅔ dozen large-size bottles were seized by the United States marshal pursuant to a libel filed by the United States of America and process duly issued out of this court.

3. That the preparation or substance contained in said bottles, seized as aforesaid, consisted of the following ingredients in the following proportions: Lard (approximately 70 percent), alcohol (approximately 6 percent), canada baslam (approximately 10 percent), volatile oils including camphor, oil of rosemary, and oil of origanum (approximately 15 percent).

4. This product is packed, sold, and shipped in interstate commerce in bottles to which is affixed a label composed to two printed sheets. The front sheet of the label reads:

"Lee's Save The Baby." Reg'd U.S. Patent Office. Trade Mark. Contains 8% Alcohol U.S.P. ——Size. Copyright 1914 by William W. Lee & Co. N.Y.C.R. No. 297, Troy, N.Y., and this sheet of the label also contains the facsimile signature of William W. Lee, together with a picture of a woman with a baby in her arms.

The rear sheet of the label on the bottle reads as follows:

Directions. For croup, apply with the hand, or better, by saturating a flannel cloth and laying it over the throat and chest; also apply over the nose. In severe cases, where relief does not follow in half an hour, give a half teaspoonful internally every half hour. For snuffles, apply over the nose. For sore throat, apply on the throat; also take one-half a teaspoonful internally. For coughs and colds apply on the chest, also take one teaspoon morning and night. For ague in breast, apply to the parts affected. Shake well before using, and keep in a warm place, as it solidifies when cold. In all cases apply hot.

5. This bottle is wrapped in a circular containing directions for use of the mixture or compound in English as well as in six foreign languages, and reads as follows:

"Lee's Save The Baby" Reg'd U.S. Patent Office Trade Mark For Croup, Colds, Coughs, Tonsilitis, Bronchitis, Snuffles, Sore Throat and similar ailments. [Facsimile signature of William W. Lee, together with a picture of a woman with a child in her arms]. * * * Dear Parent: What Mother or Father has not been alarmed when awakened in the night by the childish cry of pain and the dread sound of croup? Or who of us has not shuddered when whooping cough, pneumonia or a hard cold has racked our children with pain and coughing spasms. It was because of a child's suffering that "Save The Baby" came into being more than fifty years ago. In a village near Troy, N.Y., a wee girl lay seriously sick

with croup. The doctor, who had done his best to relieve her, had given up hope for her recovery. The father, Mr. William W. Lee, refused to admit defeat. In desperation, he administered a remedy of his own compounding * * * the doctor on his morning call to his surprise found a happy child completely out of danger. This physician prescribed the remedy for both children and adults in other cases, always with gratifying results. Soon its reputation spread through the community. Neighbors came repeatedly to Mr. Lee for "some of that medicine to save the baby." He gave it freely to all comers. Soon it became necessary to mix it in larger quantities to supply the demand. In a short time the calls became so many and from such distant points that Mr. Lee made up a quantity and bottled it, placing it in a few drug stores in convenient locations. The bottles bore only a handwritten label with just the words "Save The Baby," for by that name it had come to be known. Such was the beginning of "Save The Baby." By sheer force of merit alone, just by one mother telling another, has the business grown so that thousands of bottles are used each year by mothers to help their suffering children. "Save The Baby" is now sold in every State of the Union and exported to foreign countries. The voluntary testimonials Mr. William W. Lee received during his life, and which the present manufacturers (his children) continue to receive, fully warrant us in recommending "Save The Baby" for use in cases of colds, croup, "snuffles," tonsilitis, bronchitis, sore throat and all similar ailments in children and adults. "Save The Baby" always has been a family product. For more than half a century it has been compounded and still is being made by members of Mr. Lee's family from his original formula, the ingredients are simple and the purest and best money can buy. "Save The Baby" is harmless. It can be used externally and internally. Use It Freely And Use It Hot. The results will be beneficial. For Adults—"Save The Baby" works just as fast and with as good results for adults as it does for children. The quick relief given in coughs, colds, bronchitis, pneumonia and other congested conditions of the head, throat, or lungs often seem miraculous. Use it freely as directed and always Use It Hot. Directions for use. Shake well before using and keep in a warm place as "Save The Baby" solidifies when cold. This does not impair it but "Save The Baby" is most effective when used Hot. For Croup: Heat a flannel cloth, saturate it with hot "Save The Baby" and lay over throat and chest or rub the remedy in with the hand. Also apply over nose and back. In severe cases, where relief does not follow in half an hour, give a half teaspoonful internally every half hour. Keep patient warm and away from drafts. For Snuffles: Apply over nose and sniff a little into nostrils. For Coughs and Colds: Apply on chest and throat; also take one teaspoonful morning and night. Influenza, Grippe and Pneumonia: For these serious illnesses it is wise to call a doctor as soon as possible. Pending his arrival use "Save The Baby." Heat a flannel cloth, saturate it with hot "Save The Baby," and lay over chest and back, or rub the hot remedy in by hand. In severe cases give a half teaspoonful internally every half hour. Keep patient warm and protected from drafts. After doctor arrives use "Save The Baby" as directed by him. For Sore Throat and Tonsilitis: Apply on the throat and along the cord that runs from behind the ear down the neck; also take one half teaspoonful internally. Take from one half to one teaspoonful internally for all chest congestions and gathering of phlegm. Keep a bottle of "Save The Baby" handy for emergencies. Use it freely and use it Hot. Made only by William W. Lee & Company, Troy, N.Y. For sale at All Retail Drug and Country Stores. Small Size, 35 Cents Per Bottle. Large Size, 70 Cents Per Bottle. The 70¢-size is more economical to buy, as it contains 2½ times as much as the 35¢-size. Beware of Imitations: The genuine "Save The Baby" is always sold in bottles with labels bearing the facsimile signature ff William W. Lee across the face. Accept No Substitute. Any infringement of the copyrighted label or our trade mark will be vigorously prosecuted. Contains 8 Per Cent Alcohol By Volume As a Solvent and Preservative.

6. The bottle is wrapped in the circular and packed in a carton upon the front panel of which appears a facsimile of the front label on the bottle.

On the left side panel of the carton the following words appear:

For Croup, Snuffles, Colds, Coughs and Sore Throat. Frequently Used in Cases of Grippe, Bronchitis, Laryngitis, Tonsilitis, Pneumonia, Etc. Absolutely Safe for Children and Adults.

On the right side panel of the carton the following words appear:

The genuine "Save The Baby" Bears the Facsimile Signature of William W. Lee across the face of the label. Accept no substitutes.

The rear panel of the carton bears a facsimile of the label described above, with the following words:

Established 1875. An invaluable Croup Mixture made of Pure Simple Ingredients. Can be used Internally or Externally. Use it Hot.

The top panel of the carton bears the words:

Save The Baby. For Children and Adults.

The bottom panel bears the words:

Announcement. We knew of no way to improve "Save The Baby" itself, but we have adopted this new form of packing to make our package more attractive, and for the convenience of our dealers. Wm. W. Lee & Co.

7. The single bottles containing the mixture or compound after being packed in the circular and carton just described, are placed in larger cartons containing 1 dozen bottles each, and the four side panels of this container read:

One Dozen Lee's Save The Baby. For Croup, Coughs, Colds, Etc. William W. Lee & Company, Troy, N. Y. Large Size [or Small Size, as the case may be].

8. The cartons containing a dozen bottles are then enclosed in a larger carton, the front and rear panels of which read as follows:

12 Dozen Large Size [or Small Size, as the case may be], Save The Baby, Manfd. By Wm. W. Lee & Co., Troy, N. Y.

One side panel reads:

Glass, Handle With Care.

The other side panel reads:

Samson Sixty Five. Buffalo Box Factory, Buffalo, N. Y. Certificate of Box Maker. This Box Conforms to all Construction Requirements of Consolidated Freight Classification. Resistance 200 pounds per Square Inch (Bursting Test) Dimension Limit 65 inches. Gross weight Limit 65 pounds. This Box exceeds 250 lbs. test!

9. The name "Lee's Save The Baby" is and has been registered and copyrighted in the United States Patent Office for many years last past, and that trade mark and trade name is a property right belonging to these claimants.

10. The mixture or compound itself is an article of drugs within the purview of the food and drugs act, and all the ingredients contained in it have some curative and therapeutic effect in the treatment or mitigation of the diseases and ailments mentioned on the label and on the carton or cartons and in the circular wherein the product is packed for shipment and sale.

11. The labels on the bottle itself, the circular wherein it is wrapped, and the cartons wherein it is packed, and shipped, contain no statement, design, or device regarding the curative or therapeutic effect either of the compound itself or any ingredient therein contained, which is false or fraudulent.

Conclusions of law: 1. The product contained in the bottles seized as aforesaid is a drug within the meaning of the act of Congress of June 30, 1906, as amended by the act of August 23, 1912.

2. The bottles seized in this proceeding are not misbranded within the purview of the act ot Congress mentioned in paragraph 1.

3. The name "Lee's Save The Baby" is a distinctive and not a descriptive name and offends no Federal statute.

4. The statements appearing on the carton, bottle label, and circular accompanying each of the bottles of "Save The Baby", seized as aforesaid concerning the curative or therapeutic effect of the article, are not false and fraudulent within the meaning of the Act of Congress of June 30, 1906, known as the "Food and Drugs Act", as amended by the act of August 23, 1912.

5. The libel is dismissed and the seized goods are ordered returned to the claimant.

CHICHESTER CHEMICAL CO. ET AL. v. UNITED STATES

(Court of Appeals of District of Columbia, Apr. 6, 1931)

49 Fed. (2d) 516

Appeal from the Supreme Court of the District of Columbia. Libel by the United States for condemnation of certain drugs as misbranded in violation of the Food and Drugs Act. From an adverse judgment, libelees appeal. Reversed.

GRONER, *Associate Justice.* This is a libel filed by the United States August 20, 1920, to condemn certain drugs, known as "Chiches-ters, Diamond Brand, New Style Pills", as misbranded, in violation of the Food and Drugs Act. There was a trial to a jury in the court below, and a verdict and judgment in favor of the Government. An amended libel was filed November 28, 1921, which charged that the drug was misbranded in that the booklet placed in each package of pills contained statements which were false and fraudulent within the intent and purpose of section 8, paragraph 3, of the act (act of June 30, 1906, ch. 3915, sec. 8, 34 Stats. 771, as amended by act of Aug. 23, 1912, ch. 352, 37 Stats. 416, 21 U.S.C. sec. 10). The statements which the libel charges were false and fraudulent are as follows:

> Relief for Ladies. * * * Worth proved * * * Reliable. Effective * * * a standard, reliable remedy for functional derangements of the female organism. * * * a standard and reliable remedy * * * for Amenorrhoea (Suppression of the menses, due to colds, ill-health and other morbid causes). * * * For Dysmenorrhoea (Painful or scanty menstruation). The intensity of suffering varies. In some, the pain is moderate, continuing only a few hours, or it may be agonizing as to cause fainting, and undermine the patient's health. In all such cases, we earnestly recommend that a regular course of treatment with Chi-ches-ters Diamond Brand Pills be taken at each period for three or four months, when our remedy will be found to give lasting benefit and genuine relief * * * To prevent difficult, painful, over profuse and other morbid menstrual conditions, and to keep this important function normal, take one pill three times daily for a few days before the expected re-appearance of the menstrual flow. Our Diamond Brand Pills can be confidently be depended upon * * * Worth any money to suffering females. * * * No lady should think of being without this valuable remedy, and avoid long suffering. * * * Can not be surpassed * * *. For severe pain they cannot be surpassed for relief given * * * they are truly wonderful. * * *

Section 8 of the Drugs Act, as amended (21 U.S.C.A. sec. 10), provides:

> That for the purposes of this Act an article shall also be deemed to be misbranded: In case of drugs: * * * If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent.

The assignments of error on this appeal relate, first, to the refusal of the trial court to permit to be read in evidence letters of instruction and directions from appellant to his attorney, written between the years 1908 and 1920, and a certain other letter from appellant to Drug Inspector Kathe, the purpose in offering the letters being to show appellant's good faith in the preparation of its advertising literature; second, the admission in evidence by the court, over the objection of the company, of a certified copy of a record of the Department of Agriculture containing an alleged formula, or list of ingredients entering into the composition of the pills; third, that the court erred in so broadening the inquiry before the jury as to permit the Government to show that the pills were useless in cases of menstrual trouble caused by cancer, tuberculosis, and other diseases, notwithstanding a fair construction of the language used in the pamphet confined its claims to value as a cure for amenorrhoea due to colds, anemia, and other like causes; and, finally, that the court erred in submitting the case to the jury at all because the evidence failed to show intentional fraud.

The pills were first put on the market in 1881, and were manufactured for the then owner of the formula by Parke, Davis & Co. Since 1915 they have been manufactured by Arner & Co., who are said to be the largest manufacturing chemists in the United States. The challenged literature was changed from time to time, but had been used as it was when suit was brought for several years. The pills are said to contain 4 ingredients, namely: 2 grains of extract of cotton-root bark, one fourth grain of extract of hellebore, one half grain of iron sulphate, one-half grain of aloes.

Since, after careful consideration, we have reached the conclusion that the court erred in rejecting the letters from appellant which were offered in evidence, we shall discuss the other assignments only as they relate to the first.

The rejected correspondence between Chichester, who then owned the formula, and his counsel began in February 1908—12 years before the institution of the suit in this case. The first letter in the correspondence directed counsel to deliver to the head of the Bureau in Washington copies of the decisions in three Federal cases involving infringements in which the Chichester Company had been successful, and directed him to go over these decisions with the law officers of the Government. The letter also noted an enclosure of advertising matter which had been revised by counsel, and requested that counsel would confer with the Department and obtain its directions so that all necessary changes in its printed matter could be made. Another letter was dated in 1915, in which attention was called to the fact that new booklets were being gotten out, and requesting that these be gone over carefully to "see whether there is anything in any of it that might for any reason be regarded as 'repugnant' to the Federal or State officials within whose purview such matters come", and in-

structing counsel to "go over it again and strike out or change or modify any part of it that in your best judgment might be open to criticism." And again in the latter part of 1915 a letter to the effect that "in view of increasing strictness of the censorship of all such matter in connection with proprietary or patent medicines it may be well for us to have you go over them again and eliminate anything and everything that in your judgment might be in any way repugnant to the powers that be." And still again in 1916, instructions that you again scan carefully to see if anything should be taken out or added to in order to make sure that nothing in either piece will conflict with any existing laws, regulations, or decisions"; and, at a later date in the same year, "we are very glad * * * that it will not be necessary * * * to throw away the printed matter which we have gotten out." And in 1917, the excluded letter to the Government inspector, after noting the enclosure of advertising matter, labels, etc., stated: "If there is anything further you would like from us in regard to our business or any of our preparations, please let us know and we shall be glad to furnish it."

It is quite true that the court permitted the letters of counsel in response to the excluded letters to be introduced in evidence, but the admission of the latter gave only half of the picture, and tended to confuse, rather than to explain, the issue, which was, as we shall see, whether appellant was guilty of fraudulent intent in the advertisement and sale of its drugs.

We think the fact that the obligation imposed by the act on the Government involved proof of actual intent to deceive—an intent which may be derived from the facts and circumstances, but which must be established (*Seven Cases* v. *U.S.*, 239 U.S. at page 517, 36 S.Ct. 190, 60 L.Ed. 411, L.R.A. 1916D, 164)—takes the question of the admissibility of the letters out of the established rule that the statements of a party, oral or written, which are self-serving, are not admissible in his favor. In such circumstances, it is not unusual or improper to admit evidence of his declarations or acts fairly indicative of the existence of the mental state in which he did a particular thing. "Whenever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party" (*Connecticut Mut. Life Insurance Co. of Hartford Connecticut* v. *Hillmon*, 145 U.S. 295, 295, 12 S.Ct. 909, 912, 36 L.Ed. 706. See, also, *Butler* v. *Watkins*, 13 Wall. 456, at page 464, 20 L.Ed. 629).

If it be conceded, as apparently the trial court thought, that the test of the good faith of the advertising literature, which the Government declares is fraudulent, embraces the question whether the advertisement held out the pills as a "cure-all" for amenorrhea, obviously little, if any, evidence would have been necessary to prove the falsity of such a representation, for it may be assumed that the most ignorant person would know that no medicine which science has discovered is capable of relieving a disease, or sympton, whichever it may be called, produced sometimes by cancer, tuberculosis, pernicious anemia, lead poisoning, or induced by misplaced organs, or no organs, but in the view we think may be taken of the fair import of the advertising language which the Government points to as the head and front of the

offending—namely, "a standard and reliable remedy for amenorrhea (suppression of the menses due to colds, ill-health, and other morbid causes"—the language "other morbid causes", when read in connection with the preceding language, may fairly be construed to mean "other *like* causes", that is to say, other irregularities of the menstrual function of the same general nature as those particularly specified. "When an author makes use, first, of terms, each evidently confined and limited to a particular class of a known species of things, and then, after such specific enumerations, subjoins a term of very extensive signification, this term, however general and comprehensive in its possible import, yet, when thus used, embraces only things 'ejusdem generis'—that is, of the same kind or species—with those comprehended by the preceding limited and confined terms" (3 Words and Phrases, 1st Ser., p. 2328).

And, since the advertising matter does not guarantee a cure but is held out only as a remedy, and since the evidence unquestionably shows that several of the ingredients contained in the drug are prescribed and used by reliable physicians and chemists in amenorrhea and dysmenorrhea resulting from trivial causes rather than organic diseases, and that the authors of well-recognized medical textbooks agree that some, at least, of the ingredients forming the composition of the pills are useful in relieving such temporary menstrual disorders, the question of the good faith of the language used, as well as the significance which ordinarily would attach to it, was properly one for the jury. In saying this, however, we do not wish to be understood as approving the challenged language of the booklet as it was. Enough, we think, is shown in the record to convince us that the remedy is at best confined to those causes which are in their nature ephemeral, and a broader claim than this may well subject it to the condemnatory provisions of the statute. But, notwithstanding this, it was important in the protection of appellant's rights that its good faith in so advertising its drug should be tested by its motives and actions in the preparation thereof, and in the absence of any suggestion or evidence of any kind that the rejected letters were written for the purpose of making a case, or in anticipation of a prosecution, or for any other purpose than an honest desire to obey the law, we think their rejection was error. "When the good faith or the intent of a party in a given affair is in issue, his acts and sayings in relation to it at about the time of the transaction generally constitute the best evidence of the fact, and are always competent" (*U.S.* v. *Gentry* (C.C.A.), 119 Fed. at p. 73).

In that view, we think it important that a manufacturer of patent drugs should, on the issue of his good faith, be permitted to show, if it is a fact, that he sought the advice of counsel, who in turn had consulted the proper officers of the Government in an effort to bring his advertising matter within the terms of the law, and this appellant sought to do in his tender of the letters.

In these circumstances, the rejection of the letters was material, and makes it our duty to send the case back for a new trial, for it is only when it is certain that the error assigned could not have prejudiced the complaining party that the rule—that it is no ground for a reversal—is applicable (*Choctaw, O. & G. R. Co.* v. *Holloway* (C.C.A.), 114 Fed. 458, 465,

Reversed.

UNITED STATES v. TEN CASES, MORE OR LESS, BRED SPRED, ETC., ET AL.

(Circuit Court of Appeals, Eighth Circuit, Mar. 25, 1931)

49 Fed. (2d) 87; N.J. No. 18426

Appeal from the District Court for the Southern District of Iowa. Judgment affirmed.

Before KENYON and BOOTH, Circuit Judges, and REEVES, District Judge.

BOOTH, *Circuit Judge.* This is an appeal from a judgment after a directed verdict in favor of claimant, Glaser, Crandell Co., intervener, in a libel by the United States against Ten Cases, More or Less, of Bred Spred, Strawberry Flavor, and other articles of food of similar character.

The libel proceedings were brought by virtue of the Food and Drugs Act, 21 U.S.C. sec. 1 et seq. (34 St. 768). The libel contained 3 charges of adulteration and 5 charges of misbranding. The product involved was a food product, its use being indicated by its name.

The libel alleged a shipment in interstate commerce of the Bred Spred by the Glaser, Crandell Co.; and prayed for a seizure of the product for condemnation and confiscation.

The provisions of the statute here deemed material are set out in the margin.[35]

The answer set up an estoppel by reason of the record of a similar suit in the United States District Court for the Eastern District of

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[35] SECTION 8. Adulterated articles. For the purposes of sections 1 to 15, inclusive, of this title, an article shall be deemed to be adulterated * * *

Food. In the case of food:

Injurious mixtures.—First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength. * * *

Damage or inferiority concealed.—Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed. * * *

SECTION 9. Misbranded; meaning and application. The term "misbranded", as used in sections 1 to 15, inclusive, of this title, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

SECTION 10. Misbranded articles. For the purposes of sections 1 to 15, inclusive, of this title, an article shall be deemed to be misbranded; * * *

Foods. In the case of food: *Imitation or use of name of other article.*—First. If it be an imitation of or offered for sale under the distinctive name of another article. * * * *False or misleading statements on package or label as to ingredients or substances.*—Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular. An article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

Mixtures or compounds under distinctive names.—First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

Articles labeled, branded as compounds, imitations, or blends; construction of term "blend"; disclosure of trade formulas of proprietary foods.—Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word "compound", "imitation", or "blend", as the case may be, is plainly stated on the package in which it is offered for sale. The term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only. Nothing in sections 1 to 15, inclusive, of this title shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except insofar as the provisions of such sections may require to secure freedom from adulteration or misbranding.

Michigan, including a judgment of dismissal on the merits and a dismissal of an appeal by the United States, said record being set out at length in the answer. Denials of the charges of adulteration and misbranding were also set up in the answer.

On motion of the United States, the trial court, in the case at bar, struck out all that part of the answer relating to the alleged estoppel based on the record of the Michigan case.

A trial was had on the merits and at the close of the evidence introduced by the United States, on motion of the claimant, Glaser, Crandell Co., a verdict was directed in its favor and judgment entered dismissing the libel for want of proof of adulteration or misbranding.

The present appeal followed.

The facts, either admitted or shown by the testimony, are, as appears from the record, substantially as follows: Bred Spred, Strawberry Flavor, contains 17 parts of strawberries, 55 parts of sugar, 11½ parts of water, ¼ part of pectin, and 0.04 of a part of tartaric acid. Pectin is a fruit product found in considerable quantities in apples, and in different amounts in different fruits. It has the effect, if there are proper amounts of water, sugar, and acid present, to form a jelly. In a product such as Bred Spred, it forms a jelly with the water, sugar, and acid present, and keeps the fruit distributed—keeps it from floating to the top. Tartaric acid is a natural fruit acid and has nothing harmful in it. There is nothing harmful or deleterious in the product Bred Spred. It has some food value and some nutritive value. The label on the jars containing Bred Spred was in part as follows: "Bred Spred [pictorial design of fruit] Strawberry * * * Flavor, Glaser, Crandell Co., Chicago, Net weight 4 pounds." There were other flavors such as peach, pineapple, blackberry, etc.

The jars of Bred Spred here in controversy had been shipped in interstate commerce.

Jam is considered by manufacturers as not less than 45 parts of fruit to 55 parts of sugar. Housekeepers usually make jam of 50 percent fruit and 50 percent sugar.

In addition to the foregoing facts, appearing in the record, there were introduced exhibits, about eight in number, consisting of jars of jam and jars of Bred Spred, the latter being part of those seized and sought to be condemned and confiscated. None of these exhibits have been brought before this court.

The main contentions of appellant in this court are that the trial court erred in not submitting the questions of adulteration and misbranding to the jury.

The claimant not only opposes these contentions, but urges affirmatively that both questions were res adjudicata by reason of the Michigan judgment, and asks that this court so hold.

We take up first this request of the claimant.

It is to be noted that the claimant made no cross-assignments of error, and took no cross-appeal. Perhaps this was not feasible, inasmuch as the judgment was in claimant's favor and was not divisible into parts (Zoline's Fed. App. Juris. & Proc. [3rd ed.] sec. 138). However, claimant contends that inasmuch as the record of the Michigan case is in the record of the present case, this court should examine the same and pass upon the question of res adjudicata.

That the Supreme Court of the United States would have power so to do, if the appeal were pending before it, appears to be settled (*Langnes* v. *Green*, 282 U.S. 531; *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555).

Whether this court has such power, we need not decide. Even conceding the existence of the power, we think it should not be exercised in the instant case.

It has long been the general rule of practice in law cases in the Federal courts that questions decided adversely to the defendant in error (now the appellee), in the course of the trial in the lower court, will not be considered in the appellate court, in the absence of a cross-appeal (*Cleary* v. *Ellis Foundry Co.*, 132 U.S. 612; *Bolles* v. *Outing Co.*, 175 U.S. 262, 268; *Pauly, etc. Co.* v. *Hemphill County*, 62 Fed. 698, 703; *Guarantee Co. of N.A.* v. *Phenix Ins. Co.*, 124 Fed. 170 (C.C.A. 8); *Aetna Ind. Co.* v. *J. R. Crowe, etc. Co.*, 154 Fed. 545, 567 (dissenting opinion) (C.C.A. 8); *Midland Valley R. Co.* v. *Fulgham*, 181 Fed. 91, 95 (C.C.A. 8); *Philadelphia Gas Co.* v. *Fechheimer*, 320 Fed. 401, 418; see *Peoria Ry. Co.* v. *United States*, 263 U.S. 528, 535, 536; *The Maria Martin*, 12 Wall. 31, 40; *Board of County Comm'rs* v. *Hurley*, 169 Fed. 92 (C.C.A. 8); *O'Neil* v. *Wolcott Min. Co.*, 174 Fed. 527, 535 (C.C.A. 8); *Swig* v. *Tremont Tr. Co.*, 8 Fed. (2d) 943, 945).

While libel proceedings such as the one in the case at bar are likened in the statute (21 U.S.C.A., sec. 14) to proceedings in admiralty, yet this similarity is largely confined to the seizure of the property by process in rem. The method of review follows the practice in law actions (*443 Cans of Egg Product* v. *United States*, 226 U.S. 172, 183; *United States* v. *779 Cases of Molasses*, 174 Fed. 325 (C.C.A. 8); *United States* v. *Hudson Mfg. Co.*, 200 Fed. 956; *Lexington, etc. Co.* v. *United States*, 202 Fed. 615 (C.C.A. 8)).

In view of these considerations, we think the question of res adjudicata presented by the claimant should not be reviewed by us.

We turn to the questions presented by the appellant.

The purpose of the Food and Drugs Act is well established. In *United States* v. *Lexington Mill Co.*, 232 U.S. 399, the court, in its opinion, used the following language (p. 409):

> The statute upon its face shows that the primary purpose of Congress was to prevent injury to the public health by the sale and transportation in interstate commerce of misbranded and adulterated foods. The legislation, as against misbranding, intended to make it possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was and not upon misrepresentations as to character and quality. As against adulteration, the statute was intended to protect the public health from possible injury by adding to articles of food consumption poisonous and deleterious substances which might render such articles injurious to the health of consumers.

The position of the appellant is thus stated by its counsel in their brief:

> In the instant case there is no charge against the name "Bred Spred" as such, but against the adulteration of the article because it was mixed so as to conceal its inferiority, and the misbranding of the article because it was an imitation of another article, jam.

The statutory provision relied upon as to adulteration reads:

Damage or inferiority concealed.—Fourth. If it be mixed, colored, powdered coated, or stained in a manner whereby damage or inferiority is concealed'

It is apparent that two things were required to be proven in the case at bar, as respects adulteration: First, that Bred Spred was a damaged or an inferior food product, because one or more of its constituents was damaged or inferior; second, that it was mixed in a manner whereby the inferiority was concealed. There was no proof of either of these matters. There was no proof that Bred Spred contained any damaged or any harmful or deleterious substance. The word "inferiority" in the statute raises the question, what is the other member of the comparison; or, in other words, the question, "Inferior to what?" The use of the word "damage" in connection with the word "inferiority" is significant. The word "damage" in this connection means that an ingredient has suffered a loss of strength or quality; the word "inferiority" means that an ingredient is, in the first instance, of low grade or quality. Nothing of this kind is shown by the evidence as to the elements going to make up Bred Spred. The strawberries, the sugar, the pectin, the tartaric acid, the water, were none of them, so far as the evidence shows, either damaged or of low grade; nor was the resulting product either damaged or of low grade quality. The mere fact that the product contained fewer strawberries than some other product, e.g., jam, does not show that Bred Spred was inferior to jam; nor does it show that a comparison with jam was called for by the statute unless Bred Spred was being palmed off on the public as jam. No showing of this kind was made.

As to the matter of misbranding, the evidence clearly shows that the label contained no false or misleading statements; and, therefore, did not come within that definition of misbranding contained in section 10 of the statute. But the Government contends that misbranding, under section 10, includes imitation of some other article, and that, in this case, Bred Spred was an imitation of jam. Conceding, but without deciding, that the construction of the statute contended for by the Government is correct, yet there is no evidence in the case that Bred Spred was an imitation of jam. Such imitation would, naturally, be disclosed by the tests of appearance, of taste, of smell. But, although there were introduced in evidence, in the trial court, physical exhibits consisting of jars of Bred Spred and jars of jam, these physical exhibits have not been brought by the Government to this court. Nor is there other evidence in the case showing imitation. On such a record, we cannot hold that the ruling of the trial court was error.

One other matter is called to our attention by appellant. The Government offered to show by one of its witnesses, a grocer, "that a product consisting of 17 parts of strawberry, 55 parts of sugar, 11½ parts of water, one-fourth part of pectin, and a small amount of tartaric acid, is an imitation of strawberry jam." Objection was made to this offer and the objection was sustained. We think there was no error in the ruling. The matter was not one calling for expert testimony, and especially so when the physical articles themselves were present in court.

We find no error in the record, and the judgment is accordingly affirmed.

UNITED STATES v. SOUTH PEACHAM CREAMERY CO.

(District Court, District of Vermont, May 19, 1931)

N.J. No. 18233

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of not guilty.

The United States attorney filed an information against the South Peacham Creamery Co., a corporation, South Peacham, Vt., alleging shipment by said company, from the State of Vermont into the State of Massachusetts, of a quantity of butter which was adulterated and misbranded, in violation of the Food and Drugs Act.

It was alleged in the information that the article was adulterated in that a substance containing less than 80 percent by weight of milk fat had been substituted for butter, a product which must contain not less than 80 percent by weight of milk fat as defined and required by the Act of Congress of March 4, 1923, which the article purported to be.

It was alleged that the article was misbranded for the reason that the statement "Butter", borne on the cartons containing the article, was false and misleading in that it represented that the article was butter, a product which should contain not less than 80 percent by weight of milk fat; and for the further reason that the article was labeled as butter, so as to deceive and mislead the purchaser into the belief that it contained not less than 80 percent of milk fat; whereas the article contained less than 80 percent of milk fat.

The case having come on for trial before the court and jury, the court delivered the following charge to the jury.

HOWE, *District Judge.* Gentlemen of the jury: The first count in this information is the only one submitted to you. There are two charges in it for violations of the Pure Food and Drug Law, but there is only evidence as to one, that is the first count or charge. There is only one principal question of fact in the case for you to decide, that is, whether the South Peacham Creamery, on the 27th day of May, shipped butter into Massachussetts which contained less than 80 percent of milk fat—on the 27th day of May. If the creamery company shipped into Massachusetts from Vermont a quantity of butter which contained less than 80 percent of milk fat, if you are satisfied beyond a reasonable doubt that they did ship butter on the 27th day of May from Vermont into Massachusetts, and you are satisfied beyond a reasonable doubt that it contained less than 80 percent milk fat, you will find the defendant guilty. Your verdict, Mr. Foreman, will be oral and will be guilty or not guilty.

There has been no evidence in the case what the effect of time, if any, has on the percentages of milk fat. Of course, in order to find the defendant guilty, you must be satisfied that on the 27th day of May this butter contained less than 80 percent of milk fat. The defendant, under the law, is not required to guarantee that it continued to contain more than 80 percent of milk fat after the shipment is completed.

The burden of proof, in this case, is on the Government. To begin with, gentlemen, the defendant is presumed to be innocent. This is a criminal case. If your verdict is guilty, the defendant will be obliged to pay a fine—can't send the defendant to jail, because it is a corporation. In a criminal case the only punishment that can be dealt out to a corporation is to make them pay a fine. What is the presumption of innocence in a criminal case? What does it mean? It means that the jury start in the trial of a case and continue the trial of a case with the thought and the belief uppermost in their minds that the defendant did not ship in interstate commerce butter containing less than 80 percent milk fat. You should have that uppermost in your minds, verily believe that, and continue to believe that throughout the trial until the Government has introduced sufficient evidence to convince you that the defendant did ship butter containing less than 80 percent milk fat beyond a reasonable doubt—convince you of that fact beyond a reasonable doubt—that's the presumption of innocence. It's a very old law and a very sound law. It is, in fact, evidence in the defendant's favor which protects the defendant throughout the trial until sufficient evidence has been introduced to prove that the defendant is guilty beyond a reasonable doubt.

And then, the next question you want to know is what is a reasonable doubt? A reasonable doubt does not mean beyond all doubt, but it means beyond such a doubt as a reasonable man would have after considering all the evidence in the case, beyond a doubt based on reason, beyond a doubt for which you cannot give a good reason. If, after an impartial consideration of all the evidence in the case, you can candidly say that you are not satisfied with the defendant's guilt, you have a reasonable doubt and you should find the defendant not guilty. If you can candidly say that you are not really and truly satisfied with the defendant's guilt, you should find the defendant not guilty. But if, after such impartial consideration of all the evidence, you have an abiding conviction of the defendant's guilt, and that abiding conviction is so strong that you would be willing to act upon it in deciding a very important matter relating to your own affairs, such as the welfare of your family, your daughter, your son, a very important matter relating to your own affairs, if you are sure of the defendant's guilt to that extent, then you have no reasonable doubt and you should find the defendant guilty.

The mere fact that the Government has instituted this case, commenced this prosecution; you shouldn't infer from that fact that the defendant is guilty or draw any unfavorable inference whatever against the defendant because it is being prosecuted here.

If you can reconcile the testimony on any reasonable basis consistent with the defendant's innocence you must do so and in that case find the defendant not guilty. This is a very old law and a very sound law and it means that if there are two or more theories in the case—in a criminal case—two or more theories, and they are each equally reasonable, one theory leads to guilt, and the other theory leads to innocence, the jury must adopt the theory leading to innocence instead of the theory leading to guilt, because it is safer and

better to believe good of a person rather than to believe evil of him—believe good of a corporation rather that to believe evil of it, believe good of a company or association instead of believing evil of it—if you can do so on a basis consistent with reason and which is reasonable in view of all the evidence in the case.

As to the credibility of the witnesses and the weight to be given to their testimony, the law is that you are not bound to give the same credit or the same weight or have the same faith in the testimony of each witness, but you should give their testimony just such weight, give it just such credit, have just such faith in it, as you think it is fairly entitled to receive. Consider their appearance upon the stand, their candor or lack of candor, their feelings or bias, if any, their interest in the result of the prosecution, if any, and the reasonableness of the testimony which they give, and believe as much or as little of the testimony of each witness as you think you ought to.

If you are satisfied beyond a reasonable doubt that the butter that was analyzed was butter made by this defendant, the South Peacham Creamery, and that when it was shipped in interstate commerce on the 27th day of May it contained less than 80 percent of butterfat, if you are satisfied of those facts beyond a reasonable doubt, as defined, your verdict should be guilty. If you are not satisfied of those facts beyond a reasonable doubt, if you are not satisfied with the identity of the butter, if you are not satisfied that it contained less than 80 percent milk fat on the 27th of May, the date it was shipped and delivered at Boston, if you are not satisfied of those facts beyond a reasonable doubt, then your verdict will be not guilty. You won't need the complaint because there is just one charge.

UNITED STATES v. NINE PACKAGES OF CRISP'S TUNG-TONE ET AL.

(District Court, E.D. Louisiana, May 19, 1931)

N.J. No. 18501

Libels under section 10 of the Food and Drugs Act. Jury trial. Verdicts for the Government.

BORAH, *District Judge*. These proceedings bearing docket nos. 19626 and 19763 are in rem against certain articles of drugs known as Crisp's Tung-Tone, Crisp's Distemperte, Crisp's Black Tongue Remedy, and Crisp's Hot Shot. The United States is the libelant in these proceedings and is seeking a condemnation of the aforementioned drugs on the ground that they are misbranded within the meaning of the Food and Drugs Act of June 30, 1906, as amended.

The S. A. Crisp Canine Co., of Blacksburg, S. C., is the manufacturer and shipper of the drugs in question and is the claimant in these proceedings.

You will recall that by stipulation of the parties and with the consent of the court these proceedings have been consolidated for the purpose of trial; however, you will be required to render separate

verdicts in each case—the forms of verdicts I shall hereinafter indicate. Before directing your attention to the issues in the case I shall apprise you briefly of your duties as jurors. The sole function of a jury in the national courts is to determine facts. You are the sole, final, and exclusive judges of the facts in this case, of the credibility of the witnesses and of the weight that is to be attached to their testimony though you are obliged, under your oaths, to accept the law as it shall be given to you by me in charge. In considering the weight that you will give to the testimony of the various witnesses you should have in mind their intelligence or the want of it, their interest, if any, their experience or the want of it, and their knowledge or lack of knowledge of the subject matter concerning which they have testified. In this case, as indeed in all cases, it is not the number of witnesses that controls but rather it is the quality of the testimony that demands your consideration. There is one other observation that I desire to make in passing and that is this: that the rule of law here applicable is that the burden of proof is upon the United States to prove the justice of its claim by a fair preponderance of the evidence and by preponderance is meant that which is entitled to the greatest weight. Having in mind what I have just said to you, let us see what the libels charge so as to get at the questions you are to consider in the light of the evidence. The libels, after setting forth the jurisdictional allegations as well as the shipments in interstate commerce, allege in article 5 that each of the aforesaid articles is misbranded in violation of the Food and Drugs Act as amended, section 8, paragraph 3, in the case of drugs, in that certain statements borne on the package, bottle, and carton labels and appearing in circulars accompanying the articles, regarding the curative and therapeutic effect of the articles are false and fraudulent, in this, that the articles contain no ingredient or combination of ingredients capable of producing the effects claimed, and that the same were applied to the said articles knowingly and in a reckless and wanton disregard of their truth or falsity, so as to represent falsely and fraudulently to the purchasers thereof the impression and belief that the articles were, in whole or in part, composed of, or contained, ingredients or medicinal agents effective in the prevention of and treatment of the diseases and conditions named therein. Articles 6 of the respective libels charge that the aforesaid product was at the time of the shipment aforesaid and are subject to seizure, condemnation, and confiscation under section 10 of the aforesaid Food and Drugs Act.

The answers of claimant admit the jurisdictional allegations as well as the shipments in interstate commerce, but they deny that said articles and drugs are and were misbranded within the meaning of the Food and Drugs Act and deny that the statements regarding the curative and therapeutic effect of the articles and drugs set forth in the libels are false or fraudulent or that they were made in reckless or wanton disregard of their truth or falsity. The answers likewise affirmatively allege in substance that the drugs in question are capable of producing and have produced the curative and therapeutic effects claimed for them, and, believing in the verities of each and every statement made, claimant alleges that each and every statement

made is true and that these statements were made in good faith and after years of experimentation. Claimant denies the allegations of the sixth article of the libels and on the contrary alleges that the aforesaid products were and now are legitimate articles of shipment in interstate commerce, that it never was and is not now subject to seizure, condemnation, and confiscation, and that it in no way violates the aforesaid Food and Drugs Act. And this presents the issues you must decide in the light of the evidence, all other material facts being either admitted or covered by stipulation.

Now in arriving at your findings you should bear in mind that from the allegations of the libels it appears that certain words and directions contained on the bottle label, carton label, and circular were omitted from the libels. There was no obligation on the part of the Government to set forth this information but, by well-accepted rules of pleading, the Government is precluded from the complaining of the omitted words. I therefore charge you that it is only fair in order to reach a proper conclusion respecting the issues presented that you consider the labels in their entirety and all that is contained in the circulars which accompany the bottles as bearing upon the good faith of the manufacturer of the product.

With this information before you it is for you to say whether or not these preparations are misbranded within the meaning of the Food and Drugs Act and whether or not the Government has proven to your satisfaction by a preponderance of the evidence that the statements made or the design or device carried on the label or carton or in the circular regarding the curative or therapeutic effects of the same are false and fraudulent, and the fraud alleged must be established by competent proof and by credible and convincing evidence.

I further charge you that certain sections of the act are here applicable and demand your consideration.

Section 9 (title 21, U.S.C.):

Misbranded; meaning and application.—The term "misbranded", as used in sections 1 to 15, inclusive, of this title, shall apply to all drugs, * * * the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular * * *.

Section 10 (title 21, U.S.C.):

Misbranded articles.—For the purposes of sections 1 to 15, inclusive, of this title, an article shall be deemed to be misbranded; In the case of drugs: * * * If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein which is false and fraudulent.

I charge you in this connection that the words "therapeutic" and "curative," as set forth in the statute, were intended to be given their ordinary accepted meaning and that while they have a certain meaning to the expert doctor, nevertheless they are a part of the vocabulary of any intelligent man. Therapeutic to the medical world means to heal, to make whole, to restore to health. To the lay mind it means having healing qualities; curative, alleviative, a medicine efficacious in curing or alleviating diseases. The word "curative" is not found in the medical dictionaries and may be defined as possessing power or tending to cure; or relating to the cure of diseases. In none of the definitions have I been able to find the suggestion that the words "therapeutic" and "curative" convey the meaning of absolute cure. Having these definitions in mind, I will

now direct your attention to section 6 of the act which defines drugs as follows:

> The term "drug" as used in this Act, shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or animals.

Now again reverting to the issues in the case, the Government contends that these products contain no ingredients or combination of ingredients capable of producing the effects claimed for them and that the claims that are made for them are false and fraudulent and were applied by the manufacturer knowingly and in disregard of their truth or falsity, so as to falsely and fraudulently represent to the purchasers and create in their minds the impression and belief that the articles were in whole or in part composed of or contained ingredients effective in the diseases mentioned in the cartons and circulars or in the prevention thereof.

In this connection I charge you that the words "false" and "fraudulent" as used in the statute must be taken in their accepted legal meaning and that before you will be justified in finding for the libelant it must be found that the statements contained in the labels or circulars were put there to accompany their goods with actual intent to deceive—an intent which may be derived from the facts and circumstances but which must be established. It was the claimant's duty, however, to make such investigation as was necessary to enable him honestly to make statements concerning the curative or therapeutic effect of his preparations. If he did not do this, and he says that he did, but acted with such gross carelessness and indifference to the truth of the representations contained in the statements as to warrant the conclusion that he acted fraudulently, you are at liberty to so find, and in that event, should return a verdict that the drugs are misbranded.

If you find it as a fact that the statements were false, and known to be false, then, of course, your verdict would be for the Government. If you find as a fact that they were not false, or that, being false, there was no intent on the part of the defendant, whether actual intent or implied intent, to defraud, then your verdict would be for the claimant.

If you believe from the evidence that any one of the therapeutic claims as to the effect of these drugs upon black tongue, running fits, pneumonic distemper, or as a preventative of black tongue was false, and was made by the claimant with a reckless and wanton disregard as to whether it was true or false, you may find a verdict for the Government. The form of your verdict will simply indicate whether or not the four preparations here on trial were misbranded within the meaning of the Food and Drugs Act, and you will be required to render separate verdicts in each case. All twelve of you must agree in order to arrive at a proper verdict and the form of your verdict will be, "We, the jury, find that the drugs, naming them—in one instance there are three drugs covered by the libel and in the other there is only one, the Hot Shot—are or are not misbranded", which verdict will be written on the record and be dated and signed by your foreman.

I have been requested to give certain special charges by both the Government and the claimant. I have not had opportunity to examine these charges as closely as I would like to have, due to the

fact that closing arguments were waived in this case and I shall therefore refuse said charges, being of the opinion, from the examination I have made of them, that they are thoroughly covered by the general charge, or in some other particular (are) improper. * * *

Gentlemen, you are instructed that in considering the evidence in this case you should not take the view that this is a controversy between the veterinary medical profession and the manufacturers of proprietary or veterinary remedies. It is your duty under the statute to determine only whether or not the articles in question are misbranded within the meaning of the act, and in which determination you should wholly disregard personalities or other extraneous issues.

In other words, gentlemen, you are not concerned with the fact that the Government is the libelant in this case and that the claimant in this case is concerned with the manufacture of these drugs except insofar as they are litigants, each having the right to have their case determined in a court of law, and so far as you are concerned it is a case of "A" against "B." * * *

Gentlemen, certain depositions have been offered in evidence. Provision is made by law to take the testimony of persons who reside over 100 miles from the place of trial by means of depositions and interrogatories. I charge you that you should receive and consider the testimony of each witness where his testimony has been taken by either deposition or by interrogatory the same as though the witness were present and took the stand before you, giving to the testimony such weight as in your judgment you think it was entitled to. The Government was given notice of the taking of these depositions and interrogatories. It is admissible in evidence and there can be no question about that, as it is one of the methods and manner in which the testimony may be taken.

Charge No. 12. Under the rules which govern cases of this character a number of letters have been offered in evidence in the form of testimonials. Before admitting the letters and under the law, it had to be shown that these letters came to the defendant in the due course of mails; that the defendant believed in the genuineness of the letters; and that these letters related to the matters in controversy in this suit. I have ruled that these letters are competent for you to consider as bearing on the question of intent. If the defendant made the statements contained on the cartons, labels, and circulars believing in the truth of the statements made in these letters, and believing that they told the truth, then I charge you that there can be no fraud on the part of the defendant. * * * You may now retire gentlemen.

NATIONAL REMEDY CO. v. HYDE, SECRETARY OF AGRICULTURE ET AL.

(Court of Appeals, District of Columbia, June 1, 1931)

50 Fed. (2d) 1066; N.J. No. 16780

Appeal from Supreme Court of District of Columbia. Suit by the National Remedy Company against the Secretary of Agriculture, and others. From an adverse decree, plaintiff appeals. Reversed and remanded.[36]

[36] Reversing decree in *National Remedy Co.* v. *Hyde et al.*, p 1230, ante.

Before MARTIN, Chief Justice, and ROBB, HITZ, and GRONER, Associate Justices.

ROBB, *Associate Justice.* Appeal from a decree in the Supreme Court of the District sustaining a motion to dismiss appellant's bill to enjoin appellees from causing to be made so-called "multiple seizures" of appellant's "B. & M. External Remedy" until such time as the disputed questions of law and fact can be judicially determined in some one of the several libels already filed against the remedy.

The averments of the complaint, stated in narrative form, are substantially as follows: Appellant, the National Remedy Company, is a Massachusetts corporation, with its principal place of business in Boston, in that State. In 1913 it commenced and has since continued to manufacture and sell the above proprietary remedy. This enterprise has prospered to such an extent that the business and goodwill now "amount to the sum of $100,000."

The remedy is not a nostrum but is of value in the treatment of diseases of the human body, as has been demonstrated by practical experience and also by scientific, laboratory, and clinical research, experimentation, and study. It is intended, as its name signifies, solely and only as an external remedy. "The statements contained in and upon the labels, pamphlets, booklets, circulars, and other printed matter have been prepared with care, under scientific direction, and in the utmost of good faith." No representations have been made which appellant and its officers and agents did not believe, and have reason to believe, were and are true, and the medicine never has been, and is not now, adulterated.

The medicine is manufactured in the State of Massachusetts and distributed not only in that State but also in interstate commerce to practically all the other States of the Union, to the District of Columbia, and also to foreign countries.

During the year 1919, at the instance of officials of the Department of Agriculture of the United States, a hearing was had in that Department at which appellant appeared and presented evidence in support of the claims made in the labels, circulars, pamphlets, and booklets advertising the remedy. The representations made at that time in the labels, books, pamphlets, etc., were substantially the same as those contained in the present literature accompanying the remedy. Appellant being unable at that time to satisfy the Department as to this advertising matter, the Department caused seizures of the remedy to be made under libels filed by the United States in various jurisdictions, and among other places in the city of Concord, N.H., in October 1922. Trial was had before a jury in the District Court of the United States for the District of New Hampshire, at which it was contended by the Government that the statements in the advertising matter of appellant regarding the curative and therapeutic effects of its remedy were false and fraudulent. A verdict was rendered for the claimant, appellant here. Judgment was entered on this verdict.

For a period of 6 consecutive years following the judgment in the New Hampshire District Court appellant continuously sold and distributed its remedy in interstate commerce and in the State of Massachusetts without molestation or criticism. The remedy is now carried

in stock and sold by many thousand drug dealers in practically all of the States of the Union and the District of Columbia.

In December 1928 and January 1929 the Department of Agriculture caused libels to be brought against appellant's remedy, and seizures thereof to be made in the following cities: New York, N.Y.; Pittsburgh, Pa.; Philadelphia, Pa.; Baltimore, Md.; Oakland, Calif.; Portland, Maine; Miami Fla.; and elsewhere.

Appellant avers, upon information and belief, that the Secretary of Agriculture, acting through subordinates, is purposing and intending to cause to be instituted and prosecuted libels in numerous other places in the United States, all arising out of and based upon the same general allegations and statements so contained in the circulars, pamphlets, booklets, and cartons of appellant. The several libels already instituted contain identical statements and allege the adulteration and misbranding of appellant's remedy. So far as appellant is advised, the specifications and details of the charges made against appellant's remedy in the several States where the libels have been filed are identical. If the appellees proceed with other seizures in other places, as they have threatened to do, the entire output of appellant's factory and workshop could be seized and held for an indefinite period of time.

The prosecution of libels in various courts in widely separated parts of the United States is unnecessarily oppressive and causing appellant great and unnecessary expense, and is ruining, and will ruin and destroy, its business and goodwill.

Appellant does not seek to restrain appellees from obtaining, "by the due and proper method provided by law, a decision upon the disputed questions of law and fact involved, but merely wants to prevent irreparable injury to itself arising out of the multiplicity of such libels in widely separated jurisdictions." Appellant has no plain, adequate, and complete remedy at law, and its property, business, and goodwill will be ruined and destroyed unless relief is granted herein.

The motion to dismiss admits all material facts averred in the bill. *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94, 103, 23 S.Ct. 33, 47 L.Ed. 90.

Under the Pure Food Law (act of June 30, 1906, 34 Stat. 768 (21 U.S.C. secs. 1–5, 7–15), as amended by the act of August 23, 1912, 37 Stat. 416 (21 U.S.C. secs. 9, 10)) it is the duty of the Department of Agriculture (sec. 4 (sec. 11)) to make examination of specimens of certain foods and drugs for the purpose of determining whether such articles are adulterated or misbranded within the meaning of the act, and, if it shall appear from such examination that any of such specimens is adulterated or misbranded, to "certify the facts to the proper United States district attorney", who (under sec. 5 (sec. 12)), without delay, must institute "appropriate proceedings", by indictment or libel for condemnation, or both, as the facts may warrant. *United States* v. *Morgan*, 222 U.S. 274, 280, 32 S.Ct. 81, 56 L.Ed. 198.

It is conceded by appellees that the determination of the question whether a given product is adulterated or misbranded is for the court, and that "the function and duty of appellees under section 4 of the Food and Drugs Act is one of investigation. Their findings and conclusions in respect of adulteration and misbranding are merely tentative, and have no binding or obligatory force in themselves. They are not a regulation or an order but are merely the assertion of an opinion that the law has been violated and that proceedings in the

name of the United States as directed by statute should be instituted for this alleged violation." Indeed, such was the conclusion of the court in the *Morgan case*. Due process of law required this. *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U.S. 287, 40 S.Ct. 527, 64 L.Ed. 908.

Inasmuch as every district attorney to whom the Department makes certification must institute appropriate proceedings, by indictment or libel for condemnation, or both, it is evident that, even though the findings of the Department are merely administrative, nevertheless, if such certification should be made to the district attorney in every district where a product might be found, the manufacturer would be crippled or ruined long before the final adjudication in the court could be had. Such a result, we think, was not contemplated by Congress, except possibly in unusual cases where drastic action would be necessary for the immediate protection of the public. Is this a case of that character? We think not.

Appellant's remedy is for external use only. Its business was started in 1913. In 1919 the Department caused seizures to be made in various jurisdictions, and at the trial in the United States District Court for the District of New Hampshire the issue whether the advertising matter constituted misbranding was submitted to the jury, and resulted in a verdict and judgment for the defendant (appellant here). We must assume, therefore, that the department at that time was mistaken, and that the remedy was not misbranded within the meaning of the law. The remedy was the same and the advertising was substantially the same as it is now. The contention then was that the remedy was misbranded. It is now contended that it is not only misbranded but adulterated. If it is adulterated now, it must have been then, yet the analysis at that time failed to disclose adulteration. We may assume, therefore, that the adulteration (if any) is not of such a character as to endanger the public. This assumption is justified, not only because of the failure to detect adulteration in the analysis of 1919, but because for a period of 6 years after the judgment in the District Court for New Hampshire appellant was unmolested in the conduct of its business.

In *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714, 13 L.R.A. (N.S.) 932, 14 Ann. Cas. 764, it was held that, while there is no rule permitting a person to disobey a statute with impunity at least once for the purpose of testing its validity, when such validity can only be determined by judicial determination and construction, a provision in the statute which imposes such severe penalties for disobedience of its provisions as to intimidate the parties affected thereby from resorting to the courts to test its validity practically prohibits those parties from seeking such judicial construction and denies them the equal protection of the law. In the present case, the action and proposed action of the Department would, under the averments of the bill, in effect deprive appellant of its property through the destruction of its business before the issues involved could be determined by the court. The result, therefore, would be little different than as though no provision had been made for judicial review. Such a course of conduct on the part of the Department amounts to arbitrary exercise of power, and is a deprivation of due process of law. It is not, therefore, a suit against the United States. *Philadelphia Co.* v. *Stimson*, 223 U.S. 605, 620, 32 S.Ct. 340, 56 L.Ed.

570; *Heath & Milligan Co.* v. *Worst*, 207 U.S. 338, 28 S.Ct. 114, 52 L.Ed. 236.

A court of equity has jurisdiction to restrain by injunction the institution of a multiplicity of suits under such circumstances as are here present. In *Third Ave. R.R. Co.* v. *Mayor, etc., of N.Y.*, 54 N.Y. 159 (cited with approval in *Cave* v. *Rudolph*, 53 App. D.C. 12, 15, 287 Fed. 989), the municipal authorities had commenced 27 actions against the railroad company to recover penalties prescribed and imposed by city ordinances for running cars without a license. The railroad company brought an action to restrain the prosecution of more than one until that one could be finally heard and determined. The Court of Appeals ruled that, as the prosecution of all the suits would be unnecessarily oppressive, the interference of a court of equity was properly invoked and exercised. But it is contended that, "if appellees should be enjoined in this case no practical relief would be afforded appellant, since under section 5 of the act the United States Attorney could proceed against various shipments of the product throughout the country when any health, food, or drug officer or agent of any State, Territory, or the District of Columbia should present satisfactory evidence of such violations." This contention is without merit. The relief prayed for is against appellees to prevent them from causing seizures of practically all of appellant's product, and to this relief, under the admitted facts, appellant is entitled.

The decree will be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

KNAPP ET AL. v. CALLAWAY ET AL.

(District Court, S.D. New York, Aug. 5, 1931)

52 Fed. (2d) 476; N.J. No. 20149

In equity. Suit by George S. Knapp and others, copartners doing business under the firm name and style of Paterson, Boardman & Knapp, against Joseph Callaway, Jr., as Chief of the New York Station of the Department of Agriculture, and others. On motion for preliminary injunction. Motion denied.

BONDY, *District Judge*. This is a suit to enjoin officers of the Department of Agriculture from detaining certain shipments of dried egg yolk belonging to the plaintiffs and from basing the standard of dried egg yolk, for purposes of admissibility into the United States, upon the Department's fatty-acid test.

Section 2 of the Food and Drugs Act (21 U.S.C. sec. 2) prohibits the importation of any article of food which is adulterated, and section 7 (21 U.S.C. sec. 8) provides that an article shall be deemed to be adulterated in the case of food if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance.

Section 3 (21 U.S.C. sec. 3) provides that the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce shall make uniform rules and regulations for carrying out these provisions

Pursuant to this authority a rule was adopted (Regulation 4b of the Regulations for the Enforcement of the Federal Food and Drugs

Act) providing that all foods shall be analyzed by the methods prescribed by the Association of Official Agricultural Chemists, when applicable, provided, however, that any method of analysis or examination satisfactory to the Food and Drug Administration may be employed.

It is contended by the plaintiffs that the new test which was recently put into effect in place of the organoleptic tests—appearance, taste, texture, solubility, viscosity and odor—theretofore used by the Department of Agriculture and still used by the trade to determine the merchantable quality and fitness of dried egg yolk for human consumption, is unfair and enforces an unauthorized standard which is arbitrary and capricious, citing *Waite* v. *Macy*, 246 U.S. 606, 38 S.Ct. 395, 62 L.Ed. 892; *Lynch* v. *Tilden Produce Co.*, 265 U.S. 315, 44 S.Ct. 488, 68 L.Ed. 1034; *Ambruster* v. *Mellon*, 59 App.D.C. 341, 41 Fed. (2d) 430.

The plaintiffs urge that the decomposition detected by the Department's test is chemical decomposition of the fat into its component parts and not the bacterial decomposition resulting in staleness or rottenness intended by the statute, citing *A. O. Andersen & Co.* v. *United States* (C.C.A.), 284 Fed. 542.

The plaintiffs concede that the test is a fair and scientific test to determine the percentage of fatty acid contained in dried egg yolk.

They assert that whether or not such yolk consists in whole or in part of a filthy, decomposed, or putrid animal substance, can be adequately determined, as it always has been, by the organoleptic test, and that the test of lipolytic decomposition adopted by the Government does not show whether such egg yolk consists of decomposed animal substance, and that decomposed dried egg yolk often shows a lower percentage of fatty acid than the standard fixed by the Department.

The test required by the statute is not whether the food is unwholesome or injurious to health. See *United States* v. *Two Hundred Cases of Adulterated Tomato Catsup* (D.C.), 211 Fed. 780, 783; *A. O. Andersen & Co.* v. *United States* (C.C.A.), 284 Fed. 542.

That such a test has never been used or heard of before is immaterial. See *United States* v. *One Hundred Barrels of Vinegar* (D.C.), 188 Fed. 471, 473, 474. The fact that the trade does not use it is immaterial. See *W. B. Wood Mfg. Co.* v. *United States* (C.C.A.), 292 Fed. 133, 134.

It appears by the Government's affidavits that the fat or ether extract of fresh eggs passes practically unchanged from the liquid egg into the dried egg; that the acidity of a strictly fresh liquid egg has never been found to be higher than 1.72 cubic centimeters N/20 sodium ethylate per gram and never higher than 1.99 cubic centimeters for any egg of edible commercial quality; that in no case were good shell eggs or frozen eggs ever found the acidity of the ether extract of which exceeded 2.5 cubic centimeters per gram; that the acidity of this ether extract is always low when fresh sound eggs are used and high when decomposed or unsound eggs are used, and that the acidity of dried egg yolk prepared from sound fresh eggs was found to increase so slowly under ordinary conditions of storage that at the end of 3 years it does not equal 5 cubic centimeters, whereas egg products from decomposed eggs exhibit high acidity and a marked tendency for this acidity to increase rapidly; that, accordingly, sound eggs properly stored and shipped would show on arrival in the

United States from China an acidity of from 2 to 3 cubic centimeters; and that the acidity of the ether extract of dried egg yolk made from decomposed eggs often exceeds 5 cubic centimeters at the time of drying, and, if not, it increases rapidly and soon exceeds that figure.

From these scientific facts the Department concludes that when dried egg yolk shows an acidity of 5 cubic centimeters or more on arrival in the United States that indicates that it was made from eggs which would have shown, if tested in the liquid state, the characteristics of such decomposition as amounts to staleness or rottenness clearly within the meaning of the word decomposition as used in the statute, but which cannot be detected by the organoleptic test after drying because the volatile products of decomposition are driven off by drying, or else that such a percentage of acidity shows that the egg yolk was improperly dried or stored and thus became decomposed after drying.

The acid test seems to be a good test of whether the fatty part of the egg has been attacked by decomposition. Eggs may have a bad odor and show a low acidity, for it is conceded that the test does not detect protein decomposition, but eggs with a bad odor would be excluded as putrid. Thus, eggs may be filthy, decomposed, and putrid, and they may not have a high acidity, but, if they have a high acidity, that shows that the fatty part of the egg has been affected by decomposition. Many tests may be required to show that an egg is good in all respects, but any one of a number may suffice to show that it is bad in a certain respect. Though the affidavits of chemists, dealers, and dietitians used in support of the motion deny that the Government's acid test shows that dried egg yolk is decomposed, or that decomposed liquid eggs were used in making it, it cannot be said, in view of the statements set forth in defendants' affidavits, that the test adopted by the Government is arbitrary or capricious (see *United States* v. *Bartram Bros.* (C.C.A.), 131 Fed. 833; *Commercial Solvents Corp.* v. *Mellon*, 51 App.D.C. 146, 277 Fed. 548), or that the complainant shows reasonable probability of ultimate success. Where the facts are disputed, a preliminary injunction will not issue. *Cumberland T. & T. Co.* v. *Stevens* (D.C.), 274 Fed. 745; *Wisconsin-Minnesota L. & P. Co.* v. *Railroad Commission of Wisconsin* (D.C.), 267 Fed. 711.

The motion for a preliminary injunction is denied. However, in view of the sharp conflict in the opinion of experts and the desirability of an early determination of the issue, the action will be given a preference, if desired.

UNITED STATES v. 94 DOZEN, MORE OR LESS, HALF-GALLON BOTTLES CAPON SPRINGS WATER

(Circuit Court of Appeals, Third Circuit, Aug. 19, 1931)

51 Fed. (2d) 913; N.J. No. 19236

Appeal from decree of the District Court for the Eastern District of Pennsylvania dismissing libel brought under section 10 of the Food and Drugs Act. Decree dismissing libel affirmed.[37]

[37] Affirming *United States* v. *94 Dozen, More or Less, Half-Gallon Bottles Capon Springs Water*, p. 1216, *ante*

Before BUFFINGTON, DAVIS, and THOMPSON, Circuit Judges.

DAVIS, *Circuit Judge.* This is an appeal from a decree dismissing the libel in the above stated cause.

On January 28, 1928, the United States filed a libel under section 10 of the Food and Drugs Act and prayed for seizure and condemnation of 94 dozen half-gallon bottles of Capon Springs water, which had been shipped on January 20, 1928, from Capon Springs, W.Va., to Philadelphia, Pa., on the grounds that the water was adulterated and the bottles in which it was contained were misbranded.

An article is adulterated within the meaning of the act, "if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance."

An article is misbranded within the meaning of the act, "if the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular."

The learned trial judge in his second conclusion of law dismissed the count in the libel based upon clause 6, section 7, "because of the failure to grant the claimants the preliminary hearing allowed by the regulations." The regulation to which the court referred was regulation 5 (a) which provides as follows:

> (a) Whenever it appears that an article is adulterated or misbranded within the meaning of the act, and proceedings are contemplated under sections 1 and 2, notice shall be given to the party or parties against whom prosecution is under consideration and to other interested parties, and a date shall be fixed at which such party or parties may be heard. The hearing shall be held at the office of the Food, Drug and Insecticide Administration most convenient to the parties cited, and shall be private and confined to questions of fact. The parties notified may present evidence, either oral or written, in person or by attorney, to show cause why the matter should not be referred for prosecution as a violation of the Federal Food and Drugs Act.

This regulation refers to sections 1 and 2 of the act which provide the penalty for conviction in criminal proceedings under section 4. It does not refer to proceedings in rem as provided in section 10 of the act. This section does not require that a preliminary hearing be given to claimants of the articles alleged to be adulterated or misbranded. *United States* v. *50 Barrels of Whiskey*, 165 Fed. 966; *United States* v. *65 Casks of Liquid Extract*, 170 Fed. 449; *United States* v. *9 Barrels of Olives*, 179 Fed. 983; *United States* v. *100 Barrels of Vinegar*, 188 Fed. 471; *United States* v. *75 Barrels of Vinegar*, 192 Fed. 350. But section 4 does require that when on examination the Board of Chemistry finds an article to be adulterated or misbranded, notice be given the party from whom the sample was obtained and an opportunity to be heard. But under section 5 of the act which also relates to criminal proceedings, it is the duty of the district attorney to whom satisfactory evidence of any violation of the act is reported by the Secretary of Agriculture or by any health officer of any State, to begin proceedings against the offender without notice or an opportunity to be heard. So even in criminal proceedings notice is not always necessary. *United States* v. *75 Boxes of Alleged Pepper*, 198 Fed. 934; *United States* v. *Morgan, et al.*, 222 U.S. 274.

The Government charged in its libel that the water was misbranded in that the labels on the bottles and circulars contain statements,

designs, and devices regarding the ingredients and substances in the water to the effect that it is a "healing water" and possesses curative and therapeutic properties, which, it alleges, are false and fraudulent. It further charged that the water was adulterated in that it "consists in part of a filthy, decomposed, and putrid animal and vegetable substance." These allegations were earnestly denied by the appellee. It appears that several hundred pages of testimony were taken to establish and rebut these allegations. The court made the following general finding: "We make the finding that this water at the time of the trial was free from the criticisms made of it and will continue to be free." The "criticisms made" were that the water was adulterated and misbranded. But the Government has not brought any of the testimony here to establish these allegations. The record before us consists of the pleadings, the opinion, decree, exception, assignment of errors, petition for appeal, order allowing appeal, and citation. These alone are open for consideration. *Reilly* v. *Beekman*, 24 Fed. (2d) 791, 795.

The third conclusion of law is: "3. The libel should be dismissed." The decree is: "And now, to wit, this tenth day of December, 1930, it is ordered that the libel in the above-entitled case be dismissed."

The general finding, the specific conclusion of law, and decree are based upon the evidence which is presumed to support them and there is nothing in the record before us to rebut this presumption. *Southern Railway* v. *Lester*, 151 Fed. 573, 575; *Bankers Trust Co.* v. *Missouri K. & T. Railway Co.*, 251 Fed. 789, 798; *Arena* v. *Delaware, Lackawanna & Western Railway Co.*, 292 Fed. 1, 4; *Coldwell* v. *United States*, 256 Fed. 805; *Clarke* v. *United States*, 255 Fed. 546; *Samuel Olson & Co.* v. *Voorhees*, 292 Fed. 113, 115.

It is true that in the second conclusion of law, which the Government says is predicated upon the third finding of fact, the dismissal of the count based upon clause 6, section 7, of the act may have been put upon the wrong ground. This clause and section refer to paragraph 6 only of the libel which charges adulteration. With this paragraph eliminated, the rest of the libel is left standing. The third conclusion of law, that "the libel should be dismissed," is based upon the evidence as a whole and dismisses not only the sixth paragraph but the entire libel. While the record does not disclose any exceptions taken at the trial, embodied in a formal bill, presented to and signed by the trial judge within the term as required by the decisions generally, it is true, as the Government here contends, that in trials by the court without a jury the sufficiency of facts specially found to support the judgment or decree may be reviewed without a bill of exceptions. *Sloss-Sheffield Steel Etc. Co.* v. *Stover Mfg. Etc. Co.*, 37 Fed. (2d) 876; *General Motors Co.* v. *Swan Carburetor Co.*, 44 Fed. (2d) 24; *Seeberger* v. *Schlesinger*, 152 U.S. 581; *Lewellyn* v. *Electric Reduction Co.*, 275 U.S. 243, 248. But this does not materially help, for as above stated, there is nothing in the record open to us that justifies a reversal. There are 23 assignments of error, but they are not contained in any special finding and there is no bill of exceptions bringing up those portions of the record upon which they are predicated. If we are free to consider them, they show findings against the Government presumptively on sufficient evidence or a refusal to find for the Government on insufficient evidence.

It follows that the decree dismissing the libel must be affirmed.

UNITED STATES v. 620 CASES OF CANNED TUNA FISH

(District Court W.D. Washington, Aug. 25, 1931)

N.J. No. 19023

Libel under section 10 of the Food and Drugs Act. Trial before the court. Decree in favor of the United States.

The United States attorney filed a libel for seizure and condemnation of 620 cases of canned tuna, alleging that the article had been transported from the State of California into the State of Washington and remained in the original unbroken packages, and that it was adulterated in that it consisted in whole or in part of a decomposed animal substance.

NETERER, *District Judge.* Libelant seeks to condemn 620 cases of canned tuna, labeled "Tuna for pets not intended for human consumption * * *." The libelant's expert testified that he examined 96 cans in San Francisco of the quantity in issue by opening the cans, testing the contents for firmness, and smelling to determine the condition; that 21 percent were in advanced stage of decomposition, the remaining were in satisfactory condition. At trial 12 cans were opened, selected at random. One was shown to be decomposed by the same test. The same standards were applied as applied to tuna consigned for human consumption. The claimant's expert at trial agreed with libelant's witness that the cans examined at trial, one of which was condemned, were not in a state of decomposition; but he stated that the condemned can is fit for the purposes for which it was intended, and that he had fed a number of like cans to his own cat and the cat thrived.

From all the evidence presented the conclusion is inevitable that some of the canned product was decomposed and others tainted. 21 percent of the 96 cans examined were somewhat decomposed, and between 8 and 9 percent of the remaining portion was tainted to the extent that it was susceptible to smell, making practically one third of the product open to criticism and imposing upon the public a canned product, of which one third was unsound.

The act is broad in its provision, and section 6 provides the term "food", as used, shall include food for man or other animals. The intent of the act, no doubt, was to prevent imposition of fraud upon the public by canning and commercializing a product which was decomposed and not in a healthy, normal condition. The provisions of the act are broader than its title, which shows the object to be against adulterated, misbranded, poisonous, and deleterious food, drugs, etc. The act, no doubt, was primarily in the interest of humanity and against fraudulent practices.

The product by its label, presumably, is for dogs and cats. As to that, however, there is no evidence. The same standard of test was applied as for human consumption. Common sense enters into and becomes a part of every law, in the absence of explicit enactment. The same standard—test and strictness—applied to food for human consumption may not be applied to food branded for animals other than man—"Man, the autocrat among animals"—Heine. "Man",

said Thomas Browne, "is a noble animal, splendid in ashes, and pompous in the grave. A dog is never offended at being pelted with bones," although a man's best friend is his dog, who often has more trouble to get food than to digest it. The old maxim, "Who will not feed cats must feed mice and rats", may be contemplated. But with all considerations and tests, there are other pets than dogs and cats, and in view of the broad scope of the act and of the large percentage of decomposed and tainted commodity (practically one third), the seizure is confirmed, and an order of condemnation is directed.

UNITED STATES v. CATZ AMERICAN CO., INC.

(Circuit Court of Appeals, Ninth Circuit, Nov. 2, 1931. Rehearing denied Dec. 7, 1931)

53 Fed. (2d) 425; N.J. No. 19276

Appeal from decree of the District Court of the United States for the Northern District of California dismissing a libel by the United States against certain sacks of cull figs. Decree affirmed.

Before WILBUR and SAWTELLE, Circuit Judges, and JAMES, District Judge.

JAMES, *District Judge.* Appellant brought its libel in the district court seeking a decree condemning approximately 2,000 sacks of "cull" dried figs which were found at the dock in San Francisco ready to be loaded aboard ship, with initial destination Trieste, Italy. It was charged in the libel that the shipment consisted partly of "filthy, decomposed, or putrid vegetable matter", and was subject to seizure under the Food and Drugs Act.

The answer of appellee admitted that the figs were "culls", and that without further segregation or processing they were not fit to be used as food. It was further alleged in the answer that the figs had actually been placed in transit, consigned to a buyer in Austria.

Trial was had, and there was no conflict in the evidence as to matters material to the issues. In brief, appellee, a dealer in dried figs, had prepared the fruit to meet an order for that particular kind and quality of figs; the order being received from an Austrian manufacturer who processed like fruit to make a coffee flavoring. The figs were wormy in part. Appellee had made shipments of many tons of the same kind of figs to the same buyer during the preceding four years. The district court found that the facts, under the law appealed to, did not show a cause for the decree demanded. This decision, we believe, was right.

The Food and Drugs Act (21 U.S.C. secs. 1–25) contains many provisions respecting adulteration and misbranding of articles of food and drugs, and the shipment of the same in interstate commerce. Section 2 forbids the introduction into any State or Territory from another State or Territory, or from a foreign country, or the shipment to a foreign country, of any article of food or drugs adulterated or misbranded within the meaning of the law. This section provides that the offender shall be guilty of a misdemeanor and subject to a fine

for the first offense, and fine or imprisonment, or both, for a subsequent offense. The concluding portion of the section reads as follows:

> No article shall be deemed misbranded or adulterated within the provisions of said sections when intended for export to any foreign country and prepared or packed according to the specifications or directions of the foreign purchaser when no substance is used in the preparation or packing thereof in conflict with the laws of the foreign country to which said article is intended to be shipped; but if said article shall be in fact sold or offered for sale for domestic use or consumption, then this proviso shall not exempt said article from the operation of any of the other provisions of the sections hereinbefore enumerated.

Section 8 provides that:

> For the purposes of sections 1 to 15, inclusive, of this title, an article shall be deemed to be adulterated: * * * Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance. * * *

Section 8, in the part quoted, furnishes the definition of an "adulterated" article of food. The exception is, as is specified in that portion of section 2 quoted, that articles of food shall not be deemed "adulterated" when intended for export to a foreign country, and prepared or packed according to directions of the foreign purchaser, and where no substance is used in the preparation or packing which is in conflict with the laws of the country to which the article is intended to be shipped. Construed together, these provisions seem intended to allow the shipment to a foreign country of products which are not up to the requirements imposed upon interstate shipments where the foreign purchaser has ordered the precise kind and quality which the exporter designs to send to him, so long as the law of the country to which they are being sent does not impose similar restrictions as to substances "used in the preparation or packing thereof." The words "prepared or packed" should be held to mean any condition or grade of the merchandise, including any deteriorated state of the goods, considering the class to which they belong. The law thus interpreted (and we feel that the language used is fairly expressive to the intent indicated), the libel did not show that the merchandise seized was subject to forfeiture.

The certificate introduced by appellant in the trial court, showing the provisions of an Austrian law as prohibiting certain impure materials being used in coffee admixtures and coffee substitutes, could not have the effect to put the shipper here out of the excepted class, as showing that he had used a substance in the preparation and packing of the fruit "in conflict with the laws of the foreign country to which said article is intended to be shipped" (sec. 2 above cited). The manufacturer, upon receiving the figs, might well free them from all the deleterious matter before converting them into coffee flavoring, or he might divert them to other proper uses if they were unfit for such purpose. In the absence of evidence to the contrary, it will be assumed that he will comply with the law of Austria.

The decree is affirmed.

SAWTELLE, *Circuit Judge* (dissenting). I am unable to agree with the majority in the view that the saving provision of section 2 of the Food and Drugs Act protects from seizure shipments of decayed food in its "natural condition", to use the expression reiterated by the appellee. The saving provision relates solely to articles "prepared or

packed" according to the directions of the foreign purchaser; it does not authorize shipment of food inherently "adulterated" by being, according to section 8, "filthy, decomposed, or putrid." That section defines the word "adulterated" as follows:

> For the purposes of sections 1 to 15, inclusive, of this title, an article shall be deemed to be adulterated; * * *
> Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter.

The Government is not quarreling with the method either of "packing" or "preparing" the figs; it is censuring a vice that inheres in the food itself, regardless of its "packing" or "preparation"; namely, its essential putridity.

The word "prepare" implies the intervention of human agency. It does not mean the mere permission that nature take its course. Shipping rotten figs in their "natural condition" is not "preparing" or "packing" them.

The test seems to be: Did the "preparing" or the "packing," of itself, cause the condition to which the Government is objecting?

In other words, did the "preparing" or the "packing"of the fruit result in its adulteration or decay? We are assuming, for the sake of the argument only, that such preparing and packing were done according to the instructions of the foreign purchaser.

If it should be found that the putrid condition of the figs was due to the method used in packing or preparing them, the saving provision referred to above applies, and the shipment is not subject to condemnation.

If, on the other hand, it is ascertained that the fruit was "adulterated" because of natural decay—in which the hand of man had no part—then the vice complained of may be said to be inherent, and to render the shipment subject to seizure by the Government.

In *Thomas and Wife* v. *Winchester*, cited by the appellee itself, 6 N.Y. 397, 411, 57 Am. Dec. 455, the court thus defined "prepared":

> The word "prepared" on the label, must be understood to mean that the article was manufactured by him, or that it had passed through some process under his hands, which would give him personal knowledge of its true name and quality.

It may well be asked here, What "process" was used by the appellee to cause the figs to become decayed? The answer is found in the appellant's own statement, that the fruit was shipped in its "natural condition." Therefore there was no "preparation" on appellee's part.

Whatever might be the Government's action against the shipper, its suit here is against the shipment; and in such a case the construction is strict as against the shipment:

> The rule of strict construction (in favor of the allegedly offending shipper) invoked by the defendant in error has little or no application to statutes designed to promote the public health or public safety. *A. O. Andersen & Co.* v. *United States* (C.C.A. 9), 284 Fed. 542, 543.

Finally, the record shows that the law of Austria does "impose similar restrictions as to substances 'used in the preparation and packing'" of "products which are not up to the requirements imposed upon interstate shipments", even if the foreign consignee "has

ordered the precise kind and quality which the exporter designs to send to him": "Other ground coffee admixtures and coffee substitutes. These products must contain no coarse fragments, coming from stems or cores and the like of the products used for this purpose, and must be free from molds, insects, and their maggots" (Official Compilation of the Regulations of the Republic of Austria on Alimentary Foods, published by the Austrian Federal Ministry of Social Administration, Public Health Office, in Vienna).

The majority of the court seeks to answer this objection, at the conclusion of its opinion, by assuming that the "manufacturer, upon receiving the figs, might well free them from all the deleterious matter before converting them into coffee flavoring, or he might divert them to other proper uses if they were unfit for such purpose."

I do not think that the jurisprudence under the statute authorizes such an assumption. It is true that the cases that I am about to cite deal with interstate and not foreign shipments; but, since it is admitted that this is a case of first impression, the reasoning in those cases can properly, by analogy, be extended to the case at bar.

We are here concerned with the condition of the shipment as it leaves our shores, and not with what may be done to the merchandise after it has arrived at its foreign destination.

In *United States* v. *Thirteen Crates of Frozen Eggs* (C.C.A. 2) 215 Fed. 584, 585, the court said:

> The question of intent of either the shipper or the consignee has nothing to do with the question.

In the lower court, in that case, the "intent" of both the shipper and the consignee was clearly shown but such intent did not prevent the condemnation of the shipment:

> Eggs in this condition may be sold and used as an article of food, or for tanning purposes (that is, for use in the tanning of leather), and claimant had sold eggs of this description, selected and segregated at the same time as these, to a tannery or tanning firm located and doing business at a point not far distant from Chicago for tanning purposes. It had not shipped or sold any of its eggs of this description to be used and consumed as an article of food and did not contemplate doing so. 208 Fed. (2d) 950, 951.

As was said by the District Judge in that case,

> the purpose of Congress was to prohibit the transportation of articles in interstate commerce which come within the definition given in the statute and make them subject to seizure and condemnation if so transported.

See, also, *United States* v. *Two Barrels of Desiccated Eggs* (D.C.), 185 Fed. 302; *Union Dairy Co.* v. *United States* (C.C.A. 7), 250 Fed. 231, 233; *United States* v. *Ninety-four Dozen, More or Less, Half-Gallon Bottles Capon Springs Water* (D.C.), 48 Fed. (2d) 378, 379, 381.

In *Hipolite Egg Co.* v. *United States*, 220 U.S. 45, 52, 55, 31 S.Ct. 364, 55 L.Ed. 364, the Supreme Court branded as "untenable" the egg company's contention that "section 10 of the Food and Drugs Act (21 U.S.C. sec. 14) does not apply to an article of food which has not been shipped for sale, but which has been shipped solely for use as raw material in the manufacture of some other product."

"The object of the law", the court said, "is to keep adulterated articles out of the channels of interstate commerce, or, if they enter such commerce, to condemn them while being transported or when they have reached their destination, provided they remain unloaded, unsold, or in original unbroken packages."

On page 58 of the opinion in 220 U.S., 31 S.Ct. 364, 367, the Supreme Court brands articles debased by adulteration as being "outlaws of commerce."

This apt characterization fits a shipment of wormy figs, and the fact that such shipment is destined for a foreign port does not divest it of its outlaw nature.

Accordingly, I am of the opinion that the decree should be reversed.

UNITED STATES v. AMERICAN MAID FLOUR MILLS

(District Court, S.D. Texas, Nov. 5, 1931)

N.J. No. 19646

Information alleging violation of section 2 of the Food and Drugs Act. Motion to quash granted; demurrer overruled.

The United States attorney filed an information against the American Maid Flour Mills, a corporation, Houston, Tex., alleging shipment by said company, from the State of Texas into the State of Louisiana, of quantities of flour and corn meal which were misbranded, in violation of the Food and Drugs Act as amended. It was alleged in the information that the articles were misbranded in that the statements "24 Lbs." and "24 Lbs. Net", borne on the sacks containing the articles, were false and misleading, and in that the articles were labeled as aforesaid so as to deceive and mislead the purchaser, since the sacks did not contain each 24 pounds of the articles, but practically all of the sacks contained less than 24 pounds of the articles. It was alleged that the articles were further misbranded in that they were in package form and the quantity of the contents was not plainly and conspicuously marked on the outside of the package, since practically all of the packages contained less than 24 pounds, the quantity indicated thereon.

KENNERLY, *District Judge* (on motion to quash and on demurrer). This is a criminal information filed by the United States District Attorney against the American Maid Flour Mills, charging in six counts, under sections 1 to 15, of title 21, U.S.C.A., and particularly under paragraph 3 of section 10 of such title, the misbranding of certain sacks of flour, meal, etc., shipped in interstate commerce. It is alleged that such sacks were branded as containing each twenty-four (24) pounds, when in truth and fact they contained less, etc.

(1) Defendant moves to quash the information, upon the ground, among others, that the statute under which the prosecution is brought violates the Fifth and Sixth Amendments of the Federal Contitution, in that such statute, and particularly the provision as to "reasonable variations", constitutes a fixing by Congress of an unascertainable standard of guilt, and is inadequate to inform persons accused of criminal violations thereof, of the nature and cause of the accusation against them. That such motion is in that respect well taken, I entertain no doubt. *United States* v. *Shreveport Grain*, 46 Fed. (2d) 354, and cases there cited, including *United States* v. *Cohen*, 255 U.S. 93. Counsel for the Government strongly press upon me that the line of decisions represented by *Waters-Pierce Oil Co.* v. *Texas*, 212

U.S. 86, is controlling. In disposing of this contention, I cannot do better than to point to the language of Chief Justice White in *United States* v. *Cohen, supra,* as follows:

> But decided cases are referred to which, it is insisted, sustain the contrary view. *Waters-Pierce Oil Co.* v. *Texas*, 212 U.S. 86, 53 L.Ed. 417, 29 Sup. Ct. Rep. 220; *Nash* v. *United States*, 229 U.S. 373, 57 L.Ed. 1232, 33 Sup. Ct. Rep. 780; *Fox* v. *Washington*, 236 U.S. 273; 59 L.Ed. 573, 35 Sup. Ct. Rep. 383; *Miller* v. *Strahl*, 239 U.S. 426, 60 L.Ed. 364, 36 Sup. Ct. Rep. 147; *Omaechevarria* v. *Idaho*, 246 U.S. 343, 62 L.Ed. 763, 38 Sup. Ct. Rep. 323. We need not stop to review them, however, first, because their inappositeness is necessarily demonstrated when it is observed that, if the contention as to their effect were true, it would result, in view of the text of the statute, that no standard whatever was required, no information as to the nature and cause of the accusation was essential and that it was competent to delegate legislative power, in the very teeth of the settled significance of the Fifth and Sixth Amendments and of other plainly applicable provisions of the Constitution; and second, because the cases relied upon all rested upon the conclusion that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded. Indeed, the distinction between the cases relied upon and those establishing the general principle to which we have referred, and which we now apply and uphold as a matter of reason and authority, is so clearly pointed out in decided cases that we deem it only necessary to cite them. *International Harvester Co.* v. *Kentucky*, 234 U.S. 216, 221; *Collins* v. *Kentucky*, 234 U.S. 634, 637; *American Seeding Machine Co.* v. *Kentucky*, 236 U.S. 660, 662; and see *United States* v. *Pennsylvania R.R. Co.*, 242 U.S. 208, 237–238.

(2) Defendant, in like manner, attacks the information because of the provisions of paragraph 3 of section 10, permitting the fixing of tolerances and exemptions (and possibly of variations) by rules and regulations promulgated by the Secretaries of the Treasury, Agriculture, and Commerce under section 3 of title 21. There is no allegation in the information of the promulgation of, nor the violation by defendant of, any such rules and regulations. The only charge is a violation of the statute. Defendant, therefore, cannot raise this point on motion to quash.

(3) Defendant also demurs to the information, upon the ground that it is vague, indefinite, insufficient and fails to state an offense under the laws of the United States. I think if the statute in question is valid, the information is sufficient. If defendant desired more detailed information regarding the offense with which it is charged, its remedy was to call for bill of particulars.

It seems unnecessary to discuss the other questions raised. The motion to quash will, for the reason stated, be granted.

UNITED STATES v. 17 BOTTLES, LARGE SIZE, AND 65 BOTTLES, SMALL SIZE, OF AN ARTICLE OF DRUGS LABELED IN PART "B. & M."

(District Court, D. Maryland, Jan. 5, 1932)

55 Fed. (2d) 264; N.J. No. 19651

Libels under section 10 of the Food and Drugs Act. Exceptions to libels sustained in part and overruled in part. Jury trial. Verdict in favor of the United States.

These cases involved shipments of a drug preparation labeled "B. & M. Formerly Called B. & M. External Remedy." The cartons, the

bottle labels, and a booklet shipped with the article bore extensive curative and therapeutic claims. Investigation showed that the article contained no ingredient or combination of ingredients capable of producing the curative and therapeutic effects claimed. On the cover and first page of the booklet the article was described as an "Antiseptic." The booklet also contained statements supported by tables and plates purporting to prove its penetrating and germ-destroying properties. Tests showed that it would not destroy germs in the tissues and organs when used externally or by inhalation in accordance with instructions contained in the booklet.

Adulteration of the article was alleged in the libel for the reason that it was sold under its own standard of strength, to wit, (booklet cover) "For External Applications, Inhalations, Antiseptic," (booklet, p. 1) "An Antiseptic * * * Application, For Antiseptic Applications," and the strength of the article fell below such professed standard, in that it was not antiseptic when used as directed in the labeling.

Misbranding was alleged for the reason that certain statements appearing in the booklet were false and misleading, since the article fell below the professed standard of strength set forth in said statements. Misbranding was alleged for the further reason that certain statements borne on the cartons and bottle labels and appearing in the booklet, regarding the curative and therapeutic effects of the article, were false and fraudulent, since it contained no ingredients or combination of ingredients capable of producing the effects claimed.

The F. E. Rollins Co., Boston, Mass., entered an appearance as claimant and filed a motion to consolidate the cases, which motion was allowed, and claimant filed exceptions to the adulteration and misbranding charges contained in the libels. Thereupon, claimant's bill of exceptions having been heard on briefs and oral argument, the court handed down the following opinion sustaining claimant's exceptions to the adulteration and misbranding charges based on the claims as to the strength of the article, and overruling the exceptions based on the false and fraudulent therapeutic claims.

CHESNUT, *District Judge*. In these consolidated cases the Government seeks to condemn under the act of Congress known as the Food and Drugs Act of June 30, 1906, as amended in 1912 (U.S.C., title 21, secs. 1–15), certain cartons containing bottles of a proprietary drug arbitrarily called "B. & M." It is alleged in the libels that this drug is (1) adulterated and (2) misbranded, within the meaning of the act. The act is operative, so far as the States are concerned, only to interstate commerce, and it is alleged in the libels that the offending packages were shipped from Massachusetts to Baltimore.

Section 14 of title 21 of the United States Code provides that the procedure in such cases shall begin by a process of libel for condemnation, and that the procedure shall conform as near as may be to proceedings in admiralty, except that either party may demand trial by a jury of any issue of fact. In accordance with this procedure the manufacturer of the drugs, the F. E. Rollins Co., a corporation of the State of Massachusetts with principal office in Boston, has appeared as claimant of the seized articles and has filed exceptions to the legal sufficiency of the libels. It is admitted by the claimant that its preparation is a drug subject to the provisions of the act. It is

sold to the consumer in paper cartons containing bottles. The outside of the cartons contain certain printed matter descriptive of the drug and the uses for which it is recommended. The bottles also contain labels with similar information and directions for use. Inside the cartons, but not physically annexed thereto or to the bottles, is a printed booklet of 32 pages containing much more extensive information and description of the drug and its properties and its claimed effects. It is stated to be "for external use" and "for application and inhalation in the treatment of tuberculosis, influenza, pleurisy, bronchitis and other respiratory diseases" and "for application and relief of inflamed muscles, rheumatism, neuralgia, neuritis, sciatica, lumbago," and other diseases and injuries.

Three questions of law are presented as follows: (1) Is the drug "adulterated" within the meaning of the act; (2) is it "misbranded" within the meaning of the act in that certain of the statements in the booklet referred to are false and misleading; (3) is it misbranded because certain other statements in the booklet are false and fraudulent within the meaning of the act?

These questions will be discussed in the order stated.

Adulteration. It is, of course, clear enough that in the construction of language upon the cartons or bottle labels or in the booklet the meaning given to the language is that ordinarily conveyed by it to purchasers. *Libby* v. *United States* (C.C.A. 4th), 210 Fed. 148; *Hall* v. *United States*, 267 Fed. 795 (C.C.A. 5th); *United States* v. *150 Cases*, 211 Fed. 350 (D.C.Mass.); *Chichester Chemical Co.* v. *United States*, 60 App.D.C. 134, 49 Fed. (2) 516. But the term "adulterated" is given a special definition by the act, title 21, U.S. Code, section 8. In the case of drugs the term as thus defined means (1) when it is sold under a name recognized by the United States Pharmacopœia or National Formulary, that it differs from the standard of strength, quality, or purity as determined by those publications, and (2) were not sold under such a standard name, "if its strength or purity fall below the professed standard or quality under which it is sold."

Paragraph 2 of the libels alleges that this drug is adulterated "in this, that said article is sold under its own standard of strength", to wit, "for external application, inhalations, antiseptic" and "an antiseptic * * * application", "for antiseptic applications", while in truth and fact the strength of said article falls below such professed standard in that the article is not antiseptic when used as directed in the labeling thereof.

This statement appears on the cover and on the inside of the "booklet", which, as stated above, is enclosed in the carton but not physically annexed thereto, or to the label on the bottle. The label on the bottle, however, contains the following reference to the booklet: "For full directions and information please read the booklet which accompanies this bottle." It is objected by the claimant that the contents of the booklet are to be disregarded because they do not appear on the outside of the package. The same point is made and hereafter more fully discussed in connection with the charge of misbranding. It is sufficient to say that this point is, in my opinion, not sound with respect to the charge of adulteration because the statements in the booklet are, I think, quite clearly within the mischief aimed at, and are not excluded by the language of the act as to adulteration. It is also to be noted that the wording of the first paragraph defining "adulteration" is,

"difference from recognized standards; explanatory statement on or in container."

There is, however, another objection made by the claimant in answer to this charge of adulteration which is more meritorious, and, in my opinion, sound. This objection is that the statement or claim that the drug is "antiseptic", although in fact not antiseptic, is not within the definition of adulteration as contained in the act. The drug is not sold under a name recognized in the United States Pharmacopœia or National Formulary and therefore the charge of adulteration, if it can be sustained at all, must fall within the second paragraph of the definition which reads as follows:

> Below Professed Standard.—Second, if its strength or purity fall below the professed standard or quality under which it is sold.

The argument on behalf of the Government is that the statement by the manufacturer that the article is "antiseptic", professes a standard of strength for the article to which it does not conform. But I am unable to accept the view that the use of the word "antiseptic" is a profession of standard of strength within the meaning of the definition. The word "antiseptic" does not of itself convey the idea of any particular strength or degree. The primary meaning of "antiseptic" is "tending to prevent putrefaction or decay." It is said that the word was in common use long before the bacteriological discoveries of Pasteur and Koch. The word is not equivalent in meaning to the word "germicide"; that is to say, an antiseptic substance is not necessarily one that kills germs. It is probably true that the most common use of the word "antiseptic" is in relation to antiseptic surgery, but the term is, in its dictionary meaning, and I understand also in its scientific meaning, much broader than its special application to antiseptic surgery. And, as I understand it, the word does not import or imply or "profess" any particular standard of strength or quality with respect to germs or bacteria. Different antiseptic substances vary in the degree of their strength or effectiveness in killing or tending to prevent the formation of bacteria, and probably vary also with the conditions and duration of application. Therefore, to say that a substance is "antiseptic" is merely to affirm that it has a tendency to prevent putrefaction, decay, or the development or increase of bacteria; and not to affirm any particular potency in connection therewith.

Then again it is to be noted that, to be within the definition, there must be not only a professed standard asserted or implied, but the "strength or purity" of the article must fall below the professed standard. The construction contended for by the Government, would, I think, introduce forbidden elements of vagueness and uncertainty into the definition. *Small* v. *American Sugar Refining Co.*, 267 U.S. 237; *Cline* v. *Frink Dairy Co.*, 274 U.S. 445, 453, 454.

Even if the claim that the article is antiseptic, when in fact it is not, could be brought literally within the wording of the definition, yet, in my opinion, it is clearly not within the intent of the act when we look to the context of the whole definition of the word "adulterated", and also to the structure of the whole Food and Drugs Act. The obvious purpose of Congress in defining the word "adulterated" was to cover cases where a drug recognized in the United States Pharmacopœia or National Formulary is sold under its established name but does not conform to the standard of strength, quality, or

purity as determined in that official publication; and when not sold under such an established name, the second paragraph of the definition applies where the manufacturer professes a particular standard of "strength or purity" to which the article does not conform. In one case the drug fails to conform to its official recognized standard; in the other to its particular professed standard. If the drug does not profess a particular standard of strength or purity, it is not "adulterated" by reason of a falsely asserted quality, which would be a "misbranding" under the act.

The claim that the drug is "antiseptic" is a profession of quality rather than of strength or purity. It would at least be inapt to say that the "strength or purity" of a drug "falls below the professed quality" of the drug because "strength" and "purity" are ideas that cannot readily be stated in comparison with or in proportion to "quality"; and it is to be noted that while the first paragraph of the definition of "adulterated" condemns a drug which falls below the standard of "strength, quality, or purity", yet the second paragraph (with which we are concerned) comprehends a case where only the "strength or purity" falls below a professed standard. A simple illustration of the application of this second paragraph of the definition, with respect to purity, is afforded by the well-known instance of an article that is widely advertised as "99$^{44}/_{100}$ percent Pure." If, on analysis, such an article proves to be only 90 percent pure it would obviously fall below a professed standard of purity. And so with respect to "strength." If a manufacturer represents that a drug contains 50 percent formaldehyde when in fact it contains only 5 percent, it falls below the professed standard of strength.

Apart from this merely verbal analysis of the definition, I have the conviction that the sense of the definition as a whole excludes its application to the case under consideration. A sentence from the opinion of Justice Holmes, speaking for the Supreme Court of the United States in the case of *United States* v. *Johnson*, 221 U.S. 488, 496, construing a clause of the same act, aptly expresses my view. He there said:

> It seems to us that the words used convey to the ear trained to the usage of English speech a different aim; and although the meaning of a sentence is to be felt rather than proved, generally and here the impression may be strengthened by argument.

Counsel for the Government are not able to point to any precedent for similar application of the act although it has now been in force for 25 years, and it would seem highly probable that instances must have heretofore arisen in which a similar application could and should have been made if justified. The absence of such prior application seems to me to be not without significance in interpreting the true intent of the act.

The claimant's exceptions to the second paragraph of the libel will therefore be sustained.

Misbranding. The libels allege that the booklet in the carton contains some statements which are (*a*) false and misleading, and other statements which are (*b*) false and fraudulent, and that they both constitute "misbranding" within the definition contained in the act (U.S. Code, title 21, secs. 9, 10). By section 9 "misbranding" covers, as to drugs, cases where "the package or label of which shall bear

any statement, design, or device regarding such article, or the ingredients or substance contained therein which shall be false or misleading in any particular", and in section 10, there are included three additional classes of misbranding, the third of which reads as follows:

> If its package or label should bear or *contain* any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent.

It is apparent from this that statements which are false or misleading are hit by the act only when the package or label bears the statement; but if the statement is both false and fraudulent, it is covered by the act if the package or label bears or contains the statement. In this case all the alleged offending statements are contained in the booklet which, as has already been stated, is enclosed within the enveloping carton but it is not physically attached thereto, and is not a part of the printed matter on the label on the bottle, although referred to thereon. It is clear enough and is indeed conceded by the claimant, that the word "contain" aptly covers the statements in the booklet, and that therefore statements therein which are false and fraudulent are reached by the act, but claimant also contends that the narrower language of section 9 with respect to statements which are only "false or misleading" exclude the consideration of statements in the booklet because the word "bear" is limited to statements which appear on the outside of the package as sold to the customer. If this were a case of first instance, bearing in mind the obvious and indeed oft-stated beneficient purpose of the act and the mischief it was designed to prevent, I should be inclined to hold that the construction was perhaps unnecessarily narrow, although it must be conceded that the word "bear" is more aptly used with reference to descriptive matter on the package or label than with reference to a nonattached booklet of advertising matter regarding the drug contained within the package. It is, I think, true that false and misleading statements in the booklet are quite as much within the mischief aimed at by the act as statements on the outside of the carton or on the label on the bottle. It is a matter of common knowledge that many proprietary medicines are sold in carton form with booklets or paper wrappers within the carton which give much fuller information regarding the article than is possible in the limited space provided by the outside of the carton or the label on the bottle. A careful user of articles will read the fuller statements in the booklet and probably rely upon them as much, if not more, than the more condensed reading matter on the outside of the carton or label. Emphasis is placed by counsel for the claimant on the proposition that the article is bought by the purchaser principally on the strength of the statements appearing on the outside cover of the package, and that it must be supposed that Congress, acting only on the power to regulate interstate commerce, must have intended to limit its regulations to conditions applicable to the sale in the original package and not to have intended to extend its regulatory power beyond this to the opening of the original package by the purchaser. But certainly this is too narrow a view of the power of Congress. *Seven Cases* v. *United States*, 239 U.S. 510.

However this may be, I find that the claimant's contention with respect to the construction of the act relating to statements which are merely false or misleading, including the unattached booklet, is

supported by authority. The original act became effective June 30, 1906. In 1911, the Circuit Court for the Eastern District of New York held in the case of *United States* v. *American Druggists' Syndicate*, 186 Fed. 387, 389, 391, that this section of the act under consideration did not cover false or misleading statements in a separate circular enclosed with the article in the enveloping package. And a similar holding was made very briefly in the Southern District of Ohio, in *United States* v. *Newton Tea & Spice Co.*, in 1920, 275 Fed. 384, affirmed on other grounds in 288 Fed. 475. In 1911, in the case of *United States* v. *Johnson*, 221 U.S. 488 (above cited), the Supreme Court held that this section of the act was aimed at false statements as to the identity of the article, possibly including strength, quality, and purity, and not at statements as to curative effects. Promptly thereafter, pursuant to recommendation by President Taft, Congress in 1912 amended what is now section 10 of title 21 of the act by adding the paragraph to cover false and fraudulent statements regarding the curative or therapeutic effect of the article. And the legislative history of the act tends to indicate that the word "contain" in the amendment was inserted by reason at least of existing doubts as to whether a circular or booklet within the carton would otherwise be covered. But still more importantly the Supreme Court in the case of *Seven Cases* v. *United States*, 239 U.S. 510, speaking by Mr. Justice Hughes (who had written the dissenting opinion in the Johnson case above cited), at least impliedly approves the limited effect of the word "bear" in the earlier section of the law. At page 515, in contrasting the significance of the words "bear" and "contain", he said:

> It appears from the legislative history of the act that the word "contain" was inserted in the amendment to hit precisely the case of circulars or printed matter placed inside the package, and we think that is the fair import of the provision. Cong. Rec. 62d Cong., 2d Sess., vol. 48, part 11, p. 11, 322. And the power of Congress manifestly does not depend upon the mere location of the statement accompanying the article, that is, upon the question whether the statement is *on* or *in* the package, which is transported in interstate commerce. The further contention that Congress may not deal with the package thus transported, in the sense of the immediate container of the article as it is intended for consumption is met by *McDermott* v. *Wisconsin*, 228 U.S. 115, 130.

The claimant's contention is that no merely false or misleading statements can be construed as covered by the act unless they appear on the outside of the package. And the contention so expressed would seem to exclude even statements on the label on the bottle contained within the package. It is true that this contention finds support in the dictum rather than in the decision in 186 Fed. 386, 391. But the broad language there used was not necessary to the decision either in that case or in this and finds no support in the Supreme Court cases above referred to. In that case the expressed view that the statements are limited to the outside of the package is based largely on the consideration of the wording of other sections of the law, which, in my opinion, are not controlling or even persuasive on the particular point because they relate to different conditions. The sounder rule of construction is to limit the consideration to the language of the particular section, and when so limited, we find that statements on the label of the bottle are expressly included.

I reach the conclusion that in dealing with false or misleading statements the booklet is to be excluded, on the authority of the judicial

and legislative history of the act. But before finishing the discussion on this point I think some attention may possibly at some later stage of this case be given to the effect, if any, of the legend on the label of the bottle reading as follows: "For full directions and information please read the booklet which accompanies this bottle." The significance, if any, of this notation on the bottle has not been set up in the pleadings or referred to in the written or printed arguments of counsel. As the subject is not covered by the libels as now drawn it is not before me for consideration at the present time and I, therefore, express no opinion upon it.

This particular point as to false and misleading statements is set up in paragraph 3 of the libel, and refers to certain statements appearing in the printed booklet as false and misleading, "in that the article falls below the standard of strength set forth in said statement." The claimant also excepts to the sufficiency of this averment on the ground that statements which are only false or misleading are not condemned by the act unless they relate to the identity of the article; and that the statements referred to in the libel do not relate to the identity of the article or its constituents but at most only to its quality. In this connection it is to be noted that the Supreme Court in the *Johnson case*, speaking by Mr. Justice Holmes, said:

> But we are of the opinion that the phrase is aimed not at all possible false statements, but only at such as determine the identity of the article, possibly including its strength, quality, or purity.

Justices Hughes, Harlan, and Day dissented on the ground that the section also covered false statements of fact as to the curative properties of the article. In the opinion by Mr. Justice Hughes, page 506, he says:

> I take it to be conceded that misbranding may cover statements as to strength, quality, and purity.

In the later case of *Seven Cases* v. *United States*, 239 U.S. 510, Mr. Justice Hughes, writing the opinion for the court, said at page 517:

> The fact that the amendment is not limited, as was the original statute, to statements regarding identity or composition (*United States* v. *Johnson*, 221 U.S. 488) does not mark a constitutional distinction.

As a result of these judicial expressions it is at least doubtful whether statements merely false or misleading are prohibited by the act if they relate to matters other than identity or composition. But it is unnecessary to decide this point in this case, in view of the conclusion above reached which excludes consideration of the booklet with respect to merely false or misleading statements. The exceptions to the third paragraph of the libels must also be sustained.

False and fraudulent claims. The fourth paragraph alleges that certain statements on the cartons and labels of the bottles and also in the booklet regarding the curative and therapeutic effect of the drug are:

> false and fraudulent, in this, that the article contains no ingredients or combination of ingredients capable of producing the effects claimed, and that the same were applied to said article knowingly or in reckless and wanton disregard of their truth or falsity; so as to represent falsely and fraudulently that the article was in whole or in part composed of or contained medicinal ingredients effective for the diseases and conditions named therein.

The exception to this paragraph is based on the contention that the term "fraudulent" as contained in section 10 of the Code, title 21 (above quoted), means "actual intent to deceive"; and although the libel alleges the statements are both "false and fraudulent", yet it nevertheless narrows the statutory phrase by the expression "or in reckless and wanton disregard of their truth or falsity," and that as so narrowed they are not within the act which, as construed by the Supreme Court, requires "an actual intent to deceive", and therefore it is argued that this paragraph of the libel is legally insufficient. On this point the court in the case referred to, *Seven Cases* v. *United States*, 239 U.S. 510, 517, said:

> It was, plainly, to leave no doubt upon this point that the words "false and fraudulent" were used. This phrase must be taken with its accepted legal meaning, and thus it must be found that the statement contained in the package was put there to accompany the goods with actual intent to deceive—an intent which may be derived from the facts and circumstances, but which must be established.

The point here presented is, I think, a nicety in pleading rather than one of substantial trial importance. The jury in this case would, of course, be instructed that the false and fraudulent statements relied on by the Government must be of such character that the jury could infer from them an actual intent to deceive. It is to be noted that the libels do expressly allege that the statements were false and fraudulent (in the language of the statute), and also allege that the false and fraudulent statements made in reckless and wanton disregard of their truth or falsity were effective to represent falsely and fraudulently that the article was "in whole or in part composed of or contained ingredients or medicinal agents effective for the diseases and conditions named therein." The narrow question of pleading thus presented is whether false and fraudulent statements made "in reckless and wanton disregard of their truth or falsity", and with the effect of false and fraudulent representation in fact, are within the act. As said by the Supreme Court, "the phrase 'false and fraudulent' must be taken with its accepted legal meaning." The accepted legal meaning of the term "fraudulent" includes false statements made in reckless and wanton disregard of their truth or falsity. *Cooper* v. *Schlesinger*, 111 U.S. 148; *Lehigh Zinc & Iron Co.* v. *Banford*, 150 U.S. 665; 26 C.J. Title "Fraud", section 40 bb., page 1112. Under this act libels or informations or indictments similarly worded have been held sufficient. *Eleven Gross Packages* v. *United States*, 233 Fed. 71 (C.C.A. 3d); *Simpson* v. *United States*, 240 Fed. 841, 843 (C.C.A. 6th); *United States* v. *23 1/12 Dozen Bottles*, 44 Fed. (2d) 831 (D.C.Conn.), except that the libels in those cases alleged that the false and fraudulent claims were made "knowingly and [instead of "or"] in reckless and wanton disregard of their truth or falsity." But the approved charge in 233 Fed. page 74, was: "If you believe from the evidence that any one of the therapeutic claims * * * was false and was made by the claimant with a reckless and wanton disregard as to whether it was true or false, you may find a verdict for the Government." The use of the word "or" instead of "and" in the libels in this case is emphasized as a defect by the claimant. As a matter of pleading, I think it would have been preferable in this case to use "and" instead of "or", in which event the proof would have been sufficient if it had shown the statements were made knowingly and recklessly, etc., or knowingly or recklessly, etc. Clearly, if false and fraudulent statements were made

knowingly, which I interpret to mean with knowledge of their false and fraudulent character, there could be no question of the sufficency of the proof. And likewise, the accepted legal meaning of "fraudulent" includes statements not based on knowledge and made with reckless and wanton disregard of their truth or falsity, for statements so made necessarily exclude the idea of good faith, or honest belief in the truth of the statements, or any reasonable ground for believing them to be true. See also *Erwin* v. *Jackson* (C.C.A. 4th) 22 Fed. (2d) 56, 57; *Knickerbocker Merchandising Co.* v. *United States* (C.C.A. 2d) 13 Fed. (2d) 544, 546; *Fidelity & Deposit Co.* v. *Drovers State Bank* (C.C.A. 8th) 15 Fed. (2d) 306, 308.

For these reasons, the exceptions to the fourth paragraph of the libel are hereby overruled.

The cause having come on for trial, the court, at the conclusion of the testimony, delivered the following instructions to the jury.

CHESNUT, *District Judge.* Mr. Foreman, and Gentlemen of the Jury: I congratulate you that you have now reached the final stages of this long litigation. You have been listening, I have noted, very attentively to the testimony in this case for the past 3 weeks. You may have found some compensation for your arduous public service in the interest of the subject matter covered by the testimony and in the consciousness that you are dealing with a case which involves very important issues. The direct effect of your verdict will relate only to the condemnation or release of the particular bottles of the proprietary medicine labeled "B. & M." which the Government is seeking to condemn in this proceeding. But, according to the contentions of both parties respectively, although for widely different reasons, your verdict will probably indirectly affect the health and possibly even the lives of many persons. Therefore, the verdict that you render in this case is one of considerable importance and is worthy of your very best consideration in order that you reach a right conclusion.

In order to be of what assistance I can to you in reaching your verdict, it now becomes my duty to instruct you as to the law of the case and to make some summation of the testimony submitted by the adversary parties in support of their respective contentions. At the outset, let me make it plain to you what are the respective duties and responsibilities of the judge and the jury in the case. It is my responsibility to state to you the governing and controlling law of the case. It is your duty and responsibility to determine the facts of the case. What I say to you as to the law should be accepted by you as controlling, as that is my responsibility only. On the other hand, the determination of the facts is solely your responsibility and anything that I may say in this charge with respect to the facts is to be regarded by you as purely advisory and not in any way controlling of your own determination of what are the facts of the case. In other words, but more briefly, the court determines the law for you, and you determine the facts for yourselves. The summation of any reference to the testimony by me are merely as an aid or assistance to you in a review of the case. If I express any view as to the facts or as to any part of testimony or seem to do so, you are entirely at liberty to reject that view and substitute your own determination of the facts. But when you have determined for yourselves what are the controlling facts in

the case, your verdict is properly arrived at by applying the law which I determine, to the facts which you determine. This is the usual and obligatory practice of this court in all cases, including this one.

Now first let me explain to you the nature of this proceeding. It is brought under the statute passed by Congress originally in 1906, based on the power of Congress given by the Constitution of the United States, to regulate commerce between the States. The law is known as the Federal Food and Drugs Law and is to be found in title 21 of the United States Code. This act was passed by Congress after many years of public discussion and the underlying purpose was to make unlawful interstate transactions in impure foods and drugs, and incidentally the scope of the law included a prohibition of the facilities of interstate commerce to food and drugs which were "misbranded" and thereby tended to mislead or deceive the public. The section of the statute with regard to misbranding as originally included in the act of 1906, as construed by the Supreme Court of the United States in the case of *United States* v. *Johnson* (221 U.S. 588), was aimed only at false statements as to the identity of the article, possibly including its strength, quality, and purity, and not at statements as to its curative effect. In consequence of this decision it was felt that the law was not sufficiently broad to protect the public, and therefore on June 21, 1911, President Taft (afterwards Chief Justice of the Supreme Court) sent a message to Congress advising an addition to the law in which he said in part:

> In my opinion the sale of dangerously adulterated drugs, or the sale of drugs under knowingly false claims as to their effect in diseases, constitutes such an evil and warrants me in calling the matter to the attention of Congress. Fraudulent misrepresentations of the curative value of nostrums not only operate to defraud purchasers, but are a distinct menace to public health. There are none so credulous as sufferers from disease. The need is urgent for legislation which will prevent the raising of false hopes of speedy cures of serious ailments by misstatement of facts as to worthless mixtures on which the sick will rely while their disease progresses unchecked.

I take this quotation from the charge of Judge Morris in the New Hampshire case.

As a result of this message Congress passed an amendment to the original Food and Drugs Act, known as the Sherley Amendment, so that the law (U.S.C.A., title 21, sec. 10) in this respect now reads as follows:

> An article shall be deemed to be misbranded * * * in case of drugs * * * if its package or label bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent.

Other provisions of the act authorize proceedings by the Government to seize and condemn misbranded drugs which have been shipped in interstate commerce. The proceeding is called a libel for condemnation of the offending article.

In these particular cases which you are now trying, the Government seized certain bottles of an article of drugs, labeled in part "B. & M.", here in Baltimore and on August 21, 1931, filed in this court its libel to condemn the articles, in which it is alleged in paragraph 4:

> That certain statements borne on the labels of said cartons and borne in the labels of said bottles and certain further statements appearing in said printed booklet regarding the curative and therapeutic effect of said article are false and

fraudulent, in this, that the article contains no ingredients or combination of ingredients capable of producing the effects claimed, and that the same were applied to said article knowingly or in reckless and wanton disregard of their truth or falsity so as to represent fraudulently and falsely that the article was in whole or in part composed of or contained ingredients or medicinal agents effective in the diseases named therein.

The particular statements complained of are set out in an exhibit marked "B" filed with the libel and consisting of labels on the bottles and the cartons containing them, and also for the most part, of the statements in the booklet which was enclosed in the carton around the bottle.

When you retire to consider your verdict you will receive from the clerk, and take with you to your jury room the libel papers filed by the Government in the two consolidated cases which are now on trial. I call to your attention that paragraphs 2 and 3 of the libel set out additional grounds for the claim of condemnation of the drugs, based on other alleged violations of the act but you should give no consideration to these paragraphs 2 and 3 of the libels because after argument of counsel I have determined as a matter of law that the grounds alleged in paragraphs 2 and 3 are insufficient in this case and therefore, these particular grounds of condemnation are out of the case and are not submitted in any way for your consideration. You are to limit your consideration to the ground of condemnation set up in paragraph 4 of the libels which I have already read to you.

After the bottles of "B. & M." involved in these cases were seized by the Government, the manufacturer, the F. E. Rollins Co., a corporation of the State of Massachusetts, intervened in the case as claimant and filed an answer in opposition to the condemnation in which it stated that it was the manufacturer, the shipper, and the owner of the bottles of "B. & M." and of the containers thereof, that it denied that the drug is misbranded and denies that the statements on the labels of the cartons and on the bottles and in the booklets are false and fraudulent. The answer admits that the articles were transported in interstate commerce.

The nature of this proceeding is not exactly like the ordinary case, either civil or criminal, which juries are called upon to try. The ordinary civil case tried by a jury is one where the plaintiff is seeking to recover a sum of money or other property from the defendant. The ordinary criminal case is one where the Government proceeds by indictment or information against the defendant and where, in the event of a conviction, there is a penalty by way of fine or imprisonment imposed. But the proceeding in this "B. & M." case differs from the ordinary civil or criminal case tried by a jury in that it is not a proceeding to impose any monetary damages as in a civil case or any fine or imprisomnent as in a criminal case, but only a proceeding to condemn and forfeit the particular articles seized. The manufacturer of these articles, in accordance with the established practice, is permitted to, and in this case has, come into court and claimed the articles and denied that they are subject to forfeiture or condemnation. It results, therefore, that in this particular case the two parties to the case are not called plaintiff and defendant but one party is the Government of the United States seeking to condemn the articles, and the other party is called the claimant who is opposing the condemnation. The nature of the case, therefore, is a civil case

between these two adversary parties. If you should find for the Government, your verdict would so state and the direct effect is the condemnation of the articles and their destruction or other disposition in accordance with the provisions of the statute. And if your verdict should be in condemnation of the articles, they might, upon order of court and the payment of costs of these proceedings and the execution and delivery of a good and sufficient bond to the effect that the articles shall not be sold or otherwise disposed of contrary to the provisions of the Food and Drugs Act, or the laws of any State or Territory, be delivered to the owner thereof. You will see, therefore, that the main purpose of this proceeding on the part of the Government is not primarily to acquire any property but to prevent the sale of bottles of "B. & M." contrary to law. The essential nature of the case, therefore, is that this is something in the nature of a test case in which the Government is seeking to condemn the practice on the part of the manufacturer of selling this drug in interstate commerce under the alleged misbranding. But from the standpoint of the claimant the case is also indirectly of much greater importance to it than the mere condemnation of the particular bottles of "B. & M.", in that it is said the condemnation of these bottles would in principle establish a decision which would in substance destroy the life of the business.

Now to come more directly to the exact issues of fact which you are to decide in this case, I point out to you that to establish its contention the Government must prove to your satisfaction by a preponderance of the evidence, that is, by the more weighty evidence looking both to quantity and quality thereof, two things, as follows: (1) That the articles were shipped in interstate commerce. This is admitted by the claimant so that it need give you no further concern. (2) That the representations contained on the labels of the cartons and on the bottles and in the booklets, or some essential part thereof, as contained in exhibit B filed with the libel and above referred to, are false and fraudulent.

The exact issue of fact, therefore, that you have to determine in this case, and the only issue of fact so to be determined, is whether these bottles of "B. & M." are falsely and fraudulently misbranded. But I call to your particular attention that the Government does not establish its case here unless they prove to you that the alleged misbranding is both false and fraudulent. It is not sufficient for the Government merely to prove that the branding is false. It must also prove that it is fraudulent because that is the requirement of the Sherley amendment to the Food and Drugs Act which I have above quoted to you with respect to misbranding which relates to the curative and therapeutic effects of the drugs.

Now you should separately consider in this case all the testimony submitted both for the Government and for the claimant with respect to these two questions as to whether, first, the branding is false, and secondly, if so, is it also fraudulent. Somewhat different considerations apply to these two alleged facts. It is possible that you may reach the conclusion that the branding is false but not fraudulent. If so, then your verdict should properly be for the claimant. But if you reach the conclusion of fact that the branding is both false and fraudulent, then your verdict should be for the Government.

I will make some reference to the testimony in the case dealing on the question as to whether the branding in this case, or some essential part thereof, is false—that is to say, is the representation made to the public on the labels of the bottles and cartons and in the booklets, incorrect and erroneous? Here the matter is to be considered apart from the question as to whether it is also fraudulent. A misrepresentation may be made either innocently or fraudulently; that is, it may result from misinformation or accidently or inadvertently or even from negligence. It may be false but nevertheless honest. It is in this sense that we are dealing with the word "false" as applied to the subject matter.

Now the first thing for you to determine is what, in substance, is the claim or representation made for "B. & M.", prominently displayed on the labels of the bottles and the cartons containing them and on the outside cover of the booklet in the following: "B. & M. Formerly called B. & M. External Remedy For External Applications, Inhalations Antiseptic, Stimulative, Soothing, Penetrative, Volatile, Alkaline In the treatment of Tuberculosis, Pneumonia, Bronchitis, Influenza, Colds, Croup, Rheumatism, Lumbago, Acute and Suppurative Skin Infections."

It is entirely clear, therefore, that "B. & M." is conspicuously recommended to the public as a remedy for all these numerous diseases. The question at once arises as to what is the fair meaning of this representation. The word "remedy" as thus used is to be taken in its common and ordinary meaning—that is to say, in the meaning that would naturally be attributed to it by the public and particularly those persons who whould be inclined to purchase and use it if they were suffering, or thought they were suffering, from any of the diseases mentioned. The primary signification of the word "remedy" as defined in Webster's New International Dictionary, edition of 1932, is as follows:

> That which relieves or cures a disease: any medicine or application which puts an end to disease and restores health.

The word "remedy" does not import a guarantee of a cure but it does necessarily imply as here used a substantial curative tendency with respect to the diseases mentioned. The interior text of the booklet, on page 5, states as follows, under the caption of "What we claim for 'B. & M.' "

> We claim that B. & M. alleviates much suffering and that it has remedial and therapeutic effect in appropriate cases of various afflictions in which we recommend its use. * * * We do not claim that B. & M. will make anyone live forever or that it will have remedial effect in every case.

In other places the booklet, in support of the recommendations of "B. & M." cites numerous specific instances of cures or substantial recoveries of patients suffering from the diseases mentioned as a result of the use of "B. & M." Taking the booklet as a whole and bearing in mind the nature of the subject matter and the purposes for which the booklet is written, it seems entirely reasonable to conclude that the recommendation of "B. & M." as a remedy for these diseases was designed to be understood by the public and would naturally be understood by the public in the ordinary meaning of the word "remedy" which, as already defined, is that it has curative tendencies for the diseases for which it is recommended. I have been asked by the claimant

in this case to instruct you that the recommendation of "B. & M." as a remedy means no more than that it has some palliative or alleviative effect in the treatment of the diseases; that is to say, the word "remedy" as here used implies no more than that "B. & M." will do some good in the use of the diseases, as, for instance, by relieving or abating some of the symptoms accompanying the disease, such as pain and physical suffering from the disease. But I think you can very reasonably find from the booklet that the representation to the public goes beyond this and is, in effect, a representation that "B. & M." has a substantial curative effect or tendency towards arresting the disease and restoring the patient more or less fully to normal activity. However, you have each received and read, or will have opportunity to read, the booklet as a whole and to the extent, if any, that the representations made on the labels and in the booklet as a whole are uncertain or doubtful you can draw your own conclusions as to what is the substantial representation therein made to the public reading and interpreting the language used in its ordinary and common acceptation.

Now when you have determined what is the fair meaning and import of the representations made with respect to the use of "B. & M." for the diseases mentioned, you should ask yourselves whether, as a result of consideration, of all the testimony in the case, the representations so made to the public are true or substantially false. For your convenience only, I will now make, as far as I possibly can in view of the great volume of the testimony in this case, a succinct summary of the more important testimony submitted on both sides bearing on this issue of fact. On behalf of the Government you have heard the testimony of numerous medical and scientific witnesses, which in effect purports to give you practically the whole field of knowledge and scientific and professional consensus of opinion on this issue, and in substance it is that there is no basis in medical or other pertinent science in support of the claim that "B. & M." is a remedy for the diseases mentioned, or any of them. And the opinions and information thus given to you are supported by the respective witnesses from the fullness of their knowledge and personal experience, and the reasons for their statements have been given to you at great length. These witnesses include experienced analytical chemists, a competent and experienced doctor of medicine who is specializing in the field of pharmacology, which is the science or profession dealing with the effect of drugs upon animal and human bodies, physicians in general practice, and specialists in the study and treatment of tuberculosis. Most of these witnesses are graduates of, and some are now professors in their respective subjects in, the best known medical colleges and universities of this country, including the Harvard Medical School, the Johns Hopkins University, and the University of Maryland. To recall to your recollection only a few, these witnesses included, among others: Dr. Geiling, professor of pharmacology in the Johns Hopkins Medical School; Dr. Grollman, assistant professor of physiology, Johns Hopkins University; Dr. L. L. Barker, former professor of medicine, Johns Hopkins University, and for many years widely engaged in consulting and bedside practice of general medicine in Maryland and elsewhere; Dr. James H. Sever, professor of orthopedic surgery, Harvard University; Dr. Victor F. Cullen, superintendent

Maryland State Tuberculosis Sanitarium, Sabillasville, Md.; Dr. John B. Hawes, graduate of Harvard Medical School, specializing in tuberculosis; Dr. Floyd, also of the Harvard Medical School, specializing in tuberculosis and connected with the Boston Health Department; Dr. Lawrason Brown, graduate of Johns Hopkins University, for many years superintendent of Tuberculosis Hospital, Saranac, N.Y.; Dr. Gordon Wilson, professor of medicine, University of Maryland; Dr. Samuel Wolman, graduate of Johns Hopkins Medical School, and for many years specializing in tuberculosis.

The substance of the testimony of these witnesses, if believed by you, is that there is no known medicine which has or could possibly have the substantial curative effect claimed for "B. & M." for the numerous and several diseases recommended or for any of them, and in many cases the witnesses testify that they are not giving merely their individual opinions based on their own scientific and professional knowledge and experience, but are stating the consensus of medical opinion upon the subject. The chemical analysis of B. & M. shows that it contains 50 percent water, 40 percent of turpentine oil, 5 percent ammonia gas, and small quantities of proteins (egg), carbolic acid, thiosinamine, and some salicylates. These witnesses were informed of the constituent element or drugs composing "B. & M." and were familiar with the several drugs and the effect thereof as applied and used for the various purposes in medicine, and expressed the opinion that the drugs either separately or in the combination in which they are found in "B. & M." could not possibly have the effect claimed. Two of the witnesses specializing in tuberculosis, Dr. Cullen and Dr. McMurray, of the Davidson County Tuberculosis Hospital at Nashville, Tenn., testified that at the request of the Department of Agriculture a year or two ago they experimented with the use of B. & M. in the treatment of patients suffering from tuberculosis at their hospitals and found no beneficial effects whatever in any of the cases. Counsel for the claimant criticizes the adequacy and sufficiency of the use of B. & M. as actually used in these experimental cases. You have heard the testimony of these witnesses and will yourselves be the judges of the fairness and sufficiency of the tests made by them of B. & M.

The testimony submitted on behalf of the claimant in this case in support of the remedial effect claimed for B. & M. consists of the testimony of Dr. Martin, who is the only physician testifying for the claimant, and the testimony of Mr. Rollins, chief executive officer of the claimant, and of Mr. Johnson, the president and counsel in this case for the B. & M. company, the latter testifying to personal experience of B. & M. as to a few of the less serious diseases mentioned, and the testimony of certain laymen who were suffering from, or thought they were suffering from, some of the diseases mentioned. The reports and studies of Fenwick and Pease are not to be considered in this connection, as they are not supported by any legal evidence as to the statements or conclusions therein. You should carefully consider all this testimony submitted on behalf of the claimant and give to it such weight as you think it is entitled to in view of all the testimony in the case. You have seen and heard Dr. Martin testify. He is not a specialist in tuberculosis but is a Boston physician engaged in general practice. For many years he has been regularly on an annual salary of, at first, $600, and now $900, a year from the claimant corpora-

tion for medical advice which is given mainly in the form of correspondence with customers using or proposing to use B. & M. Dr. Martin testified to numerous and very remarkable cures effected by B. & M. in his personal practice. You heard his testimony as to what knowledge he had of the constituent drugs used in B. & M. You may have thought it was not very full or accurate. He was unable to submit any definite statement of how B. & M. accomplishes the results which he says he has noted. He submits a tentative theory of his own which finds no support in the whole field of medicine and scientific knowledge as testified to by the Government witnesses. He is the only medical witness who undertakes to justify the claims made for B. & M. You should carefully consider his testimony and give it such weight as you think it is entitled to. You should also consider the testimony of Mr. Rollins, bearing in mind that he is, of course, the most directly interested party in this controversy and the fact that he has had no scientific or medical education. He testifies to very many remarkable cures made by B. & M. according to his own personal observation. He has also submitted his theory and belief as to how B. & M. works and accomplishes the wonderful results claimed by him for it. It is fair to him that you consider that as a layman he has, of course, had the greatest opportunity to observe the use of B. & M. in actual experience. He, more than anyone else, is in direct contact with the users of B. & M. Whether he is competent to diagnose and correctly interpret the diseases which he has mentioned in the cases of various patients and to reasonably interpret the effect of the use of B. & M. in the several cases, is to be determined by you and you can also consider, in weighing his testimony, the fact of his great personal interest in this controversy. You should also consider for whatever weight you think it may have, the testimony of the other laymen who, as witnesses, have testified to the effect they have noted in the personal use of B. & M. in various diseases from which they were suffering or thought they were suffering. About 20 lay witnesses testified for the claimant in this case as to various beneficial and curative effects from the use of B. & M. In connection with their testimony you can properly consider whether, in view of their lack of medical knowledge, they were competent to properly diagnose their own cases and to correctly interpret the effect of the use of B. & M. You can also consider the testimony submitted by the Government in rebuttal with respect to many of these cases in which tuberculosis was the disease dealt with, which is to the effect that the witnesses referred to, who thought they had been cured from tuberculosis by the use of B. & M., according to the testimony of Dr. Wolman, the tuberculosis expert who examined them during the trial, are still suffering from tuberculosis; and in some cases the Government has offered death certificates showing that persons said to have been cured of tuberculosis have shortly thereafter, in fact, died from tuberculosis.

Very shortly summarizing the effect of the conflicting testimony on this issue, it is that the whole consensus of medical opinion is that B. & M. is substantially worthless in the treatment of the diseases mentioned; and as against this consensus of medical opinion the testimony of the claimant in support of the claims made for the remedy consists only of the testimony of Dr. Martin and the lay witnesses who testified from personal experience. This latter testi-

mony the claimant refers to as empirical knowledge as contrasted with the scientific knowledge on the part of the Government. The claimant seeks to justify its representations to the public principally on this empirical knowledge. But you may consider that this so-called empirical knowledge with respect to tuberculosis is contradicted by some empirical and scientific knowledge contained in the testimony of Drs. Cullen and McMurray who used B. & M. in some 40 cases of tuberculosis without beneficial result. You may consider that the results of the use of B. & M. as observed by a competent and experienced specialist in tuberculosis are more valuable than the testimony of laymen based on their own untrained experience. And in this connection reference be made to the statement in the claimant's booklet on page 5 as follows:

> We expect better results invariably where the use of B. & M. is combined with other care and treatment by a skillful, conscientious, and open-minded physician.

You can, of course, consider whether Drs. Cullen and McMurray are skilled, conscientious, and open-minded physicians.

In reaching your determination on the issue of fact as to whether the claims made for B. & M. are false, you are, of course, not bound to accept the consensus of medical opinion as stated by the Government's witnesses. And you are not to be governed in any way in your decision by the fact that the United States, as represented by the Department of Agriculture, has decided to prosecute this proceeding. On the contrary, you are entitled fully to consider what weight the claimant's testimony on this issue has with you. If you reach the conclusion that the matter is one really of two schools of thought and that there is very substantial basis for the claims made and that the whole matter at issue is really one of controverted opinion, then you should properly find for the claimant on this issue because where there is a substantial difference of opinion between people who on reasonable bases think differently about a matter, that difference of opinion only cannot be made the basis of a finding that the claims for remedy are false. In any event the Government having brought the charge has the burden of proving to your satisfaction by a preponderance of the evidence that the representations made are in fact false. I point out to you, however, on this issue, that there is here no mere conflict of opinion between two schools of medicine. The difference of opinion here is not between two groups of scientists holding opposing views, but (with the exception of the testimony of Dr. Martin for what value you attribute to that) the difference is between a practically nation-wide scientific knowledge on one side, and personal observation of a comparatively few laymen on the other side. I think you can very reasonably reach the conclusion in this case on this issue that after making all allowance for the good faith of these lay witnesses (which on this issue for the sake of the particular inquiry may be assumed) there still remains a field in which statements as to curative properties may be downright falsehoods and in no sense mere expressions of judgment. But however that may be, the issue is for you to determine from all the testimony in the case, giving the respective contentions such weight as you think they are entitled to.

If you reach the conclusion that the representations as to B. & M. are substantially true, then your verdict should properly be for the

claimant. But if you reach the conclusion that these claims are substantially false, then your next inquiry must be whether, in addition to being false, they are also fraudulent, because it is only in the event you find that the claims as made are both false and fraudulent that you can properly find a verdict for the Government and against the claimant.

And here I must instruct you further as to what is the legal meaning of the word "fraudulent" as here used. I have pointed out to you that the Food and Drugs Act as originally passed and as construed by the Supreme Court did not prohibit even false branding of drugs in matters relating to their curative or therapeutic effects, and to repair this omission Congress in 1912, by what is known as the Sherley amendment, amended the law to prohibit misbranding of drugs with respect to their curative or therapeutic effects, and prohibiting such misbranding in interstate commerce if the misbranding was false and fraudulent. This amendment of the law came before the Supreme Court of the United States for consideration in 1915 in a case entitled "*Seven Cases* v. *United States*," reported in 239 U.S. 510. The Supreme Court, by Mr. Justice Hughes (now Chief Justice), sustained the validity of the amendment and in discussing the law plainly explained the effect of the amendment and the force of the word "fraudulent" as therein contained. It was there said:

> This phrase must be taken with its accepted legal meaning, and thus it must be found that the statement contained in the package was put there to accompany the goods with actual intent to deceive—an intent which may be derived from the facts and circumstances, but which must be established. That false and fraudulent representations may be made with respect to the curative effect of substances is obvious. It is said that the owner has the right to give his views regarding the effect of his drugs. But state of mind is itself a fact, and may be a material fact, and false and fraudulent representations may be made about it, and persons who make or deal in substances, or compositions, alleged to be curative, are in a position to have superior knowledge and may be held to good faith their statements. * * * It cannot be said, for example, that one who should put inert matter or a worthless composition in the channels of trade, labeled or described in an accompanying circular as a cure for disease when he knows it is not, is beyond the reach of the law-making power. Congress recognized that there was a wide field in which assertions as to curative effect are in no sense honest expressions of opinion but constitute absolute falsehoods and in the nature of the case can be deemed to have been made only with fraudulent purpose.

It is clear from this pronouncement of law by the highest authority that to find the actions of the claimant fraudulent in this case you must find that they involved bad faith. And it is equally true that bad faith may be inferred from all the circumstances in evidence. In this case the claimant is a corporation. As such it is, of course, an artificial being created by the law. But in determining whether its representations to the public are fraudulent you must look to the knowledge or lack of knowledge of its several officers who acted in the matter of making these representations to the public. If some of these officers knew, or must be held from the circumstances to have known, that the representations were substantially untrue, then the corporation has acted in bad faith and you can find in that event that the representations were both false and fraudulent. It is not a sufficient defense to the claimant in this respect to establish merely that one or more of these officers has an honest opinion as to the truth of the representations. If any of them who acted in the matter within the scope of their authority and who had a substantial part in the mak-

ing of the representations to the public did not honestly believe in the representations and had information and knowledge that the representations were untrue, you may find that the claimant corporation did not act in good faith but fraudulently. Now it is a sufficient defense to the corporation to show that one of the officers, to wit, Mr. Rollins, alone had a bona fide opinion as to the representations; nor is it a conclusion on this issue that Mr. Rollins states that he does not believe in the claims as made. You have a right to look at all the facts and circumstances in the case to determine whether the representations as made were in fact known to be false or if not actually positively known to be false, then were made in reckless disregard of the truth which could have been ascertained upon reasonable inquiry from authoritative and reliable sources. Fraud in its very nature is difficult to define in any all-inclusive way. Here we are dealing with fraud in its relation to the state of mind of the officers of this claimant corporation. The fact that they say they were acting in good faith does not conclude the matter. You have a right to examine and determine from all the circumstances whether their statement as to their opinion is to be accepted and believed by you. If you find that they were in fact acting in good faith and with no intention to deceive the public, then you should find for the claimant in this case. If, however, you find that the statements made by them were made with knowledge of their falsity, or recklessly made without reasonable grounds for making them, in defiance of known authoritative information which was reasonably available to them and the failure on their part to make said reasonable inquiry, then you may find that they were acting in bad faith and fraudulently. The claimant should not be convicted of fraud merely because it advocates the theory of medicine which is not endorsed by the medical profession but it is equally true that when he fraudulently represents a medicine as a remedy he cannot escape the consequences of his fraud by the mere fact that someone may honestly believe in the theory that he fraudulently and dishonestly exploits. The fact, therefore, if you find it to be so, that numerous persons who are laymen believe in the efficacy of this remedy is not a justification for the claimant in this case if its officers did not act in good faith. It is for you to determine from all the evidence in the case whether the statements of [or] any of them are false and fraudulent. If you believe that the drug is so absolutely worthless, for example, for tuberculosis, pneumonia, bronchitis, influenza, or any of the diseases for which it is recommended to have a curative effect and that the claimant must have known it, then you would be justified in finding that the statement with reference to such disease or diseases is both false and fraudulent.

The accepted legal meaning of the term "fraudulent" includes false statements made in reckless and wanton disregard of their truth or falsity. Therefore if you believe from the evidence that any one of the therapeutic claims made for B. & M. was false and was made by the claimant with a reckless and wanton disregard as to whether it was true or false, you may find a verdict for the Government.

As I have said, you are to determine in the light of these principles of law whether the claimant has acted fraudulently or in good faith in the matter of these representations. You must consider all the testimony in the case on this point. It has taken a very wide range and comprehends the whole history of the relation of Mr. Rollins and the

claimant corporation to this medicine. It is impossible to review it in detail but I shall endeavor to make a condensed summary or outline of the more important facts of the case bearing on this issue of fraud or good faith. And I think they will be clearer in perspective if they are stated largely chronologically.

Mr. Rollins had no relation to B. & M. until after about 1913. For some years prior thereto he had been a court stenographer in Massachusetts. He knew a man named McClelland who owned the formula for B. & M. McClelland invited Rollins to become treasurer for his company. From McClelland, Rollins learned that in McClelland's association with the race track he had met a Dr. Burns (whether Burns was a doctor of medicine or a veterinarian is not entirely clear from the evidence), from whom he obtained the formula. Mr. Rollins understood that Burns was a medical man, a Cleveland doctor, and had two formulas for liniment, one for horses and one for men. Apparently B. & M., which is a coined phrase named after McClelland and Dr. Burns, was being sold by McClelland to the public as a liniment and possibly for other purposes. Mr. Rollins says he used it on his hand for rheumatism which aided him in his court work as a stenographer. Later he used it on a member of his family for tuberculosis with very effective results. This member of his family was his daughter who has not testified in the case nor has there been any medical testimony as to her condition. I think that is true, although I am not absolutely certain about it. Mr. Rollins said he was impressed with the efficacy of the medicine and learned from personal experience of its beneficial effects in very serious cases of tuberculosis, rheumatism, pneumonia, etc. He thereupon began to acquire stock in McClelland's corporation and in a few years had bought out all the stock. The sale of the preparation to the public for a wide variety of diseases, including all those mentioned in this case and numerous others, principally including infantile paralysis, was continued. In 1920 Mr. Rollins' company, then known as the National Remedy Co., was prosecuted for false statements or misbranding in the Boston municipal court and found guilty on two counts out of many, and fined $10. The opinion of the municipal court judge has been produced in evidence and found in effect the good faith of Mr. Rollins in that case. The quotation from the opinion in that case is carried on page 22 of the booklet in this case. Reference was made by the judge to the testimony of a Mr. Philbrick as justifying the claimant in some of its statements in that case, with regard to the effect of the use of B. & M. by Mr. Philbrick for a disease with which he was alleged to be suffering. The Government offers evidence in this case that about a year later Mr. Philbrick died from another disease which is among those for which B. & M. is recommended. Mr. Rollins knew of this fact. The quotation from the opinion is still carried in the booklet without reference to the specific cause of death of Mr. Philbrick. In 1919 the Government filed a condemnation proceeding similar to this against B. & M. in the District Court of New Hampshire. The case was tried in December 1922. The jury found a verdict for the claimant. For reasons to be hereinafter stated, I must instruct you that the finding in this case is not conclusive in this present case nor a bar to its maintenance by the Government. It was, however, a finding that as of that date, to wit, 1919, the goods were not subject to condemnation either because the representations at that time were not false or fraudulent or neither

false nor fraudulent. The result of this decision was perhaps naturally to fortify Mr. Rollins's belief that he had been vindicated. He continued to sell the preparation to the public and while the financial returns had been smaller up to that time, they shortly thereafter very materially increased. In recent years the gross sales of the business have amounted to $130,000 to $140,000. In 1931 the amount was $110,000. The net profits have been approximately as follows: 1923, $5,000; 1924, $5,000; 1925, $10,000; 1926, $22,000; 1927, $7,200; 1928, $22,000; 1929, $8,000; 1930, $6,000; 1931, a loss of $13,000. If these figures are not accurate they can be corrected by counsel. That is in accordance with my notes.

In addition to this, Mr. Rollins' personal salary has varied from $1,200 to $10,000, and still in addition to this, since 1924, or 1925, the corporation has paid out extraordinary expenses for scientific investigations of nearly $100,000, and for legal expenses approximately $25,000.

In 1929 the Government filed another libel condemnation proceeding against B. & M. in this District Court of Maryland. After the case had been set for trial the Rollins company, which had intervened as claimant similarly as in this present proceeding, withdrew its claim and consented to a judgment of condemnation which was accordingly entered. At that time the claimant was represented by Mr. Johnson, now acting with Mr. Yost as trial counsel for the Rollins company. It was stated by Mr. Johnson that the reason for abandoning the test in that case was due to an unexpected discovery that there was a misstatement in the booklet, or claimant's literature, with regard to the percentage of the phenol coefficient (carbolic acid) present in the preparation and that this was due to an error made by one Fenwick, who was a pharmacist advising the Rollins company. It was, however, at that time pointed out to claimant's counsel that if the only change that was to be made was to correct this relatively minor error, another proceeding would promptly be brought and tried out on the full merits. Mr. Johnson then stated that it was the intention of his client to substantially revise its literature and claims so that there could be no cause for complaint by the Government and that steps would immediately be taken to accomplish this. Thereafter the Rollins company engaged the services of the Pease Laboratories at New York, a commercial laboratory said to be headed by Dr. Pease who is said to be a doctor of medicine and who has wide experience in dealing with the Department of Agriculture in matters of this kind. Claimant contends that it has substantially altered its literature and that the present booklet is very different in the claims made from that previously made. On the other hand, the Government contends that there is little substantial change in the claims as made in the respective booklets. You have both booklets before you and can consider this point for whatever value it may have to you in determining this issue of fraud or good faith. Mr. Johnson also had various interviews with representatives of the Department of Agriculture in which he endeavored unsuccessfully to obtain their approval of the new literature. They warned him before its publication that it would be unsatisfactory and that anyone issuing it would have heavy responsibility to justify it. Nevertheless new literature having been prepared or editorially supervised by Mr. Pease, was published and this proceeding has followed.

You are also to consider on this issue of fact that Mr. Rollins testifies that he endeavored in good faith in the early days of his relationship with B. & M. and his control of the preparation, to have it adopted by the medical profession and have it used in various hospitals and sanitariums. He says it was refused by practically all for different reasons but mostly he attributes the refusal to use it to the fact that it was a proprietary medicine and therefore he charges in substance prejudice or lack of good faith of the medical profession in not adopting it. And you should also bear in mind the testimony of Mr. Rollins that during all the years he has been selling B. & M. he has had numerous testimonials from people suffering with tuberculosis and other diseases testifying to the efficacy of B. & M. This, he contends, has fortified his own opinion as to its usefulness. During the New Hampshire trial of 1922 Mr. Rollins was fully advised from the testimony of numerous scientists and doctors that in their view the remedy was worthless. There was also testimony in the case from certain laymen as to its efficacy. In addition to this testimony, medical and lay, Mr. Rollins admits that he was generally advised by physicians from time to time that the remedy was worthless. He discredited their opinion as of no value because he contends that it was based on prejudice against proprietary medicines or ignorance as to what B. & M. would actually do. He has steadfastly maintained his own opinion about the matter. He reluctantly accepted some diminution of the extent of his claims as set out in the booklet now on trial as compared with previous editions. He maintains vigorously that he is entirely right in his claims for B. & M. and that the medical profession as a whole is entirely wrong. He refuses to give any weight to their views. He maintains his own opinion despite practically universal medical opinion to the contrary, seeking to justify his opinion of what he calls empirical knowledge that is derived from actual experience from the use of a drug.

You should also consider what is the weight and effect, if any, as bearing on this issue of good faith due to the fact that the Rollins company has in recent years paid nearly $100,000 for alleged scientific investigations to demonstrate the efficacy of B. & M. in accordance with Mr. Rollins' own views, or to establish scientifically similar views. In 1924 Mr. Rollins employed a man named Fenwick, now recently dead, who was a pharmacist, to study the effects of B. & M. scientifically. And it is said that Fenwick performed various experiments on animals and devised a special apparatus for the purpose of testing the germicidal effects of B. & M. This apparatus has been shown to you by one of the witnesses. It is referred to in the present booklet. Mr. Rollins states that he received voluminous reports from Fenwick from time to time and these reports, or some of them, have been offered in evidence. Mr. Rollins contends generally that his opinion is to some extent confirmed or justified by these reports. Mr. Rollins says that his company paid Fenwick for compensation and for disbursements over a period of several years, about $80,000 for this work. Mr. Rollins further admits that these scientific investigations as reported by Fenwick were not clearly understood by him. Some of the reports, or what purport to be copies thereof, have been offered in evidence. Their genuineness and other effect in this case, bearing on the issue of good faith alone, can be considered by you. It is not claimed that Fenwick had any medical experience or that

he experimented with the drug on human beings. The Government contends that Fenwick's experimental data is of no value whatever and could not reasonably have been relied upon by the Rollins company. While Fenwick was originally said to have been employed merely as a chemist by the Rollins company, it also appears that later he was called by the company its Director of Research, and the large sums of money paid him would seem to indicate that he was in a very substantial sense an employee and agent of the corporation. Whether, under all the circumstances, Mr. Rollins or his corporation was substantially justified in making their statements in reliance upon anything Fenwick had said or done is for your determination, bearing in mind all the circumstances of the case including those already specially referred to.

You will also bear in mind that the present booklet is said to have been prepared by Dr. Pease and a large amount of it, and particularly all of it under the head of scientific evidence, is the work of his laboratories based in part upon Fenwick's work and apparatus and that other parts of the booklet were under the editorial supervision of Dr. Pease. You can also consider the form and arrangement of the booklet in this case with respect to the matter in large type with reference to the treatment of various diseases and the so-called scientific evidence in small type. You can consider whether this scientific data thus arranged was for the purpose principally of being superficial impressions to the laymen or whether it has any real value to B. & M. with regard to the diseases for which it is recommended. In this connection you can bear in mind the testimony of Dr. Martin, claimant's medical adviser, that he does not understand the purport of the so-called scientific data and that in substance it was placed in the booklet, as he understood it, merely for advertising purposes and in effect that it really means nothing substantially to the laymen. You may possibly conclude that the effect of this arrangement of the booklet with reference to the so-called scientific evidence is to be impressive, rather than really informative. In this connection you can consider the testimony of the Government's witness to the effect that the scientific data is of no value as applied to the effects of B. & M. on the human being in view of entirely different conditions. All this has some bearing on the question of the good faith of the claimant in publishing the booklet. As to its weight in this connection you must be the judge of it.

Another consideration of possibly even greater importance in this case is the nature of the claim made for B. & M. and the suggestion, at least, in the booklet as to the belief of Mr. Rollins as to how it works. You should consider this as bearing on the issue of good faith and real belief on the part of Mr. Rollins in the light of much common knowledge with respect to tuberculosis which is one of the diseases prominently and conspicuously mentioned in the booklet and as to which much of the testimony has related. You have been told that the tuberculosis germ was discovered about 1881 and as applied to tuberculosis of the lungs, this germ fastens itself within the lungs and becomes encased in a waxy capsule. Medical testimony is all to the effect that there is no known drug which, taken either externally or internally, can penetrate within the lung encased as it is, in sufficient quantities to destroy it. And that therefore, there is no medical

remedy having any substantial curative effect for tuberculosis. The disease is widespread, is a great scourge, many people are infected with it, it is itself infectious and a great danger to the world. In recent years it is common knowledge that many millions of dollars have been spent in the treatment and cure of tuberculosis. Many hospitals have been established for the care of its patients. Much of this work has been charitable and philanthropic as well as governmental. Hundreds and thousands of physicians have been seeking for the best method of cure. Complete rest, nourishing food and similar treatment is the only effective remedy according to the established medical opinion. Now in the light of all this knowledge, you should consider what is the claim that is made by Mr. Rollins as to how B. & M. works as bearing on his good faith. He says in the booklet that he cannot prove how it works but that he believes it works by penetrating through the skin and to some extent by inhalation through the mouth and that it reaches the germs encased within the lungs and draws the poisonous bacilli out through the body and through the skin in the form of eruptions or blisters, from which the poisonous matter is discharged. He contends further that B. & M. is a remedy for any germ disease within the body except possibly brain diseases and that the remedy if used long enough and as directed and applied to the skin will penetrate through the skin and in some way reach the germs wherever they are in the body. But that this cannot be accomplished with diseases of the brain on account of the thickness of the skull. Furthermore, he says the eruptions on the body will appear only over the seat of the poisonous infections even though B. & M. is applied to other parts of the body. Medical testimony is to the effect that blisters on the body from the use of B. & M. result from the constituents of turpentine and ammonia in the substance. Now you will consider as bearing on the issue of good faith whether Mr. Rollins under all the facts and circumstances of the case honestly believes that the medicine will work this way. It is not sufficient for him or for other agents of the corporation merely to say that they believe it. The question is whether to find that they do honestly believe it. The theory advanced by Mr. Rollins is characterized in substance by medical witnesses as practically impossible. Dr. Geiling, eminent pharmacologist, testifying for the Government, says it is pure nonsense. Dr. Barker said the idea was purely medieval. Even Mr. Rollins admits he has no knowledge that the medicine does work in this way or what properties of the combination known as B. & M. are causative of this alleged result. He says it is a pure mystery to him but he knows it does so work. You will consider whether this claim which, after all, is the one that Mr. Rollins originally had and which he has persisted throughout the last 15 years, is made honestly by him and is honestly believed in by other agents of the corporation with regard to the claims made to the public, or whether under all the facts and circumstances the idea is so fanciful, unsubstantial, unsupported by known scientific information, that it is incredible that any reasonable man should actually believe it in the face of the fact that he also is perfectly well-informed as to the practically unanimous medical and scientific opinion to the con-

trary. In this connection you should also bear in mind, as said by the Supreme Court in the case from which I have quoted, that:

> Persons who make or deal in substances or compositions alleged to be curative are in a position to have superior knowledge and may be held to good faith in their statements.

You can also consider the fact that it is, of course, to the financial advantage of Mr. Rollins to make these representations to the public and that sufferers from diseases that are hard to cure naturally look for help from any source from which it is thought obtainable but they are naturally credulous and generally hopeful and eagerly receptive to suggestions as to cures when their doctors cannot themselves give them much hope.

You can also consider testimony in specific cases offered by the Government tending to show a lack of good faith with respect to certain particular points or statements in the booklet. Time will not permit an enumeration of these particular instances which the Government sets up as specific badges of fraud. The testimony with regard to most of them is conflicting and you should consider the testimony of the claimant with regard thereto as well as that of the Government. Reference may be made particularly to one conspicuous illustration involving the relations between Mr. Rollins and a Mrs. Merchant, to which several hours of testimony were devoted. Mrs. Merchant, you will recall, was a sufferer from tuberculosis and claimed to have been cured by the use of B. & M. Her testimony was included in one of the booklets and continued until 1927. It is a very comprehensive and thorough testimonial. Many people who were presumably prospective customers for B. & M. wrote to her about it. She replied to them. The correspondence consisted of possibly an average of several letters a day over a period of several years. Mr. Rollins was advised of this correspondence. During this time from time to time, he made presents to her aggregating in all over $1,100. He says that much of this was given purely as charity in her later years or when she again became ill and destitute. While she claims to have been cured of tuberculosis by the use of B. & M., the Government offers in evidence a death certificate showing that she died from pulmonary tuberculosis. Mr. Rollins disputes the accuracy of this cause of her death and attributes it to cancer of the rectum. He says her attending physician told him that that was the cause or one of the causes of her death. In the close of the correspondence Mr. Rollins suggested to Mrs. Merchant's son that he supposed the cause of death was cancer of the rectum and that it would be detrimental to his company if the real cause of death was tuberculosis. He enclosed a check to the son as a gift. The implication from all this should have your consideration. Mr. Rollins contends he was acting throughout in entire good faith.

Another case that has been specifically mentioned by the Government as indicative of fraud but denied in testimony submitted by the claimant, is that of Agnes Lovejoy who was referred to by name in some of the earlier booklets as cured of tuberculosis of the joints by the use of B. & M., which disease is also referred to specifically in the present booklet, and Mr. Rollins says that the Lovejoy case, although not specifically named in the booklet, was in his mind as a basis for that recommendation. But the Government contends that the Love-

joy case was the one which was involved in the Boston trial and the claimant continued to make statements of the case after Dr. Sever testified that Agnes Lovejoy was cured before discharge from the hospital and before the use of B. & M. The present booklet refers to certain cures of tuberculosis treated with B. & M. by Mrs. Hammond. The Government has offered testimony tending to show that B. & M. had no substantial part in the treatment of the majority of these persons so referred to. This again is disputed by the claimant and the testimony is conflicting. The method of treating customers of B. & M. by correspondence is advanced by the Government as indicative of reckless actions in the treatment of diseases by the claimant and as suggestive of lack of good faith by reason of its recklessness. You can also consider that in the early days around 1915, Mr. Rollins stated that B. & M. was cordially recommended for various diseases by three doctors whom he named. Two are now dead and one called as a witness by the Government has testified that Mr. Rollins has either grossly exaggerated or entirely misstated the effect of his statements to him, Mr. Rollins, as to the effect of the use of B. & M. His testimony is categorically denied by Mr. Rollins. The case of a Mrs. LaPierre as alleged to have been cured of tuberculosis by the claimant is cited despite the fact that her death certificate shows she died of tuberculosis May 3, 1914. Mr. Rollins disputes this.

You can also consider the fact that Mr. Rollins and Mr. Johnson, to a lesser extent, after hearing all the medical testimony in this case maintain their position and their opinions and in substance give no weight or effect whatever to the Government's testimony as affecting their views. Arguments in favor of their respective positions over this are made by both parties. The Government contends that such an attitude is evidence of reckless disregard of the very highest and most authoritative and informed medical opinion without adequate basis for rejection of it. The claimant relies on the circumstance as indicative of their persistent and consistent good faith. The jury can make their own inferences in this respect. The jury may also consider what inferences are to be drawn from the failure of the claimant to call Dr. Pease as a witness in this case. As he has not been called as a witness it is clear that the jury cannot consider the scientific work that he is said to have done in support of the claimant's position. The fact that he did the work and made the reports and was paid $15,000, for the work by the claimant is relied upon as showing their good faith with respect to the claims contained in the booklet. While Dr. Pease has not in fact been called as a witness, claimant's counsel states that he was in court during the taking of the Government's testimony for a week or more and that they fully expected to call him as a witness in this case. They expressed great surprise and disappointment that he refused to stay and testify. The Government in the closing days of the trial upon learning definitely that the claimant did not expect to call Dr. Pease as a witness, obtained a special order for him to be summoned. His business is in New York and his home is nearby. It is reported that the summons has not been served on him. In the absence of any other testimony with regard to Dr. Pease the jury fairly cannot consider anything other than the bare fact that he is not called as a witness for the claimant. This fact is a matter of argument and possibly inference which may be addressed to you by counsel for

the parties respectively. In connection with the good faith of the claimant in relation to Dr. Pease and whether the claimant was justified in relying upon his reports and experimental work, you can consider all the facts and circumstances in the testimony. It appears that Dr. Pease was first employed by Mr. Johnson as an expert witness to testify in court in support of the claim. Later, after the claimant determined to change its literature, Mr. Johnson says he employed Pease to advise them generally with regard to what claims they could justly make. Claimant contends that as a result of this it substantially changed this booklet. The Government contends there is no substantial change. You have both booklets to compare in this respect. You may bear in mind that the essential nature of the claims for B. & M. was advanced many years ago by Mr. Rollins, and his company, long before their contact with Dr. Pease.

There are some other matters in this connection that you should bear in mind, particularly in weighing the testimony offered by the claimant in support of its good faith. The law does not presume that statements, even though extreme, are fraudulently made. The burden of proof is on the Government to show that they were fraudulent by a preponderance of the evidence. The claimant has spent large sums of money for laboratory work and scientific investigations. This has already been mentioned in another connection and is possibly susceptible of different interpretations as applied to the results of the work in this case. Claimant contends that the large sums paid for this work indicate its right to substantially rely thereon and that it would not pay such large sums for work if they did not believe the work honestly represented results of bona fide work done by those who submitted the reports. You can also consider on behalf of the claimant for whatever you may think they are worth in the testimony, the large number of testimonials received by the claimant as to favorable results from the use of B. & M., and you may consider the results of personal use by Mr. Rollins of the drug upon himself for various ailments, some of a virulent nature, and in which he says B. & M. has cured him and that he relied upon B. & M. for this purpose without calling in any specialist to treat him for the infections, consulting only Dr. Martin. During the progress of the trial the Government has called for numerous papers from the claimant and the latter contends it has supplied any and all data from its files so called for. Certainly it has supplied a great deal of such information voluntarily. You may also consider that one of the agents of the corporation, Mr. Rollins, is not a highly educated professional man but is a person of only ordinary intelligence but in this connection you should also bear in mind that this comment is not applicable to other agents of the corporation whom you may find to have had some substantial part in making the representations to the public. You can also consider in this connection what has already been said on the subject that the claimant says it relies upon what it believes to be competent and outstanding scientific advisers in the preparation of its literature and accepted the advice of such advisers, particularly Dr. Pease, to the extent of subordinating or somewhat abating its views or contentions in statements which Mr. Rollins believed to be true with reference to the merits of the drug.

It is not possible even in this lengthy charge to review all the evidence in this case bearing on the issue of fraud or good faith. In

the last analysis it is a question of fact for you to determine from all the facts and circumstances in the testimony. I again summarize it briefly by saying that if from all the facts and circumstances you determine that the agents of the corporation acted in good faith and with no intention to deceive the public and that the honest conviction that their statements were true and that this conviction is not merely a reckless assertion but a bona fide belief founded on reasonable basis, then you should find that the statements were not made by the claimant and you should find for the claimant. If, on the other hand, you are satisfied by a preponderance of the evidence that the statements as tested by the above principles of law defining fraud were in fact fraudulent and if you have also found the statements to be false, then you should find a verdict for the Government.

I will say a word to you with regard to the effect of the New Hampshire case tried in 1922. I previously stated that you were not to regard that case as a bar to this proceeding. I have, however, admitted the important papers relating to this case into evidence for whatever bearing they might have on the state of mind of the claimant's officers with regard to fraud or bad faith. Ordinarily a case tried between the same parties involving the same subject matter and decided on its merits is a bar to further litigation on that same case. But in my opinion the case now being tried is not the same case as was tried in New Hampshire because the legal issue that was there tried was the relation of the literature then published to the drug and involved, among other issues, necessarily the issue of fraud or good faith as of 1919 on the part of the claimant. This case arises and is tried more than 10 years after the New Hampshire case. It is contended by the claimant in this case that the booklet has been entirely rewritten. Therefore, there has been a change in the subject matter, but perhaps even more importantly in this case, the developments during this period of 10 years may make a very great difference from the standpoint of whether what was claimed in good faith by Mr. Rollins in 1919 can still be said to have been claimed in good faith by the claimant in this case as of 1931. To some extent there has been a change in the officers of the company, many things have happened since 1919, much additional information has been obtained or has been available to the claimant in these 10 years, other cases have been brought and disposed of, including the 1929 case in this court, negotiations have taken place between the claimant and the Department of Agriculture, and generally speaking, it is entirely possible that the facts and circumstances relating to fraud or good faith of the claimant in 1931 may differ vastly from those existing in 1919. And as to the 1929 case disposed of heretofore in this court, it also, in my opinion, is not an estoppel as against the claimant because it appears that although that case was abandoned by the claimant yet there was no trial on the merits.

There are some general considerations which I think are reasonably implied in what I have already said but which it may be just as well to express to you. There has been some testimony in this case on behalf of the claimant and some expressions of counsel for the claimant in which possibly it might be inferred that this is a case of a medical profession against the Rollins company. That is, of course, not true. Anything that has been said along this line is to be properly understood only as in criticism of the testimony of doctors who testified as wit-

nesses for the Government. The proceeding is by the United States Government and not at all by the medical profession. The medical testimony is that of witnesses only.

The proceeding is not for the purpose of completely stopping the sale of B. & M. It is aimed only at the condemnation of B. & M., which is sold to the public under representations that it is a remedy for specific and particular diseases complained of in the Government's libel, which had been heretofore mentioned. It is not contended by the Government that B. & M. may not be properly sold as a liniment and used for such purposes. It is also not contended that it may not be sold for various skin troubles such as athlete's foot, or for sprains, bruises, or insect bites. It is not contended by the Government that B. & M. has no curative qualities in the way of destroying the germs with which it can come into contact. Therefore, your verdict in this case if it should be for the Government will not prevent the sale of B. & M. for the treatment of diseases which are not complained of in the libel. But if you find that the claims are false and fraudulent with respect to any one or more of the diseases so mentioned, then your verdict should be for the Government. It is not necessary for the Government to show that the claims are false and fraudulent with respect to all of the diseases complained of. If it is false and fraudulent as to any one, that is sufficient.

In determining whether the claims are false and fraudulent you may take into consideration the fact that when an individual or company puts out a drug intended for use by persons so credulous as those suffering from disease such individual or company is assuming a great responsibility, and extreme caution should be exercised in informing the public of the curative or alleviating properties of the drug. Great and lasting injury to the health of individuals may result if misstatements are made as to its curative effects by inducing its use in incipient stages of diseases upon which it has no effect, which, if taken in time, might by proper treatment be cured. Knowing and realizing this as every owner of a proprietary medicine must, if he is a person of intelligence, it is for you to say whether or not he should not first ascertain just what its curative and therapeutic effect is upon the diseases for which it is recommended. In this connection and in this case you can consider whether the investigation originally made when the drug was put on the market was sufficient and reasonable or insufficient. You can also consider what has been done in the way of scientific investigations by the claimant in later years in whether the results of this investigation reasonably justified the continuance of the claims as modified and as now made. The testimony shows that large sums of money have in recent years been paid by the claimant for alleged scientific data. You can consider the source from which this information was obtained by the claimant and whether it was selected with reasonable judgment and good faith as authoritative and reliable. It is said by the claimant that the investigations have still not been completed. You can consider whether the claimant has acted reasonably in reference to its claim of good faith in putting out the product before these investigations have been completed, or whether, consistent with its claim of good faith, it should have waited the results of the full investigation before selling the drug to the public under the representations made. In this connection, you may also bear in mind

claimant's testimony to the effect that he believes the investigations that have been made are sufficient to justify the claims as made. This case does not involve in any way the right of any person to buy what medicine he pleases and use it for what he pleases. Or, as expressed by counsel for the claimant, the case does not involve, nor does it deny, the right of self-medication. Nor does the law prohibit a man or corporation from making any medicine he wants to and sell it to the public if he honestly tells the truth about it.

I have been asked by the parties to give you certain specific instructions. In the charge which I have given you I have covered most of the matters about which specific instructions have been asked by the parties, but a few may not have been expressly referred to and I will now cover them.

You are instructed that you cannot infer that a statement is fraudulent merely because it is false. The Government must prove both by a preponderance of the evidence. With reference to statements in booklets other than those involved in this present case, you are instructed that a verdict for the Government must be based only upon false and fraudulent statements contained in or upon the cartons, bottle labels, and booklets involved in the present seizure and complained of in the libel in this case, and particularly exhibit B filed with the libel. Any evidence of statements in the booklet has been admitted only upon the evidence of the intent of the claimant in the issuance of the present booklet and your verdict, if against the claimant, should not be made on the basis of statements in former booklets alone. You should not base a verdict for the Government merely upon your own belief that the statements in the booklet in the present case are false and unfounded. If you believe that the claimant was even grossly in error in making the claims, that is not sufficient. You must find that the statements were made fraudulently within the principles above outlined. The point of time as of which you must find that the statements in the booklet were false and fraudulent is the time of the shipment of the particular articles in interstate commerce which was in this case on or about August 1931. As I have said, the burden of proof is on the Government to establish both the falsity and the fraud claimed, by a preponderance of the evidence. If after considering all of the facts of the case the minds of the jury are in a state of equipoise on either the question of fraud or the question of falsity, then your verdict must be for the claimant; that is to say, if you find the evidence on each side on either of these questions is equally weighty, then the Government has not established the affirmative by a preponderance of the evidence. In considering the preponderance of the evidence you are not limited to the mere number of witnesses on a particular issue, but you may consider the quality and quantity of testimony bearing on the issue. You are instructed that your verdict, if for the Government, must not be based upon false and fraudulent statements in the booklet which do not relate to the curative or therapeutic effects of B. & M. You are also instructed that in determining the question of fraud or good faith the agents and officers of the claimant corporation are not necessarily to be held to the standards of knowledge of a physician, and the question to be determined is not primarily what a physician or scientist would believe but what the claimant's agents having

charge of the matter honestly believe, bearing in mind also, however, as I have said, that the manufacturers of medicine sold for serious diseases are in a position to have and should have superior knowledge upon the subject to that of the general public and must be held to good faith in their statements accordingly. In considering the two issues of falsity and fraud or good faith presented, you are to consider the carton, bottle label, and booklet in their entirety and all that is contained in them as bearing upon the good faith of the representations of the claimant.

In considering whether B. & M. is a remedy as recommended in the treatment of the diseases mentioned and complained of by the Government, you may consider the effect which the different drugs acting together, or in combination with each other, will have on the human body, but you must also consider the effect of the application as a whole and the manner in which the directions call for its application so that its usefulness, if any, of one or more of the ingredients of B. & M. if separated from the other in the treatment of diseases, is no conclusive proof of the remedial value of B. & M. in the treatment unless good derived from the application of the whole is less than the harm caused thereby.

In considering the effect of the reports of Pease and Fenwick, as I have heretofore indicated, they are to be considered by you only on the question whether or not the claimant acted in good faith and you must not accept such reports as any proof whatsoever of the scientific truth or accuracy of the theories or statements made in these reports, Fenwick having died before having testified in this case and Pease not having been called as a witness.

Finally, gentlemen, if your verdict is for the Government, when called upon by the clerk for your verdict, you will be asked, "Who shall speak for you?" and you shall say your foreman, and the foreman will then be asked for your verdict, and if it is for the Government, you will say, "We find for the Government." If, on the other hand, you find for the claimant, then the answer will be, "We find for the claimant."

I am very sorry indeed, gentlemen, to have had to enlist your further attention to this lengthy charge. The case, as you know, is a highly important one. I am sure that you all have but one desire, and that is to render a public service in the interests of impartial justice in accordance with your very best judgment about all the testimony in this case, to which I noted you have listened so very attentively, sometimes under circumstances of not too comfortable conditions as to weather or otherwise.

Gentlemen, and counsel of the bar, to the extent that all requests for instruction submitted by the respective parties are not covered in the charge, they are hereby rejected, and exceptions noted on behalf of the parties respectively.

Of course, it is the usual practice in the Federal courts if counsel desire to take exceptions to the charge as given, they must be specific, that is, to the particular parts of the charge.

Mr. Yost. May we confer just a minute on that question, Your Honor?

The Court. Yes. Gentlemen of the jury, we will take a recess for 10 minutes.

Mr. YOST. Your Honor, there are just two exceptions. While the reference to them may be involved in the prayers, there were so many prayers I should like to make these specific exceptions: In the first place, I should like to except to what we consider the broad definition which the court has given to the words "remedy" and "therapeutic."

Our idea is that they are susceptible, properly, of a narrower construction.

The COURT. Well, is that all you want to say on that?

Mr. YOST. Yes.

The COURT. I have very carefully considered that and I will have to stand by the instruction I gave to the jury on it. Exception noted on that point.

Mr. YOST. Secondly, Your Honor has referred to knowledge of the several officers of the corporation as constituting the knowledge of the corporation, and then you have referred, of course, to the testimony of Mr. Johnson as president. It is undisputed that at the time this literature was issued, and at the time of these seizures, Mr. Johnson was not president of the corporation. The issue in this case is the intent at the time of these seizures, and I think that that fact, as a matter of law, should be pointed out to the jury because I do not think that Mr. Johnson's intent now has anything to do with the question, has any bearing upon the question of the intent of the corporation at the time the literature was issued, and the seizures in this case made.

The COURT. Well, I leave that issue as to who were the officers of the corporation at that particular time entirely to the jury.

Mr. YOST. Of course, there is no evidence to the contrary, Your Honor, I take it.

Mr. SOBELOFF. Yes; there is, and I will point it out.

Mr. YOST. And that is a matter of argument, I assume. I know of no other evidence. Your Honor also uses the phrase at one point that the manufacturer of a drug must use "extreme caution." We think that is further than the decisions go, and that he is only answerable for reasonable care and good faith, rather than extreme caution.

The COURT. Now, let me consider that a moment: I think I would say to the jury on that that the amount of care that must be exercised is, of course, that which is reasonable in the light of the recommendations made, and the nature of the disease for which the recommendation is made, how serious it is, how serious may be the consequences of a mistake, or of a wrongful representation. As applied to some of the diseases in this case, it is clear that they are highly dangerous to the community, to the individual, and the proportion of care that must be exercised must be in proportion to the nature of the thing that is done in the way of representation. From my point of view care which would be reasonable in one connection might be regarded as extreme care in a less important matter. I attach no particular importance to the use of the word "extreme" as used. I think, probably, your view that it must be reasonable, but reasonable in the light of the subject matter to which it is applied, is probably the correct one, and the jury is so instructed.

Mr. YOST. On the question of res adjudicata, I understand Your Honor's ruling to be that while the New Hampshire case established the fact that at that time there was no bad faith, or no falsity, either

one or both, that that did not necessarily conclude the present litigation, because there is a change in the literature and that, therefore, different issues are involved. I take that to be a ruling on Your Honor's part that, as a matter of law, the issues are different. We are of the opinion that the difference in the booklets, as to whether there is any substantial difference in the booklets, and, if so, whether the claims in the 1919 literature are broader than the claims in the present literature, and, therefore, substantially cover the present claims, should be left as a question of fact to the jury. I am not quite certain whether, under Your Honor's instructions, you meant to leave that open to the jury or not, or whether you have ruled on it as a question of law.

The COURT. Well, at the earlier stages of this case I suggested, for consideration of counsel, possibly, the testimony could be limited on the issue of good faith, particularly as to matters arising since 1919. Apparently, counsel for the claimant did not take that view of it, because they themselves decide to put in evidence facts and circumstances prior to 1919. I, therefore, thought it was unnecessary to make any further distinctions about that case except to say that in my opinion it is not res adjudicata as to this.

Mr. YOST. And there was one further extract from the charge: Your Honor emphasized, I thought somewhat negatively, from the claimant's standpoint, to the jury that they might consider that as the result of their finding, or, should they not find for the Government, they might consider the dilemma in which sufferers from certain diseases might be left by being misled into using something that would not be of any help to them, without in any way offsetting that by a positive statement that, of course, if the remedy has any therapeutic value, in the minds of the jury, and they find for the Government, they might at the same time be depriving the public of a remedy that might be helpful to them. In other words, I think the negative emphasis was placed on that matter.

The COURT. I think whether the matter is affirmatively indicated is dependent on the view that the jury takes of the facts. In the first part of the charge I said that the case, in my opinion, is a very important case, according to both the contentions of the Government and of the claimant, that the result would be likely to affect, importantly, the health, if not the lives of a great many people. The Government's contention is that the continued sale of this preparation to the public under the recommendations made tends to induce sufferers from some very serious diseases, particularly tuberculosis, to rely upon the remedy, which the Government says is of no value, and to neglect proper medical advice which might be of real help, while the claimant's contention in this case is that the remedy is so wonderfully efficacious that it ought to be used by every physician for the treatment of these major diseases, including tuberculosis, and if the B. & M. company cannot sell it for use in the treatment of tuberculosis the public will be deprived of a very valuable remedy. Now, whether those two things are true is an issue in this case.

Mr. YOST. That is all I have, Your Honor.

Mr. SOBELOFF. The charge is satisfactory to the Government. We have no exceptions, and in view of the very complete review of testimony which is contained in Your Honor's charge, at the request of both the Government and the claimant, a good part of what I

would have said in my opening argument becomes unnecessary to say. I am perfectly willing, if it is agreeable to the court and the claimant, to waive my opening argument.

The COURT. Whatever counsel for the claimant desire to say as to that is, of course, agreeable to the court. I am rather disposed myself to suggest that in a case of this importance, which has taken so long to try, probably it would be more satisfactory both to the jury and to counsel for the claimant, to have the Government make at least some opening argument. You do not waive your concluding argument?

Mr. SOBELOFF. No, sir.

The COURT. I think it is better to have the opening argument made to the jury. Now, gentlemen, as to the practical question of time: The case has taken so long to try, there has been so much testimony, that I am in no disposition at all to unreasonably, if at all for that matter, limit counsel, but I have indicated that I thought that three hours on each side, is, perhaps, enough for counsel to cover the case in argument. Unless I hear some dissent from that view, I think we can proceed on that assumption, citing quite a legal precedent for similar conditions that, in the appellate courts, while counsel are permitted to take that length of time, they are not obliged to do so. Proceed, Mr. Sobeloff.

Counsel for the Government and claimant thereupon delivered their final arguments, at the conclusion of which the court further instructed the jury.

The COURT. Gentlemen, you are now ready to retire to your room. The clerk will give you, as is customary in all cases, simply the papers in this case, that is, the libel papers. There are two cases consolidated, but they are treated as one, and there is no real difference between them, except they are two different seizures here in Baltimore made at two different times. I think I will not ask the clerk to give you any other papers than that unless you ask for them. If you want other papers, you can ask for them from time to time; but to start with I should think that the request should come from you, if you want anything more than just the ordinary papers. * * *

Of course, you will remember, gentlemen, in addition to this charge as given yesterday morning, there has been one or two things said since then. You will recall them, I think. The principal thing was that this morning I called to your attention that as to Mr. Johnson the evidence showed that he was not president of the company at the time the shipment was made. And it resulted from that, in view of other testimony, that the inquiry particularly with regard to good faith of the officers of the company resolves itself into an inquiry as to Mr. Rollins in that connection, in connection with which, however, you should consider from the standpoint of the claimant corporation as a whole, what information and knowledge and notice it had by virtue of what it learned from Mr. Johnson's activities in the case as its counsel. But in testing the good faith of the individuals, it must ultimately substantially in this case relate to Mr. Rollins.

However, you will bear in mind that the claimant is a corporation, and if the evidence shows the lack of good faith on the whole, you can consider all the evidence with regard to it.

Now, is there any other paper you would like to have, gentlemen?

The FOREMAN. Your Honor, in the matter of rendering the verdict on behalf of the jury, the mere statement of the verdict for or against the claimant or for or against the Government is sufficient for the court?

The COURT. Yes. The procedure will be this: When you have agreed upon the verdict, you will advise the bailiff, who is your officer in charge, that you have agreed. You need not say any more than that. And then the court will be advised, and you will come in court. The clerk then will call off the jury list and see that you are all here. And then he will ask you if you have agreed. If you have, then he will ask, "Who shall speak for the jury?" And the response is, "The foreman." And then he will ask you, "How do you find your verdict in this case, for the Government or for the claimant?" And your reply will be in accordance with your verdict as you have reached it.

The FOREMAN. There is some question relative to the specifications, whether you eliminated two and three. I think you said you did.

The COURT. Yes.

The FOREMAN. I wanted to get clear on that one point.

The COURT. They are out of the case. You need not bother with them at all in the form of your verdict. The only charge that is the basis of the condemnation in this case, as sought by the Government and defended by the claimant, is contained in paragraph 4. And that is the one that you have heard about, the alleged misbranding as false and fraudulent.

On July 19, 1932, the jury returned a verdict for the Government. On July 28, 1932, a motion for a new trial having been withdrawn by the claimant, the court entered a decree ordering the product condemned and destroyed.

UNITED STATES v. W. T. RAWLEIGH CO.

(Circuit Court of Appeals, Tenth Circuit, Mar. 31, 1932)

57 Fed. (2d) 505

Appeal from the District Court of the United States for the District of Colorado. Libel by the United States against the W. T. Rawleigh Company. From an order dismissing the libel, the libelant appeals. Reversed and remanded.

Before PHILLIPS and MCDERMOTT, Circuit Judges, and KENNEDY, District Judge.

KENNEDY, *District Judge*. This is a libel suit brought under the Food and Drugs Act, 21 U.S.C.A. secs. 1 to 26 (act of June 30, 1906, 34 Stats. 768). The libel was directed against certain misbranded drugs found in the possession of the appellee. An answer was filed in which various exceptions to the libel were set forth by the appellee in the court below, among which was the following:

Because it does not appear in and from the averments contained in the said libel that a notice and preliminary hearing by the Department of Agriculture was afforded to the claimant prior to the institution of the libel, pursuant to law in such cases made and provided.

At the hearing the court sustained said exception, overruled all others, and entered an order dismissing the libel and for a return of the property seized under the warrant. From such order of the District Court the Government appeals.

Section 2 of title 21 prohibits the introduction of food or drugs in interstate commerce which are adulterated or misbranded within the scope of the act. Section 14 provides for the seizure of such specified food or drugs. Section 11 provides for the examination of specimens of food and drugs in the Bureau of Chemistry for the purpose of determining whether such articles are adulterated or misbranded, and that the Secretary of Agriculture shall give notice to the party from whom the sample was obtained in the event it is found that there is adulteration or misbranding; and further provides that any parties so notified shall be given an opportunity to be heard, upon which, if it appear that any of the provisions of the act have been violated by such party, then the Secretary of Agriculture shall certify the facts to the proper United States district attorney for appropriate action in the premises. Section 12 provides that it shall be the duty of each district attorney to whom the Secretary of Agriculture shall report any violation, or to whom any health or food or drug officer or agent of any State, Territory, or the District of Columbia shall present satisfactory evidence of such violation, to cause appropriate proceedings to be commenced and prosecuted for the enforcement of the penalties in such case provided. Section 2 also provides that anyone violating the act shall be guilty of a misdemeanor and subjected to certain fines or imprisonment; and section 14 contemplates proceeding against the offending articles through libel.

It does not appear from the record in this case as to how the possession or knowledge of the specimens of alleged misbranded drugs came to the district attorney upon which the libel is based.

By the order of the trial court sustaining the exception of the appellee upon the ground that no notice had been given or opportunity to be heard under the provisions of section 11 as heretofore referred to, it was held that the libel could not be sustained, which raises the question as to whether or not such notice is necessary from a jurisdictional standpoint, and this is the sole point presented upon this appeal.

It appears that there had been a diversity of opinion upon this point among the District Courts and Circuit Courts of Appeals. The matter came to the attention of the Supreme Court in the case of *United States* v. *Morgan*, 222 U.S. 274, 32 S.Ct. 81, 56 L.Ed. 198, where some of the cases of the lower courts involving conflict of opinion are cited. In the Morgan case the high court affirmatively holds that the notice indicated in section 11 is not jurisdictional. The gist of the decision is to the effect that, because under section 12 it is made the duty of the district attorney to institute appropriate proceedings for the enforcement of the penalties prescribed by the act, when reports are made to him by the Secretary of Agriculture or by any health, food, or drug officer in any State or Territory, which latter reports would manifestly not come through the Secretary of Agriculture, it should not be held that it was the intent of Congress that he should only prosecute where notice had been given in the event that the report had come from the Secretary of Agriculture, but could

prosecute without notice where the report had come from the other sources indicated, and that for the reasons stated the preliminary notice could not be held as being a necessary preliminary step to prosecutions for violations of the act either by indictment or by libel. Additional reasons are indicated in the opinion which it will not be necessary here to further set forth. The proceeding in the cited case was in the nature of a criminal prosecution by indictment, while in the case at bar it is by libel, yet we see no distinction to be made in the rule by virtue of these circumstances. We are of the opinion that this decision of the Supreme Court rules this case.

For the reasons stated, the order of the trial court will be reversed, and the case remanded for appropriate action not inconsistent with this opinion, and it will be so ordered.

UNITED STATES v. 60 BOTTLES OF DR. HERMANCE'S ASTHMA AND HAY FEVER MEDICINE

(District Court, S.D. New York, June 3, 1932)

N.J. No. 19476

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict for claimant.

KNOX, *District Judge* (charge to jury): Years ago, when I was a good deal younger than I am now, newspapers, as I recall them, sometimes carried advertisements of various patent medicines, setting forth list of symptoms of this, that, or the other disease, and stating that the particular medicine advertised would cure all of them. As I say, I occasionally read these advertisements and imagined that I had all the diseases there listed, or symptoms of them.

The world, as time went on, came to know that many of the patent medicine advertisements and representations concerning the therapeutic or curative effects of medicine were fraudulent. It came to understand that many of the medicines were mere nostrums that were put upon the market to deceive the gullible, and to separate such persons from their money, and to place it in the pocket of the producer or manufacturer of the so-called medicine. I think all of us are quite old enough to remember those days.

The Constitution of the United States gave the Congress of the country power to regulate interstate commerce. The patent and proprietary medicine evil became so great that, acting under the power to regulate interstate commerce, the Congress said that medicines and drugs which are misbranded shall not pass across State lines, and that, if they be so passed, certain steps might be taken by the Government to put an end to drugs and medicines which are falsely represented as being capable of curing or alleviating disease. That legislation has come to be known as the Food and Drugs Act, and it is under that act and some of its sections, that this case comes into this court for determination.

None can deny that that act has been extremely beneficial. The ordinary channels of trade, so far as they cross State lines, have been closed to misbranded articles, and all of us, I take it, are the bene-

ficiaries of that act. So you should start your consideration of this case, I think, with no prejudice against the Food and Drugs Act.

At the same time, Congress, by allowing a jury trial in cases of this character, had in mind the feeling, I take it, of the great mass of the country that its membership would practice, to some extent at any rate, self-medication, in an endeavor to alleviate and cure some of the ailments and diseases to which all of us are subject. It was recognized that we have had various medicines and various treatments handed down to us from one generation to another, and that the privilege of self-medication should not be taken away from the public. All of us, I take it, at times in our lives, have doctored ourselves, and it may have been wise or unwise to do it. All of us, I take it, have assumed from time to time to give advice to members of our family, or to our friends, as to what they should do in certain instances, and in most such instances where we, as laymen, attempt to treat ourselves or to treat members of our families or our friends, we ordinarily use what are known as homely and common remedies or medicines.

In the country, where I was born and raised, we made medicines ourselves. Some old woman, perhaps, would gather the herbs and barks from the various fields, and make up a concoction which she and perhaps some of her neighbors thought was good for certain types of disease. She made salve and whatnot. So Congress, having that in mind, said that, in cases such as this, 12 men should pass upon the character of the representations that are made concerning the curative or therapeutic qualities of drugs and medicines which cross State lines before condemnation should rest upon a particular product. That is why you are in the box. In this case, the Government as it had a right to do, believing, and, undoubtedly sincerely, that this medicine of Mr. Bell was false and fraudulent in character, resorted to the provisions of what is known as the Sherley amendment of the Food and Drugs Act, which is in these terms:

> For the purposes of this Act, an article shall be deemed to be misbranded: In case of drugs: * * * If its package or label shall bear or contain any statement, design, or device regarding the curative and therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent.

Relying upon that provision of law, the United States filed a libel against this shipment of this medicine, and seized it, and charged that the representations appearing upon the circular contained in the carton, and which accompanies the bottle of medicine, are false and fraudulent. The task that devolves upon you will be to say whether, under the evidence in this case, these representations are false and fraudulent. The Government charges substantially all of the printed matter contained upon the circular, and upon the bottle, and upon the carton, to be untruthful in that this medicine is not of curative or therapeutic value in the treatment of asthma or hay fever.

The claimant, Mr. Bell, came along and said, when he got notice of this seizure, "This is my product. I deny that what I have said as to the curative and therapeutic qualities of this medicine is false and fraudulent." So the issue between the two parties is joined; one claiming that the statute is violated, the other claiming that it is not. In order to enable you to decide which of the contending parties is right, you have heard this evidence for the past 4 days;

and, on the defense, Mr. Bell introduces proof from which he asks you to say that his representations were founded on facts, and that he acted in good faith in making them, even though you should, as a matter of scientific inquiry, reach the conclusion that they are false.

The Government charges, and has sought to establish by its proof, not only that the statements are false, but that they were made by Mr. Bell with an intent to deceive the public.

With that outline of what the issue is, as a preliminary, it is necessary to go a step farther and to speak of what constitutes a therapeutic quality and what constitutes a curative quality; but before I do that, and in order to allow you fairly and properly to consider the case, I desire to make some general observations upon various matters that you should take into consideration.

This is a civil case. The burden of proving its allegations rests upon the Government, and the extent of its burden is that it shall prove, by a fair preponderance of the credible evidence in the case, that its allegations, as contained in the libel, are correct, and that the representations of Mr. Bell are not only false but that they are fraudulent as well.

The Government does not have to prove the case beyond a reasonable doubt, as in a criminal trial, but it does have to produce evidence which, when it is placed in the scale, or the pan of the scale, which represents the Government's side of the case, will outweigh the evidence which is to be placed in the pan of the scale which represents Mr. Bell's side of the case; and a preponderance of evidence is made out if the weight of the Government's case is such as to make its pan of the scale descend below that of Mr. Bell by even a hair's breadth. If it should be that you think the evidence is evenly balanced, upon the contentions that are here made by the parties, then the Government cannot win, and a verdict should be returned for the claimant; or if, perchance, you conclude that Mr. Bell's testimony—speaking of the witnesses who have been brought here to justify his side of the case—outweighs the Government's evidence, then, of course, the Government cannot have a fair preponderance of the evidence, and Mr. Bell is entitled to win.

We have had an interesting lot of testimony, both upon behalf of the Government and upon behalf of Mr. Bell, and you are the judges of the weight to be given the testimony of each and every witness who has testified. You are to say whether they were telling the truth, whether they were competent to speak of the matters concerning which they gave testimony, whether they were ignorant and themselves gullible, or whether what they said was accurate and trustworthy.

If you feel and conclude that any witness in the case falsely testified as to any material matter, you may, if you desire, throw aside the entire testimony of any such witness as being unworthy of belief, or you may give credence to such part of any testimony of any witness, whom you believe to have testified falsely, as you think is true, and cast aside that which you think is false.

You can apply your own tests in passing upon the testimony of the several witnesses, and reach such a conclusion in connection therewith as you think all the facts and circumstances warrant you in doing.

It is needless to tell you, I think—but I shall do so—that this is a case which is entitled to careful attention both from the standpoint of the Government and the claimant.

If this medicine be a mere nostrum, it can do no good to those who, it is hoped, will provide a market for it. The Government, in seeking to protect the public from such products, is entitled to prevail if what has been said about this medicine is, as a matter of fact, false and fraudulent. On the other hand, Mr. Bell, if he has not offended against the statute in putting out this medicine, and if his representations are not false and fraudulent, is entitled under the law to continue to send this medicine across State lines and supply whatever market there is for it. Do not decide the case upon the mere assumption that here is a dozen bottles of a cheap medicine, to sell for the sum of not more than $12, perhaps, but consider where the right is under the law, as I have so far spoken of it, and as I shall endeavor, in the next few minutes, to speak of it.

When a man puts medicine into the market and asserts that it has certain qualities, the public has a right to expect that he shall know something about it, and that he shall not make any false statements concerning its qualities, and also that he will not make reckless statements concerning its qualities.

I may have no intention in the world—certainly I have none now—to kill anybody who may be walking down Broadway. Ordinarily a person has an intent when he shoots a particular person; but if I were to shoot a gun out of this window over towards Broadway, and someone there were to be killed by it, the law would infer me to have had an intent to kill that person, because, as a reasonably intelligent man, I did a thing which might be calculated to kill someone out there on the street. So, if a man willfully and recklessly makes statements without knowing anything about their truth, and those statements are not justified by actualities, he may be charged with intent to deceive those to whom the statements are made.

If Mr. Bell made statements that this medicine would cure chilblains and ague and scarlet fever, and diseases of that nature—take an extreme case—obviously, from the testimony that has been here adduced, his claims would be false and fraudulent. He is charged, as an intelligent person who is asking people to accept his representations, with some knowledge of the disease which he undertakes to provide for, and with the effects of the constituents of the medicine which he offers to the public for the treatment of that disease. So, when you come to hold him to his responsibility, or lack of it, you may take that into account, and, after taking it into account, consider what he has said and then decide, first, if he has made any false statements in these papers which accompany this medicine. If he has made no false statement and everything is the truth, and you are unable to conclude that he has said anything that does not represent the facts, that is the end of the case, and you should come back with a verdict for the claimant.

If you decide that he has made a false statement; that the picture is painted too rosily, and that what he has suggested, if not definitely represented, that this medicine will do, is not justified by the facts as you have heard them, you may conclude that he has made a false statement. But that will not be enough to warrant you in bringing

in a verdict for the Government. It will be necessary for you to go farther and consider whether, in making a false statement, there was an intent to deceive. Then, if you find that he has made a false statement, and that he made it for the purpose of mulcting people of their money, and that he made it in order to sell this medicine, where otherwise he would not have been able to sell it, by practicing a deception upon those who read what he has said, and you find that by a fair preponderance of evidence, then the Government is entitled to a verdict and you should return a verdict in its favor.

The language upon the carton, and the bottle and the circular, is simple, and you are entitled to construe that language as you believe it would be construed by a person who wanted some relief from asthma, and saw this bottle, and the circular, and this carton with its representations. What is the natural construction to be placed upon this language? It is conceded here that there is no out-and-out claim that this medicine will cure asthma. The contention of the defense by Mr. Johnson on behalf of Mr. Bell, is that it is helpful, and it will tend to alleviate some of the attendant physical conditions that accompany asthma and bronchitis. Now does the language in the aggregate, constitute a representation that the medicine will cure asthma and hay fever? Does the language used falsely represent any therapeutic value that the medicine may have, and were the representations, if they falsly represent the real qualities of this medicine, fraudulent, as having been made with intent to deceive? That is the basic question which you shall determine.

Now we get down to a feature of the case which is not quite so simple, perhaps, and that is as to the testimony of the experts and the testimony of the claimant's witnesses, as to what constitutes asthma.

We have heard from the pharmacist, or the analyst from the Department in Washington, his version as to what the contents of this medicine are—and the man who gave the testimony has no reason to be ashamed of it. He made his analysis and it seems to me, from the developments in the case, his analysis was pretty accurate. He found a quantity of water, got some lobelia, some potassium iodide, some licorice, some alcohol—I guess that is about all, with the exception of this much-discussed rosinweed.

The Government's witnesses could not tell us much about rosinweed. Certainly the claimant's witnesses told us nothing about it, or what its curative effects may be. Juror No. 5 contributed the most information we have as to the characteristics of rosinweed. This morning one of the scientists from the Department said that when tincture of rosinweed was injected into the veins of a cat it did not increase its blood pressure; thus tending, I take it, to prove that the substance was inert.

We have heard a good deal as to the therapeutic effect of potassium iodide and lobelia. The licorice seems to have been forgotten, save as it may tend, perhaps, to make the concoction palatable, or halfway so, if you like licorice.

Alcohol is one of the constituents of most medicines that we get, or a great many of them. I suppose it tends to preserve, perhaps, some of the ingredients that may be in the medicine—I do not know, but it is there—not enough of it to cause intoxication, I suppose, in small doses, at any rate; but it is there; and so far as asthma goes,

standing alone, there has been no testimony that alcohol would have much effect upon the treatment for that ailment.

Potassium iodide, it is admitted by the very learned experts who testified on behalf of the Government, will tend to liquefy the heavy mucus that sometimes characterizes the bronchial tubes, both in asthma I suppose, or certainly in bronchitis, and in that sense this ingredient may be of aid in allowing a patient, who has experienced difficulty in breathing, to raise and expectorate this mucus, and thus allow the bronchial tubes to function, and to have air pass through them.

Lobelia, it seems, from the medical testimony, has from time to time been used by the medical profession in treating or prescribing for those suffering from asthma. I do not recall specifically what it was said that lobelia would do, but, as I do remember, it has some therapeutic value in treating some of the ailments which manifest themselves by clogging up of the bronchial tubes, and which make it difficult for one to breathe.

It seems also to be a part of the medical testimony that certain types of heart disease will produce a pressure on the bronchus that will occasion shortness of breath in the individual who thus suffers. I take it that all of us will probably conclude that a condition of this kind is not real asthma. Some of us have irritation of the bronchial tubes which occasions mucus to be produced, and sometimes the tubes clog up, and it is difficult to remove the mucus. So when we begin to discuss this feature of the case, we get into a good deal of confusion of thought, particularly upon the part of the layman, and possibly upon the part of some physicians, as to the classification of ailments and diseases into which asthma should be placed and you must have that in mind in considering this case, and as bearing upon the truth or falsity of the representations that were made.

Medicine advances as the years go by, and we owe much to the medical profession. Certainly it has done enough for me that I take off my hat to it most of the time. I have great respect for it. I was much impressed by the learning of the two expert witnesses who were called here yesterday or the day before, and who testified concerning asthma. But we must also understand, as these gentlemen admit, that medicine is far from being an exact science. The views of the medical profession change from time to time, and it has come, apparently, to give rather a narrow definition to asthma, particularly, the allergic type of asthma, as being that condition which grows out of the action upon the human system of certain proteins, which will bring about a congestion of the bronchial tubes, and produce shortness of breath.

I think I speak a truism when I say the public does not ordinarily keep fully abreast of the advances of medical science. It is very natural that it should not do so, because we lack the opportunity and inclination to do so. We follow along like a wagon behind a tractor. So, most of us, perhaps, as members of the public, will have a wider impression of what constitutes asthma than will the skilled scientist. We speak in looser terms, more generic terms; and, in considering these representations of Mr. Bell, you should bear that in mind.

Some of the witnesses yesterday who were called by the claimant said they were suffering from bronchial asthma congestion, perhaps an

irritation of the bronchial tubes which may have been occasioned by some other cause than that of proteins. They said they got relief, were able to raise mucus, and felt better after taking this medicine.

When you come to reach a decision as to what asthma is, it is only right and proper that you should consider not only what the physicians said in connection therewith, but as to what the public believes asthma to be, because those who get relief from this medicine, if they do, take it for the condition which they describe or which they think is asthma, although it may not be true asthma within the definition of these physicians.

Was there an intent to deceive? Has this medicine any therapeutic effect which would justify these representations, or were they false and fraudulent?

"Curative" is itself not easy to define. Funk & Wagnalls Dictionary defines it as an agency possessing power or the tendency to cure. "Therapeutic" is defined as an agency having healing qualities, as an alleviator of a diseased condition.

When one suffers from a disease and has physical distress as a result of it, one of the things, naturally and humanly, that that person wants to accomplish is to relieve his physical distress and, if there is something which will enable the distress to be relieved, and if it does so without harming him, and brings about a beneficial and therapeutic effect, that person is entitled to the relief he may thus obtain. He is also entitled not to be deceived as to the quality of some agency which he would like to use to relieve him of his physical distress. I may go over to a druggist, if I have a cavity of the tooth or an exposure of the nerve, which occasions pain. I will tell the drug store man, "I have a toothache," or perhaps I have some remedy in mind, and I ask him if [he] has it in stock. If so, I will purchase it and put it in my tooth. Perhaps it will deaden the pain so as to enable me to get to a dentist, and have the toothache cured by removing its cause. If the remedy does that and gives me a bit of ease, and it does not injure me otherwise and destroy the gums in my mouth, or the structure of the tooth, it is a therapeutic agent, and I am entitled to use it.

This brings me to another feature of this case. It is said that potassium iodide, in some cases of tuberculosis, may break down the enclosing structure of tubercular sections of one's lungs and enable a latent case of tuberculosis to become active. Is that true? Is the quantity of potassium iodide that one is likely to get in treating himself with this medicine of sufficient size and power to make that a real risk? If it is a real risk, has the claimant fraudulently put this destructive agent on the market without notifying people of the danger that may follow from its use? What I mean to say is that if potassium iodide is a dangerous element and agency, then this medicine is not, without more than appears upon this carton and advertising matter, may not be benign and helpful product for the use of those who may be suffering not only from latent tuberculosis, but also from asthma and hay fever. In that respect, a statement that this concoction is an appropriate medicine for asthma, hay fever, catarrhal conditions, and head colds, may be said to be false. If it is false in that respect, was the false statement made by Mr. Bell with an intent to deceive? We have here also "catarrhal conditions

and head colds." Is there anything beneficial in this medicine and of therapeutic value for the treatment of those ailments?

It will be necessary, as I have indicated several times, for you to consider the falsity or the alleged falsity of the statements. If you find there are false statements, or even one, then you should go farther and consider whether there was an intent to deceive. If Mr. Bell acted in good faith, if he had a desire to be of service to his fellow man, and honestly believing these statements, made them, then, even though the statements are false, the Government should not prevail.

As bearing upon his good faith, you may take into consideration what he was heard from his father and mother about this medicine, about its reputation, if it has any. He has a right to his ideas as they may be formed from what the users of the medicine have said to him. He says that his wife takes it, and if she does, and he knows it, that is entitled to be considered by you as bearing upon his own good faith in the matter.

When you have given thought to all of these questions, it will be your duty to find a verdict which shall be fair to Mr. Bell and to the Government. He has a right to express his honest opinion. His opinion may be erroneous; it may even be false; but if he honestly and sincerely entertains his opinion, even though based upon insufficient evidence, he has a right to express it, just the same as you and I and all of us, about important matters from time to time, form our judgment upon what we see, upon our personal experiences and upon what people tell us; and it is no different with him in connection with this medicine.

A person can tell half-truths; what he says may be true in every syllable but his statement, nevertheless will convey a false impression. If he does this, deliberately tells half-truths, which, even though literally true, are false, in that they engender wrong inferences, he may be charged with falsity in that respect. A person making or dealing in substances, alleging them to have therapeutic or curative value, should be in a position to have superior knowledge of what he has said. Otherwise, his statements may be considered to have been recklessly and inconsiderately made. You may consider whether he has done all that a reasonably prudent man, desiring to act in good faith, would have done in the way of acquainting himself with the effect of this medicine—his education, his training, all those are matters to be considered.

I think I have charged you, in substance, that if you find from the evidence that this preparation is dangerous to entrust in the hands of a layman, without medical supervision, and if the label bears no adequate statements as to such danger, then you may find that the statements as to the therapeutic value of the medicine are false. But even if you find that, you should go farther and consider whether they were made with an intent to deceive.

I think I have substantially covered the various requests to charge that have been made by the parties, although I have not done so in the language of the requests.

JUROR NO. 5. Would you kindly state, sir, in what form you would wish the verdict announced?

THE COURT. Either in favor of the Government or in favor of the claimant.

JUROR No. 5. Suppose, on the other hand, there are certain qualifications. Do you wish them—as, for instance, you announced that we must consider whether the statement is true; but suppose we conclude that it is not true but that, as far as we know, he thought it was true; I am taking a suppositious case.

The COURT. Well, then, if you find that any particular statement is false, you may state separately what statement or statements you believe to be false; but if you do not find that a statement was made fraudulently, that is with intent to deceive, your verdict nevertheless should be for the claimant.

JUROR No. 5. Then it is proper, if we so see fit, to announce a verdict in favor of either one of the parties, but make certain additional statements?

The COURT. You may make a statement, you may make a special finding, if you desire to, upon any particular part of the matter which is false. Is there anything else?

Mr. JOHNSON. Will Your Honor look at requests 8, 9, and 10 of mine, and see if you think you have given them fully?

The COURT. I think I have covered them substantially.

Mr. JOHNSON. I am inclined to think you have.

The COURT. Any special requests that you have, Mr. De Koven?

Mr. DE KOVEN. I was considering whether No. 8 of our requests to charge was covered.

The COURT. I think I have covered that. All right, gentlemen, you may take this [indicating Government's exhibit 1] with you, if you want to.

The following verdict was returned by the jury: "We find for the claimant. We recommend that the claimant insert in his literature a warning against its use by persons having tubercular tendencies."

UNITED STATES v. ELEVEN CARTONS OF DRUG LABELED IN PART "VAPEX"

(District Court, D. Maryland, June 7, 1932)

59 Fed. (2d) 446

Libel for condemnation of article of drug. On demurrer to claimant's second special amended plea. Demurrer sustained.

CHESNUT, *District Judge*. In this proceeding at law (by the applicable statute called a libel) the Government seeks to condemn a quantity of "Vapex", shipped in interstate commerce, on the ground that it is misbranded under section 8, paragraph 2, of the Food and Drugs Act of Congress (U.S.C., title 21, sec. 10). The misbranding is alleged to result from the failure of the package

> to bear a statement on the label of the quantity of proportion of any alcohol * * *, or any derivative or preparation of any such substances contained therein.

By its second special amended plea filed February 12, 1932, the claimant, E. Fougera & Co., Inc., admits all the allegations of fact contained in the libel but, in opposition to the claimed condemnation, sets up the following contentions, in substance: (1) that the "Vapex"

as shown by the labels on the packages is "a pure inhalant generally indicated in the treatment of head colds"; (2) that the directions for using it are to place a drop or two in the center of a folded handkerchief and inhale the vapor therefrom; (3) that the alcohol contained in the article "has no office or property therein other than as a diluent or solvent of the essential oils contained therein." From these facts in the plea the legal conclusions are drawn that (a) Vapex is not a drug within the meaning of the act; (b) the act properly construed does not apply to Vapex; (c) that if construed to apply to Vapex the act is unconstitutional in the absence "of a showing that the alcoholic content of said article renders the same noxious or harmful to the public health."

The Government challenges the sufficiency of the plea to establish these conclusions.

After a study of the excellent briefs submitted by counsel, I have reached the conclusion that the demurrer should be sustained for the following reasons:

The term "drug" as used in the act is defined to include "all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for *internal* or *external* use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals." U.S.C., title 21, sec. 7. The definition so clearly includes the substance "Vapex" (as it is described in claimant's plea) that discussion seems unnecessary. The labels on the bottles as quoted in the plea state that the inhalation of the vapor from a drop of Vapex on a handkerchief is effective to relieve a head cold instantly and that its use will stop a cold at the start. It is further described as a new method of treatment for colds. The labels also assert that its use is both curative and preventative, and that breathing the vapor is inimical to the germs of common colds. It is clearly, therefore, a substance "intended to be used for the cure, mitigation, or prevention of disease", unless it were denied, as it is not, and as I think it could not be, that a head or common cold is a disease. See *United States* v. *23½ Dozen Bottles*, 44 Fed. (2d) 831 (D.C.Conn.).

The more substantial contention of the claimant is that Vapex, by reason of its nature and use, is without the substantial intent although within the literal content of the wording of the act. It is urged that the purpose of Congress in requiring preparations containing alcohol to state the percentage thereof on the label was to prevent the user of medicine from unconsciously acquiring a taste for alcohol disguised as medicine; and a comparative reference is made to the section of the same law relating to food preparations which omits any requirement that food products containing alcohol (often contained therein, it is said, as preservatives) must state upon their labels the quantity contained. It is argued for the claimant that a medicine or drug used only for inhalation and not otherwise for internal use could not reasonably be within the substantial intent of Congress in requiring the percentage of alcohol to be stated on its label. The substance of this contention is that inhaling vapor from alcohol is harmless and not habit-forming and therefore could not have been within the intent of the act as to misbranding. But this contention is only a restatement of the claimant's first contention which was that an inhalant is not a drug which, as above noted, is

I think not tenable. And if an inhalant is covered by the definition of a drug, then the misbranding section is expressly applicable to it. The statute makes no exception and I do not think the court is at liberty to read an exception into the act even though if the matter had been brought specially to the attention of the Legislature it might have done so in the original enactment. See *United States* v. *Sixty-five Casks*, 170 Fed. 449 (D.C.N.D.W.Va.), affirmed (C.C.A.) 175 Fed. 1022.

It is a well-settled principle of statutory construction that the intention of the Legislature is to be sought primarily in the language used, and where this expresses an intention reasonably intelligible and plain, it must be accepted by the courts without modification by resort to construction or conjecture. *Thompson* v. *United States*, 246 U.S. 547, 38 S.Ct. 349, 62 L.Ed. 876.

In support of its contention the claimant relies upon the cases of *United States* v. *Antikamnia Chemical Co.*, 231 U.S. 654, 34 S.Ct. 222, 58 L.Ed. 419; *Hall-Baker Grain Co.* v. *United States*, 198 Fed. 614 (C.C.A. 8th); *McDermott* v. *Wisconsin*, 228 U.S. 115, 33 S.Ct. 431, 57 L.Ed. 754, 47 L.R.A. (N.S.) 984, Ann. Cas. 1915A, 39. But I find nothing in these cases which, in my opinion, gives any substantial support to the contention. And it may also be said that the question as to whether the inhaling of alcohol is habit-forming and consequently harmful is hardly raised by the pleadings. In any event it is hardly within the scope of judicial knowledge that alcohol as an inhalant is necessarily harmless; and I do not feel warranted in determining that Congress could not have intended that preparations for inhalation only should be required to bear a statement of alcoholic content on the label. Assuming that the matter is debatable, it seems entirely clear that Congress was entitled to exercise its own judgment, not to be superseded by the verdict of a jury or the personal opinion of a judge. *Hebe Co.* v. *Shaw*, 248 U.S. 297, 303, 39 S.Ct. 125, 63 L.Ed. 255.

Finally, it is contended for the claimant that if "Vapex" is within the language of the act as properly construed, it is nevertheless without the power of Congress to prohibit its transportation in interstate commerce, because, as directed to be used, it is a harmless substance in no way detrimental to the public health. Emphasis is laid on the wording of the opinions in many of the cases in the Supreme Court dealing with the Food and Drugs Act to the effect that the primary purpose of Congress was to prevent injury to the public health and that the prohibition was only against *impure* food and drugs. See *Hipolite Egg Co.* v. *United States*, 220 U.S. 45, 31 S.Ct. 364, 55 L.Ed. 364; *Seven Cases Eckman's Alterative* v. *United States*, 239 U.S. 510, 36 S.Ct. 190, 60 L.Ed. 411, L.R.A. 1916D, 164; *Hoke* v. *United States*, 227 U.S. 308, 322, 33 S.Ct. 281, 57 L.Ed. 523, 43 L.R.A. (N.S.) 906, Ann. Cas. 1913E, 905; *McDermott* v. *State of Wisconsin*, 228 U.S. 115, 33 S.Ct. 431, 57 L.Ed. 754, 47 L.R.A. (N.S.) 984, Ann. Cas. 1915A, 39. And importantly reference is made to the Child Labor case (*Hammer* v. *Dagenhart*), 247 U.S. 251, 38 S.Ct. 529, 62 L.Ed. 1101, 3 A.L.R. 649, Ann. Cas. 1918E, 724, where the Supreme Court held invalid an act of Congress which prohibited interstate commerce in articles manufactured by child labor under certain conditions. But in that case the articles themselves were the ordinary and usual subjects of commerce, entirely

harmless in themselves, and the aim of the statute was thought to be to equalize labor conditions in the several States rather than protect the public against the use of harmful articles. For this reason the legislation was held beyond the powers of Congress under the interstate commerce clause of the Constitution.

It is true that the Food and Drugs Act does forbid interstate commerce in impure food and drugs, but the scope of the act is not limited to that subject alone. It also includes the regulation of interstate commerce in drugs and food that are not impure and not of themselves harmful, including the requirement that the articles shall not be misbranded. In the judgment of Congress consumers of articles, harmless in themselves when used as directed, are entitled, nevertheless, to be advised of the existence in the articles of ingredients belonging to classes of articles which were regarded as potentially harmful of themselves, even though contained in harmless quantities in the articles as designed for consumption. To this end Congress provided that the package must contain a statement on the labels of the quantity of alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate or acetanilide, or any derivative or preparation of any such substance contained therein. Such substances classified as "narcotics" are obviously harmful when used in excessive quantities. Within the prescribed class is alcohol. Drugs containing such narcotics when properly labeled are not forbidden the facilities of interstate commerce. The effect of the act with regard thereto is to regulate rather than prohibit and it can no longer be doubted that such regulation is within the power of Congress. *United States* v. *Antikamnia Chem. Co.*, 231 U.S. 654, 34 S.Ct. 222, 58 L.Ed. 419; *Glaser, Kohn & Co.* v. *United States*, 224 Fed. 84, 89 (C.C.A. 7th). As Vapex is a drug containing alcohol, it comes clearly within the prescribed class even though the article as designed and directed to be used by the consumer is itself innocent and innocuous. The controlling principle applicable to the case is to be found in *Purity Extract Co.* v. *Lynch*, 226 U.S. 192, 201, 33 S.Ct. 44, 46, 57 L.Ed. 184, where Mr. Justice Hughes, speaking for the Supreme Court, said:

> It does not follow that because a transaction, separately considered, is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government.

And again at page 204 of 226 U.S., 33 S.Ct. 44, 47, he continued as follows:

> The statute establishes its own category. The question in this court is whether the legislature had power to establish it. The existence of this power, as the authorities we have cited abundantly demonstrate, is not to be denied simply because some innocent articles or transactions may be found within the proscribed class. The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat.

The question in that case was whether a substance called "Poinsetta," itself entirely innocuous but containing an ingredient forbidden by the statute of Mississippi, was prohibited by the act which, as construed by the State court, forbade the sale of all malt liquors. The court held that the article in question was within the act,

The same principle has been subsequently applied by the Supreme Court to other analogous situations. As in *Hebe Co.* v. *Shaw*, 248 U.S. 297, 39 S.Ct. 125, 126, 63 L.Ed. 255, a similar situation, Mr. Justice Holmes, speaking for the court, said:

> The power of the legislature "is not to be denied simply because some innocent articles or transactions may be found within the proscribed class. The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat." *Purity Extract & Tonic Co.* v. *Lynch*, 226 U.S. 192, 204, 33 S.Ct. 44, 47 (57 L.Ed. 184). If the character or effect of the article as intended to be used "be debatable, the Legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury," or, we may add, by the personal opinion of judges, "upon the issue which the Legislature has decided." *Price* v. *Illinois*, 238 U.S. 446, 452, 35 S.Ct. 892, 894 (59 L.Ed. 1400); *Rast* v. *Van Deman & Lewis Co.*, 240 U.S. 342, 351, 357, 36 S.Ct. 370, 60 L.Ed. 679, L.R.A. 1917A, 421 Ann.Cas. 1917B, 455. The answer to the inquiry is that the provisions are of a kind familiar to legislation and often sustained and that it is impossible for this court to say that they might not be believed to be necessary in order to accomplish the desired ends.

And the same principle was again applied by the Supreme Court in the cases of *Pierce Oil Corporation* v. *City of Hope*, 248 U.S. 498, 500, 39 S.Ct. 172, 63 L.Ed. 381, and *Euclid* v. *Ambler Co.*, 272 U.S. 365, 368, 47 S.Ct. 114, 71 L.Ed. 303, 54 A.L.R. 1016.

If we assume that the inhalation of Vapex is innocuous, nevertheless it is within the category of articles which, by the act, are required to contain a declaration on the label of the alcoholic content. And it cannot be said at this time that a statute which merely regulates interstate commerce in drugs containing alcohol, passes the bounds of reason or assumes the character of an arbitrary fiat. It is, therefore, not permissible for the court to make an exception where Congress had made none, and thus to withdraw from the operation of the statute an article which, even though harmless itself, is otherwise within the proscribed class.

The demurrer is, therefore, sustained.

UNITED STATES v. CENTRALIA DAIRY CO.

(District Court, W.D. Washington, July 16, 1932)

60 Fed. (2d) 141; N.J. No. 20139

Information alleging violation of the Food and Drugs Act. On demurrer to the information. Demurrer to all counts overruled.

CUSHMAN, *District Judge.* The information is for violation of the Food and Drug Acts, more particularly sections 2, 6, 8, 9, and 10, title 21, U.S.C.A.

One set of counts in the information accuses the defendant of unlawfully shipping and delivering for shipment from the city of Centralia, in the State of Washington, to cities in the territory of Alaska, an article of food, adulterated within the meaning of the act of Congress, in that a product which contained less than 80 per centum by weight of milk fat had been substituted for butter.

Title 21 U.S.C. section 8, provides:

> Sec. 8. Adulterated articles. * * * An article shall be deemed to be adulterated: * * * In the case of food: * * * If any substance has been substituted wholly or in part for the article.

Section 6 of the Food and Drug Act of 1906, as amended by the act of March 4, 1923 (42 Stat. 1500, title 21, U.S.C. sec. 6), provides:

> Sec. 6. Same; "butter." For the purposes of sections 1 to 15, inclusive, of this title, "butter" shall be understood to mean the food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter, and containing not less than 80 per centum by weight of milk fat, all tolerances having been allowed for

The demurrer to this set of counts will be overruled.

In another set of counts the defendant is accused of misbranding such shipments, it being alleged that the packages were misbranded, in that the statements "butter" and "one pound net" were false and misleading in that they represented the article was butter, to wit, a product which should contain not less than 80 per centum by weight of milk fat and that each of said packages contained 1 pound net of the article, whereas in truth and in fact said article did not contain 80 per centum by weight of milk fat but did contain a less amount, and each of said packages did not contain 1 pound net of the article but did contain a less amount, and that said article was further misbranded in that it was labeled as aforesaid so as to mislead and deceive the purchaser into the belief that it was butter, to wit, a product which should contain not less than 80 per centum by weight of milk fat and that each of said packages contained 1 pound net of the article. These counts are, in part at least, under that part of section 8 of the act of June 30, 1906 (34 Stat. 771, as amended by act Mar. 3, 1913, 37 Stat. 732), now appearing as title 21, U.S.C. section 9. This section, in part, provides:

> Sec. 9. Misbranded; meaning and application.
> The term "misbranded", as used in sections 1 to 15, inclusive, of this title, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country, in which it is manufactured or produced.

As these counts clearly allege that the statement that the packages contained "butter", as the same is defined by section 6, was false and misleading in the particular therein pointed out, the demurrer to these counts will be overruled and it is not necessary to consider whether these counts are also under that part of section 8 of the original act as amended now appearing as title 21, U.S.C. section 10, third paragraph.

In a third set of counts shipments and deliveries for shipment such as described in the first considered counts are alleged. In these last-mentioned counts the marking, in part, is alleged to have been "one pound net" and that it was food in package form and that the quantity of the contents was not plainly and conspicuously marked on the outside of the package.

These counts are under section 10, title 21, U.S.C., and more particularly the third paragraph thereof. This section, insofar as applicable, provides:

> Misbranded articles. For the purposes of sections 1 to 15, inclusive, of this title, an article shall be deemed to be misbranded; * * *
> Foods. In the case of food: * * *
> Packages not marked with weight; variations and exceptions permitted. Third. If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count. Reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provisions of section 3 of this title. The word "package" as used in this paragraph shall include and shall be construed to include wrapped meats inclosed in papers or other materials as prepared by the manufacturers thereof for sale.

The question presented concerning these counts is as to the validity of the third paragraph of section 10, supra. In *United States* v. *Shreveport Grain & Elevator Co.* (D.C.),46 Fed. (2d) 354, 355, this part of the act was, under the sixth amendment, held unconstitutional; the court citing, in support of the ruling: *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 41, S.Ct. 298, 65 L.Ed. 516, 14 A.L.R. 1045; *Connally* v. *General Const. Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322; *Yu Cong Eng.* v. *Trinidad*, 271 U.S. 500, 46 S.Ct. 619, 70 L.Ed. 1059; *United States* v. *Reese et al.*, 92 U.S. 214, 23 L.Ed. 563; *United States* v. *Brewer*, 139 U.S. 278, 11 S.Ct. 538, 35 L.Ed. 190; *Todd* v. *United States*, 158 U.S. 282, 15 S.Ct. 889, 39 L.Ed. 982.

In construing a statute the first duty of the court is to ascertain the legislative intent. *Ebert* v. *Poston*, 266 U.S. 548, 45 S.Ct. 188, 69 L.Ed. 435.

If an act of Congress cannot, upon a fair construction, be reconciled with the Constitution, it is the duty of the court to give effect to the Constitution rather than to the statute. *Hepburn* v. *Griswold*, 8 Wall 603, 19 L.Ed. 513. Acts of Congress must, however, be regarded as constitutional unless clearly shown to be otherwise. *Hepburn* v. *Griswold*, 8 Wall. 603, 19 L.Ed. 513. A court should declare an act of Congress unconstitutional only where the repugnancy is clear and the conflict irreconcilable. *Nashville* v. *Cooper*, 6 Wall. 247, 18 L.Ed. 851. See, also, *Trade-Mark Cases*, 100 U.S. 82, 95, 96, 25 L.Ed. 550; *United States* v. *Harris*, 106 U.S. 629, 635, 1 S.Ct. 601, 27 L.Ed. 290; *Close* v. *Glenwood Cemetery*, 107 U.S. 466, 475, 2 S.Ct. 267, 27 L.Ed. 408. Acts of Congress should be construed so as to avoid grave doubts as to their constitutionality. *Lewellyn* v. *Frick*, 268 U.S. 238–251, 45 S.Ct. 487, 69 L.Ed. 934; *Panama R. Co.* v. *Johnson*, 264 U.S. 375–390, 44 S.Ct. 391, 68 L.Ed. 748; *United States* v. *Jin Fuey Moy*, 241 U.S. 394–401, 36 S.Ct. 658, 60 L.Ed. 1061; *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U.S. 366, 408, 29 S.Ct. 527, 53 L.Ed. 836; *Baender* v. *Barnett*, 255 U.S. 224, 41 S.Ct. 271, 65 L.Ed. 597.

In *United States* v. *Shreveport Grain & Elevator Co.*, *supra*, the court held the clause of paragraph third of section 10, quoted above, unconstitutional because of the following contained therein:

> Reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provisions of section 3 of this title.

Section 3, to which reference is made in the third paragraph of section 10 provides:

> Sec. 3. Regulations for carrying out food and drug laws.
> The Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce shall make uniform rules and regulations for carrying out the provisions of sections 1 to 15, inclusive, of this title, including the collection and examination of specimens of foods and drugs manufactured or offered for sale in the District of Columbia, or in any Territory of the United States, or which shall be offered for sale in unbroken packages in any State other than that in which they shall have been respectively manufactured or produced, or which shall be received from any foreign country, or intended for shipment to any foreign country, or which may be submitted for examination by the chief health, food, or drug officer of any State, Territory, or the District of Columbia, or at any domestic or foreign port through which such product is offered for interstate commerce, or for export or import between the United States and any foreign port or country (21 U.S.C.A. sec. 3).

This reference to section 3 shows that the sentence last quoted from paragraph third of section 10 is no part of the definition of the offense but is a direction as to the exercise of administrative power. The court is only concerned with whether the offense is described with such reasonable certainty as to be valid and is not, in a case such as the present, concerned with those parts of the law having to do with its administrative features.

The demurrer to these counts will likewise be overruled.

The clerk will notify the attorneys for the parties of the foregoing ruling.

UNITED STATES v. SHREVEPORT GRAIN & ELEVATOR CO.

(United States Supreme Court, Nov. 7, 1932)

287 U.S. 77

Appeal from the District Court of the United States for the Western District of Louisiana. Judgment reversed.[38]

Mr. Justice Sutherland delivered the opinion of the court.

The defendant (appellee) was charged by indictment, returned in the court below, with misbranding certain sacks, containing corn meal, an article of food, by labeling each of the sacks as containing a greater quantity by weight than in fact was contained therein, contrary to the provisions of the Food and Drugs Act of June 30, 1906, c. 3915, 34 Stat. 768, U.S.C., title 21, section 2, which makes it unlawful to ship in interstate or foreign commerce any article of food or drugs which is adulterated or misbranded, within the meaning of the act. The penalty prescribed is a fine of $200 for the first offense, and for each subsequent offense, not exceeding $300, or imprisonment not exceeding one year, or both, in the discretion of the court. Section 8, as amended by the act of March 3, 1913, c. 117, 37 Stat. 732, provides that an article of food shall be deemed to be misbranded—

> Third. If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure,

[38] Reversing *United States* v. *Shreveport Grain & Elevator Co.*, p 1239, *ante*.

or numerical count: *Provided, however,* That reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provisions of section 3 of this Act.

A motion to quash the indictment was interposed by the defendant upon the grounds that the act of Congress relied on is unconstitutional, because (1) the offense is not defined with certainty and therefore the act violates the due process clause of the Fifth Amendment, and the requirement of the Sixth Amendment that the accused shall enjoy the right "to be informed of the nature and cause of the accusation"; and (2) it is in conflict with Articles I, II, and III of the Federal Constitution which separate the Government into legislative, executive, and judicial branches.

The court below sustained the motion and dismissed the proceedings. The case comes here by appeal under the provisions of section 238 of the Judicial Code, as amended by the act of February 13, 1925. U.S.C., title 28, sec. 345; U.S.C., title 18, sec. 682.

First. The contention seems to be that the proviso makes it necessary to read section 8 as substantively prohibiting unreasonable variations in the weight, measure, or numerical count of the quantity and contents of any package from that marked on the outside of the package; and that the test thereby indicated is so indefinite and uncertain that it fails to fix any ascertainable standard of guilt, or afford a valid definition of a crime. In support of the contention *United States* v. *Cohen Grocery Co.*, 255 U.S. 81, *United States* v. *Brewer*, 139 U.S. 278, *Connally* v. *General Const. Co.*, 269 U.S. 385, and other decisions of this court are relied upon.

We are of opinion that the construction thus sought to be put upon the act cannot be sustained; and, therefore, other considerations aside, the cases cited do not apply. The substantive requirement is that the quantity of the contents shall be plainly and conspicuously marked in terms of weight, etc. We construe the proviso simply as giving administrative authority to the Secretaries of the Treasury, Agriculture, Commerce and Labor to make rules and regulations permitting reasonable variations from the hard and fast rule of the act and establishing tolerances and exemptions as to small packages, in accordance with section 3 thereof.[39] This construction avoids the doubt which otherwise might arise as to the constitutional point, and, therefore, is to be adopted if reasonably possible. *United States* v. *Standard Brewery,* 251 U.S. 210, 220; *United States* v. *La Franca,* 282 U.S. 568, 574. We find nothing in the terms of the act to require a division of the proviso so that the power of regulation will apply to the establishment of tolerances and exemptions, but not to reasonable variations. We think both are included. As to this there would be no room for doubt if it were not for the presence of a comma after the word "permitted", or the absence of one after the word "established." Inserting the latter, the proviso would read, "That reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established, by rules and regulations * * *." Punctuation marks are no part of an act. To determine the intent of the law, the court, in construing a statute, will disregard the punctuation, or will repunctuate, if that

[39] Sec. 3 provides that the Secretaries named "shall make uniform rules and regulations for carrying out the provisions of this act * * *."

be necessary, in order to arrive at the natural meaning of the words employed. *Hammock* v. *Loan and Trust Co.*, 105 U.S. 77, 84–85; *United States* v. *Lacher*, 134 U.S. 624, 628; *United States* v. *Oregon &c. Railroad*, 164 U.S. 526, 541; *Stephens* v. *Cherokee Nation*, 174 U.S. 445, 480; *Chicago, M. & St. P. Ry. Co.* v. *Voelker*, 129 Fed. 522, 526–527.

Our attention is called to the fact that the House Committee on Interstate and Foreign Commerce, in reporting the bill which afterwards became the act in question (H.R. 850, 62d Cong., 2d Sess., pp. 2–4), agreed with the view that the authority to make rules and regulations was confined to the establishment of tolerances and exemptions; and that the Senate Committee on Manufactures (S.R. 1216, 62d Cong., 3d Sess., pp. 2–4) reported to the same effect. In proper cases, such reports are given consideration in determining the meaning of a statute, but only where that meaning is doubtful. They cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms. *Wisconsin R.R. Comm.* v. *C., B. & Q. R.R. Co.*, 257 U.S. 563, 588–589; *Penna. R.R. Co.* v. *International Coal Co.*, 230 U.S. 184, 199; *Van Camp & Sons* v. *Am. Can Co.*, 278 U.S. 245, 253. Like other extrinsic aids to construction their use is "to *solve*, but not to *create* an ambiguity." *Hamilton* v. *Rathbone*, 175 U.S. 414, 421. Or, as stated in *United States* v. *Hartwell*, 6 Wall. 385, 396, "If the language be clear it is conclusive. There can be no construction where there is nothing to construe." The same rule is recognized by the English courts. In *King* v. *Commissioners*, 5 A. & E. 804, 816, Lord Denman, applying the rule, said that the court was constrained to give the words of a private act then under consideration an effect which probably was "never contemplated by those who obtained the act, and very probably not intended by the legislature which enacted it. But our duty is to look to the language employed, and construe it in its natural and obvious sense." See also *United States* v. *Lexington Mill Co.*, 232 U.S. 399, 409; *Caminetti* v. *United States*, 242 U.S. 470, 485.

Moreover, the practical and long continued construction of the executive departments charged with the administration of the act and with the duty of making the rules and regulations therein provided for, has been in accordance with the view we have expressed as to the meaning of the section under consideration. The rules and regulations, as amended on May 11, 1914, deal with the entire subject in detail under the recital, "(i) The following tolerances *and variations* (italics supplied) from the quantity of the contents marked on the package shall be allowed: * * *." Then follows an enumeration of discrepancies due to errors in weighing which occur in packing conducted in compliance with good commercial practice; due to differences in capacity of bottles and similar containers, resulting from unavoidable difficulties in manufacture, etc.; or in weight due to atmospheric differences in various places, etc. These regulations, which cover variations as well as tolerances and exemptions, have been in force for a period of more than 18 years, with the silent acquiescence of Congress. If the meaning of the statutory words was doubtful, so as to call for a resort to extrinsic aid in an effort to reach a proper construction of them, we should hesitate to accept the committee reports in preference to this contemporaneous and long continued practical construction of the act on the part of those charged with its administration. Such a construction, in cases of doubtful meaning,

is accepted unless there are cogent and persuasive reasons for rejecting it. See, for example, *United States* v. *Johnson*, 124 U.S. 236, 253.

Second. The contention that the act contravenes the provisions of the Constitution with respect to the separation of the governmental powers is without merit. That the legislative power of Congress cannot be delegated is, of course, clear. But Congress may declare its will, and after fixing a primary standard, devolve upon administrative officers the "power to fill up the details" by prescribing administrative rules and regulations. That the authority conferred by the act now under review in this respect does not transcend the power of Congress is not open to reasonable dispute. The effect of the provision assailed is to define an offense, but with directions to those charged with the administration of the act to make supplementary rules and regulations allowing reasonable variations, tolerances and exemptions, which, because of their variety and need of detailed statement, it was impracticable for Congress to prescribe. The effect of the proviso is evident and legitimate, namely, to prevent the embarrassment and hardship which might result from a too literal and minute enforcement of the act, without at the same time offending against its purposes. The proviso does not delegate legislative power, but confers administrative functions entirely valid within principles established by numerous decisions of this court, of which the following may be cited as examples. *Buttfield* v. *Stranahan*, 192 U.S. 470, 496; *Plymouth Coal Co.* v. *Pennsylvania*, 232 U.S. 531, 542; *United States* v. *Grimaud*, 220 U.S. 506, and authorities reviewed.

Judgment reversed.

Mr. Justice BRANDEIS, Mr. Justice STONE and Mr. Justice CARDOZO concur in the result on the ground that the statute, as punctuated, reads as its legislative history shows Congress intended it to read, and that, so read, it is sufficiently definite to satisfy constitutional requirements.

UNITED STATES v. 186 BOXES OF WHOLE TULLIBEES AND 116 BOXES OF DRESSED TULLIBEES

(District Court, S.D. New York, Feb. 21, 1933)

Two suits by the Government to forfeit certain lots of tullibees received in foreign and interstate commerce, upon the ground that they were adulterated within the meaning of the Food and Drugs Act of June 30, 1906 (21 U.S.C. secs. 1 to 15). By stipulation the suits were tried together before a jury of one and both sides moved for a direction of a verdict; the court thereupon orally stated the specific facts proved by the evidence and at the request of counsel reserved decision upon the motions so as to give opportunity for the submission of briefs. Verdict directed for the Government.

COLEMAN, *Judge*. Without repeating the statement of specific facts made by the court at the close of the trial, the question presented is whether under the Food and Drug Act of June 30, 1906 (21 U.S.C. secs. 1 to 15) raw fish infested with parasitic worms should be condemned and forfeited in the absence of proof that the parasites would be injurious to the consumer or would impair the taste of the fish,

but where it appears that an ordinary person would have a strong revulsion against eating such fish if aware of the presence of the worms, and where it further appears that only an experienced person would discover them. The worms themselves are threadlike structures difficult to identify, but they are surrounded by a quantity of thick, greenish yellow fluid unpleasantly suggestive of pus, which consists of broken-down fish tissue and to some extent the excreta of the worms. This fluid would readily be observable by anyone eating the fish; but unless he knew its origin, it would probably be unobjectionable.

The Food and Drug Act (title 21, U.S.C.) bans adulterated foods in foreign and interstate commerce, and section 8, subdivision 6 provides that food shall be deemed adulterated—

> if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal or one that has died otherwise than by slaughter.

It seems to me that the fish in question come within the scope of that subdivision and are not excluded by the absence of proof that their condition would impair the health of the consumer or the flavor of the fish. The subdivision does not expressly prescribe such requisite and the courts have held that it does not imply one (*Knapp* v. *Callaway*, 52 Fed. (2d) 476; *A. O. Andersen & Co.* v. *United States*, 284 Fed. 542). While the statute is primarily concerned with the health of the consumers, it might well ban " filthy " or " decomposed " animal matter or the " product of a diseased animal " without direct or scientific proof of danger to health. The æsthetic guide frequently precedes the scientific one and the Government might wisely ban food which runs counter to it in the categories mentioned.

The fact that most consumers would not discover the worms and would, therefore, not have their feelings affronted is of no consequence because were it otherwise, the statute would not be needed. The statute is largely intended to protect those consumers who would not be in a position to observe the defect in the food.

Verdict is directed for the Government. Settle order on notice.

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DIGEST OF COURT DECISIONS

ABBOTT BROS. RHEUMATIC REMEDY: Page

A drug labeled "Abbott Bros. Rheumatic Remedy" *held* misbranded in that the package and label contained statements regarding the curative or therapeutic effect of the article with respect to certain diseases, which were false and fraudulent. *United States* v. *Abbott Bros. Co*---------- 722
Affirmed, *Abbott Bros. Co.* v. *United States*---------- 831

ACETANILID:

Where a derivative of acetanilid, such as acetphenetidin, contained in a drug product, is declared on the label by its proper name, it is unnecessary to state on the label that such derivative substance is derived from acetanilid. *United States* v. *100 Packages of Antikamnia Tablets*---------- 178
Judgment affirmed, *United States* v. *Antikamnia Chemical Co*--- 260
Judgment reversed, *United States* v. *Antikamnia Chemical Co*--- 552

It is a violation of the act and regulations to label a drug as containing acetphenetidin without stating that acetphenetidin is a derivative of acetanilid. *United States* v. *Antikamnia Chemical Co*---- 552

ACETPHENETIDIN.

See Acetanilid.

ADDED POISONOUS AND ADDED DELETERIOUS INGREDIENTS:

Under the act, sections 7 and 8, an article of food other than confectionery is not deemed to be adulterated merely because it contains a poisonous or deleterious ingredient unless such ingredient has been "added", that is, unless it is foreign to the natural or normal composition of the article. *United States* v. *40 Barrels and 20 Kegs of Coca-Cola*---------- 239
Judgment affirmed, *United States* v. *40 Barrels and 20 Kegs of Coca Cola*---------- 606
Judgment of C. C. A. reversed, *United States* v. *Coca Cola Co*--- 741

The word "added", in the act, section 7, declaring an article of food adulterated if it contains any added poisonous or other added deleterious ingredient which may render the article injurious to health, implies the existence of a standard, and an element necessarily used to create a standard is not "added", and caffeine, forming a valuable constituent of Coco Cola, made up of water, sugar, caffeine, phosphoric acid, glycerine, lime juice, coloring, and flavoring matter, is not "added", where for 15 years before the act the article containing all the ingredients had been widely used. *United States* v. *40 Barrels and 20 Kegs of Coco Cola*---------- 606
Affirming judgment in *United States* v. *40 Barrels and 20 Kegs of Coca-Cola*---------- 239
Judgment of C. C. A. reversed, *United States* v. *Coca Cola Co*--- 741

The court, in construing the act, section 7, clause 5, declaring an article of food adulterated if it contain any added poisonous or other added deleterious ingredient which may render the article injurious to health, must give effect to the word "added", and not construe the clause in the same way that an almost identical clause relating to confectionery with the exception of the omission of the word "added" must be construed, for the court must give effect to all the words of a statute in their ordinary sense. *United States* v. *Coca Cola Co*---------- 741

ADDED POISONOUS AND ADDED DELETERIOUS INGREDIENTS—Continued. Page

The test whether a deleterious ingredient is *added* to an article of food, within the act, section 7, clause 5, declaring an article of food adulterated if it contain any added poisonous or deleterious ingredient, depending on whether the ingredient is in its natural or in an artificial form, may often be a useful aid in applying and interpreting the statute, but it cannot be applied where artificially compounded foods are under consideration. Id.

The court, in construing the phrase "added poisonous or added deleterious ingredient", in the act, section 7, clause 5, declaring an article of food adulterated if it contain any added poisonous or other added deleterious ingredient, must consider section 8, providing that an article of food which does not contain any added poisonous or deleterious ingredient shall not be deemed to be adulterated or misbranded in specified cases, and when so construed, the act requires a standard before there can be any added ingredient or adulteration. Id.

The act as to food makes no distinction between compounds known at its date and those thereafter devised, but the act does not absolutely forbid the use in any compound of any element that a jury may call deleterious, but Congress, having selected and regulated the use of those things known to be particularly dangerous, has not wholly forbidden other things from which no serious danger need be anticipated. Id.

The word "added" in the act, section 7, clause 5, declaring food adulterated if it contain any added poisonous or other added deleterious ingredient, may be construed as being used with reference to a possibly deleterious food ingredient beyond the quantity in which the ingredient is normally found in usual or customary articles of food, and no such ingredient should be considered as added, provided it is present only in the quantity in which it existed in common articles of food generally known, and so construed, caffeine, forming an ingredient of Coca Cola, and in less amount than common in coffee, is not an added deleterious ingredient. Id.

Under the provision of the act, section 7, that an article of food shall be deemed adulterated if it contains any added poisonous or other added deleterious ingredient which may render such article injurious to health, a poisonous or deleterious ingredient with the injurious effect stated by the statute may be an *added* ingredient in the statutory sense although it is covered by the formula and made a constituent of the article. *United States* v. *Coca Cola Co*---------- 741

Reversing judgment in *United States* v. *40 Barrels and 20 Kegs of Coca Cola*---------- 606

In order to condemn an article of food as adulterated within the provision of the act, section 7, that an article of food shall be deemed adulterated "if it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health", it is unnecessary for the Government to prove that the article contained added poisonous or other added deleterious ingredient in such quantity as would render such article injurious to health; it is sufficient if it be shown that the article contained any added poisonous or other added deleterious ingredient of a nature or character which *may* render the article injurious to health. It is the character, and not the quantity, of the added ingredient which is to determine whether the article is adulterated. *United States* v. *625 Sacks of Flour*---------- 129

In the provision of the act, section 7, that an article of food shall be deemed adulterated "if it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health", the words "injurious to health" must be considered and given their natural meaning, and the addition of an ingredient to an article of food which is poisonous in sufficient quantity does not constitute an adulteration unless the quantity used is such as may render the article injurious to health. *Lexington Mill & Elevator Co.* v. *United States*---------- 443

ADDED POISONOUS AND ADDED DELETERIOUS INGREDIENTS—Continued.

Page

In order to condemn an article of food as adulterated under subdivision 5 of section 7 of the act, providing that an article of food shall be deemed adulterated "if it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health", it is incumbent upon the Government to establish that the added substance may render the article injurious to health. The word "may" in the subdivision is used in its ordinary and usual signification; and if an article of food may not by any possibility injure the health of the consumer, it may not be condemned under this subdivision of the act. *United States* v. *Lexington Mill & Elevator Co*---------- 577
United States v. *3,192 Boxes of Apples et al*---------- 1199

The word "added" in the act, section 7, subdivision 5, is not to be taken as referring to the quantity of the ingredient used. It is added ingredient which the statute describes, not added quantity of the ingredient; although of course quantity may be highly important in determining whether the ingredient may render the article harmful. *United States* v. *Coca Cola Co.*---------- 741

Where it clearly appears that a poisonous substance wholly foreign to a food product has been added to it solely to mislead and deceive, the court is under no duty to endeavor to protect the offender against loss from destruction of the adulterated article by indulging in hair-splitting speculation as to whether the amount of poison used may possibly have been so nicely calculated as not to kill or be of immediate serious injury. *United States* v. *1,950 Boxes of Macaroni et al*---------- 112

Where a beverage sirup contains an added poisonous or added deleterious ingredient it is immaterial that the ingredient is present in a small quantity; if it is an appreciable quantity, the article is adulterated. *United States* v. *Koka Nola Co*---------- 59

Arsenic contained in shellac used for coating candy must, in order to constitute adulteration under the provision of the act that an article of food shall be deemed adulterated if it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health, be an added ingredient, and in such amount that it would reasonably have a tendency to injure the health of persons eating the candy coated with the article. *United States* v. *Weeks*---------- 528

An article of food composed of shellac containing arsenic, dissolved in alcohol, for use as a varnish for glazing candy, may be within the provision of the act, section 7, declaring an article of food is adulterated if it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health, though the amount of arsenic which could possibly be consumed by a person eating the varnished candy would be minute. The only question is: Was there sufficient arsenic in the varnish to make it an article which "may be injurious to health"? *Weeks* v. *United States*---------- 650

Coloring materials for use in food preparations containing arsenic, *held* not adulterated where there was no proof that the arsenic in the quantities present was in fact poisonous, hurtful, or injurious to health. *United States* v. *W. B. Wood Manufacturing Co*--- 1002

The word "deleterious", as used in the act, is to be taken in its ordinary meaning, i. e., harmful and destroying. Therefore a substance is deleterious if it has a tendency to be harmful or to destroy when taken into the system, though it may not be deleterious to the extent that its effect would be apparent immediately, and though it may be administered by those called to relieve the sick in distress for immediate effect. *United States* v. *One Pound Can Coal Tar Color*---------- 1019

Where, in the manufacture of coloring material, sulphanilic acid was added to a coal-tar derivative, the arsenic in such acid was "added", within the act, section 7, subdivision 5, declaring food adulterated if it contain any added poisonous or other deleterious ingredient which may render such article injurious to health, but

ADDED POISONOUS AND ADDED DELETERIOUS INGREDIENTS—Continued. Page

where it was impossible to eliminate arsenic entirely from the coloring material, the presence of such a small quantity that, when diluted as ordinarily used, it would take years to produce a dose one-thirtieth of a grain, such as ordinarily prescribed by physicians, *held* not to render the coloring material "injurious to health." *W. B. Wood Manufacturing Co.* v. *United States*_____ 1070

Coloring material for use in food products, containing an added poisonous or deleterious substance which may render the article injurious to health when so used, is adulterated under the act, regardless of how it entered the coloring material, and even though necessarily used in its manufacture. *United States* v. *One Pound Can Coal Tar Color*_____ 1019

See Adulteration; Arsenic; Boric Acid; Caffeine; Cocaine; Compound; Confectionery; Distinctive Name; Frmaldehyde; Injurious to Health; Martius Yellow; Misbranding; Nitrites and Nitrite Reacting Material.

ADMINISTRATIVE FINDINGS OR CONCLUSIONS.

See Examination; Executive Officers; Investigation.

ADMINISTRATIVE FINDINGS.

See Executive Officers.

ADMIRALTY PROCEEDINGS:

Section 10 of the act, providing that proceedings in libel cases shall conform, as near as may be, to proceedings in admiralty, does not render such proceedings within the admiralty or maritime jurisdiction of Federal courts; the jurisdiction in such proceedings being conferred by the act itself. *United States* v. *Two Barrels of Desiccated Eggs*_____ 232

The provision in section 10 of the act, that seizure proceedings shall be by libel and conform, as nearly as may be, to proceedings in admiralty, does not include appellate proceedings. Congress did not intend to confer a new jurisdiction upon the district court, but that the proceedings after seizure should take on the character of a law action. The action of the district court on the libel can only be reviewed as at common law, by writ of error and not by appeal. *443 Cans of Frozen Egg Product* v. *United States*_____ 416

The Food and Drugs Act, section 8, and amendment of 1912, do not confer admiralty jurisdiction on district courts, in proceedings to condemn property seized under such act and amendment; the provision that a libel shall be filed, and the proceedings shall conform as near as may be to those in admiralty, relating only to procedure, and not to jurisdiction. *Goodwin et al.* v. *United States*_____ 1130

Under Revised Statutes, section 563, subdivision 8, giving United States district courts jurisdiction of all civil cases of admiralty and maritime jurisdiction, and of all seizures on land and on water not within the admiralty and maritime jurisdiction, the court in cases of seizures on land proceeds, not as a court of admiralty, but as a court of common law jurisdiction on a trial by jury. *United States v. George Spraul & Co*_____ 217

See Admiralty Rules; Appeal and Error; Costs; Jurisdiction; Libel; Seizure.

ADMIRALTY RULES:

Admiralty rule 1 provides that libels shall be verified, except those filed on behalf of the United States. *United States* v. *Two Barrels of Desiccated Eggs*_____ 232

Section 10 of the act, providing that seizure proceedings shall conform as near as may be to the proceedings in admiralty does not adopt admiralty rule 22, that libels on seizures for breach of the revenue, navigation, or other laws of the United States shall state the place of seizure and the district within which the property is brought and where it then is, rather than rule 23, providing that the libel, if in rem, shall state that the property is within the district. *United States* v. *George Spraul & Co*_____ 217

ADMIRALTY RULES—Continued. Page

The provision of General Admiralty rule 23 that "the libel shall also propound and articulate in distinct articles the various allegations of fact upon which the libelant relies in support of his suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article", is applicable to libels for condemnation under the Food and Drugs Act, section 10, providing that proceedings in such cases shall conform, as near as may be, to the proceedings in admiralty. *United States* v. *154 Cases of Canned Tomatoes* 967

Admiralty rule 29 declares that, on taking of a libel pro confesso, "the court shall proceed to hear the cause ex parte and adjudge therein as to law and justice shall appertain." The act, section 10, provides that the proceedings for condemnation shall conform as near as may be to the proceedings in admiralty. *Held* that, the libel being confessed, the burden was on the Government to prove, as to the misbranding alleged, that the label contained a statement which was substantially false and misleading. *United States* v. *650 Cases of Tomato Catsup* 31

See Admiralty Proceedings; Appeal and Error; Libel; Seizure.

ADULTERATION:

The word "adulteration", as used in the Food and Drugs Act, means to corrupt, debase, or make impure by an admixture of a foreign or a baser substance. *United States* v. *St. Louis Coffee & Spice Mills* 44

The word "adulterated" imports fraud and deception; it implies that the article is not what it purports to be. *United States* v. *40 Barrels and 20 Kegs of Coca Cola* 606

An article is not adulterated so as to be subject to condemnation unless adulterated at the time of seizure; and where a drug below the standard of strength, quality, and purity by the test prescribed in the United States Pharmacopoeia or National Formulary, and not having the strength, quality, or purity stated on the containers, and therefore within the definition of adulteration in such case in section 7 of the act, was received in interstate commerce, and the containers were so marked as to comply with the requirements in the section before seizure by the Government, the drug was not subject to forfeiture under section 10 of the act. *United States* v. *5 Boxes of Asafoetida* 160

United States v. *9 Boxes of Asafoetida* 165

In a prosecution for shipping an adulterated drug product, *held*, that the jury, in order to convict, must find that the product, if adulterated, was adulterated before it was shipped. *United States* v. *Lorick & Lowrance* 202

Statements in a booklet enclosed in a carton of a drug must be considered on a charge of adulteration under the act, section 7, in that the strength of the drug fell below the professed standard. *United States* v. *17 Bottles, Etc., of An Article of Drugs Labeled in Part "B. & M."* 1287

Statement describing a drug as "antiseptic", though false, *held* not a profession of standard and strength within the definition of adulteration in the act, section 7, "if its strength or purity fall below the professed standard or quality under which it is sold." Id.

The test of adulteration of a food product, under the act, is not what is customarily done, but what is properly done. *W. B. Wood Manufacturing Co.* v. *United States* 1098

Any substance packed with an article of food, which reduces, lessens, or weakens the strength of the article, that is, renders it less efficient, less capable of performing the purpose for which it is eaten, constitutes adulteration under the act. *United States* v. *Potter* 409

ADULTERATION—Continued. Page

A charge that an article of food labeled as "Extract Terpeneless Lemon" was adulterated in that a dilute solution of alcohol and water was substituted in part for said terpeneless lemon extract so that the same contained no more than 0.05 percent of citral derived from the oil of lemon, whereas, as recognized in the trade generally and by the standard of purity established by the Secretary of Agriculture by authority of act March 3, 1903, c. 1008, 32 Stat. 1158, such extract should contain at least 0.2 percent by weight of such citral; and that the dilute solution of alcohol and water was mixed and packed with said article of food so as to reduce and lower and injuriously affect the quality and strength of said article purporting to be terpeneless lemon extract; *held*, sufficient to charge adulteration under the act. *United States* v. *Frank et al* ---- 205

It is unnecessary, in a prosecution charging adulteration of milk through the addition of water, to establish the fact that the addition of the water injuriously affected the quality or strength of the milk, in view of section 7 of the act, declaring an article of food adulterated if any substance has been mixed with it so as to reduce or lower or injuriously affect its quality or strength. *Union Dairy Co.* v. *United States* ---- 869

A shipment of oats containing 23 percent of foreign material, a percentage of which was commercial wild oats which had been intentionally added, *held* adulterated under the act in that a substance had been mixed with them so as to reduce and injuriously affect their quality, notwithstanding that the oats were graded by an authorized inspector as sample oats, and the Grain Standards Act August 11, 1916, and standards for oats promulgated by the Secretary of Agriculture thereunder, authorizing shipment, as sample grade, of oats in their natural state containing as high as 25 percent of foreign material. *United States* v. *154 Sacks of Oats* ---- 1039

Alleged pure cider vinegar *held* adulterated where samples showed only from 0.11 to 0.16 glycerin. *United States* v. *100 Barrels of Vinegar* ---- 287

Allegation that an article of food contained substances, that is, sugar, commercial glucose, and artificial coloring matter, "which had been substituted in part for the said article", *held* insufficient to charge adulteration, on the ground that the ingredients of the "said article" which was thus alleged to have been debased by an admixture of the substances mentioned were not also alleged. *United States* v. *Goodman* ---- 484

Coloring material held adulterated in that sodium chloride and sodium sulphate had been mixed and packed with the article so as to lower and reduce and injuriously affect its quality and strength, and had been substituted in part for the article. *United States* v. *One Pound Can Coal Tar Color* ---- 1019

Where the quantity of salt used in coloring material varied with each manufacturer, and even somewhat in the product of a single manufacturer, and it had the effect of increasing the quantity of the coloring material, and, regardless of the percentage used, required great dilution by the user, the Secretary of Agriculture had no authority under the act to establish an arbitrary percentage beyond which the manufacturer could not go without violating section 7 of the act, and in the absence of any deceptive labeling a coloring material containing a larger percentage of salt did not violate the provisions of said section that an article of food shall be deemed adulterated if any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength, or if any substance has been substituted wholly or in part for the article. *W. B. Wood Manufacturing Co.* v. *United States* ---- 1070

It is not necessary that an article of food, in order to be unlawfully adulterated within the act, be dangerous to the public. *United States* v. *Krumm* ---- 993

ADULTERATION—Continued. Page

The H. Co., at Kansas City, Mo., contracted to sell to the W. Co., at Fort Worth, Tex., a quantity of No. 2 Red wheat according to Missouri official State grades, and ordered the operator of a public elevator where it stored its grain to ship to the W. Co. in fulfillment of this contract No. 2 Red wheat. The operator loaded and sent to the W. Co. a car of wheat. After the wheat was loaded, an official inspector of the State of Missouri at Kansas City inspected, adjudged, and certified this wheat to be No. 2 Red wheat. An invoice of it was forwarded to the W. Co., showing that it was shipped under the contract and subject to Kansas City weights and grades. The wheat arrived in Texas without change. There, on inspection by a Texas inspector, a Federal inspector, and other witnesses, it was found to be wheat of another and less valuable grade. None of the officers or employees of the H. Co. had any knowledge of this fact, or anything to do with the grading or shipping, except to order the operator of the elevator to ship No. 2 Red wheat. *Held*, the H. Co. was not guilty of adulteration within the meaning of section 7 of the act. *Hall-Baker Grain Co.* v. *United States*---------- 391

Reversing *United States* v. *Hall-Baker Grain Co.*---------- 291

An information charging an article of food adulterated within the meaning of the act, in that a product which contained less than 80 per centum by weight of milk fat had been substituted for "butter", *held*, charged an offense in view of the Food and Drugs Act, section 7, which provides that an article of food shall be deemed to be adulterated if any substance has been substituted wholly or in part for the article, and in view of act March 4, 1923, which provides that for the purposes of the Food and Drugs Act "butter" shall mean the food product usually known as butter, and which is made exclusively from milk or cream, or both, and containing not less than 80 per centum by weight of milk fat, all tolerances being allowed for. *United States* v. *Centralia Dairy Co.*- 1336

In a prosecution charging adulteration of an article of food labeled "Condensed Skim Milk", in that a certain substance, namely, cane sugar, had been substituted in part for the article, *held* unnecessary for the Government to prove that such substituted substance is deleterious or poisonous, or injurious to health; it is sufficient to constitute adulteration within the meaning of the act if any substance not a component part of the original substance had been substituted. *United States* v. *Libby, McNeill & Libby*---------- 442

That all grades of flour bleached with nitrogen peroxide gas by the Alsop patented process are whiter than the unbleached and might be taken by the purchaser for superior grades, is not sufficient to prove that such bleaching constitutes an adulteration under the act, section 7, subdivision 4, by so coloring the flour as to conceal inferiority, in view of the fact that whiteness is generally known to be an uncertain index of quality and is desired because bread baked from it is whiter and considered better in appearance, and the further fact that the color produced by bleaching is not the same as that produced by aging. *Lexington Mill & Elevator Co.* v. *United States*---------- 443

Flour bleached by treatment by the Alsop process *held* to be adulterated in that, as a result of such treatment, nitrites had been mixed and packed with the flour so as to reduce and lower and injuriously affect its quality and strength; and in that, as a result of such treatment, the flour was mixed, colored, and stained in a manner whereby damage and inferiority was concealed; and in that, as a result of such treatment, the flour contained added poisonous and added deleterious ingredients, to wit, nitrites, which rendered the flour injurious to health. *United States* v. *420 Sacks of Flour*---------- 96

Flour treated by the Alsop bleaching process *held* to be adulterated in that, as a result of such bleaching, nitrites or nitrite-reacting material had been mixed and packed with the flour so as to reduce and lower and injuriously affect its quality and strength; and in that, as a result of such treatment, the flour had been mixed,

ADULTERATION—Continued. Page

colored, and stained in a manner whereby damage and inferiority was concealed; and in that, as a result of such treatment, the flour contained added poisonous or other added deleterious ingredients, to wit, nitrites or nitrite-reacting material, which might render the flour injurious to health. *United States* v. *625 Sacks of Flour*___ 129

Judgment reversed, *Lexington Mill & Elevator Co.* v. *United States* _____ 443

Judgment C. C. A. affirmed, *United States* v. *Lexington Mill & Elevator Co*_____ 577

Under the provision of the act, section 7, that an article of food shall be deemed to be adulterated if it contains any added poisonous or deleterious ingredient which may render such article injurious to health, the addition of an ingredient to an article of food, which is poisonous in sufficient quantity, does not constitute adulteration unless the quantity used is such as may render the article injurious to health. *Lexington Mill & Elevator Co.* v. *United States*_____ 443

The provision of the act, section 7, subdivision 5, that food shall be deemed adulterated "if it contain any added poisonous or other deleterious ingredient which may render such article injurious to health" is definitely limited to food containing an added poisonous or deleterious ingredient when such addition might render the article of food injurious to health. It is not required that an article of food containing added poisonous or other added deleterious ingredients, to come within said provision, must affect the public health, nor, in order to condemn such article as adulterated under said provision, is it incumbent on the Government to establish that fact, but it is incumbent on the Government to establish that the added poisonous or deleterious substances must be such as may render such article injurious to health. The word "may" in said subdivision is used in its ordinary and usual significance; and if an article of food may not, by the addition of a small amount of poisonous or deleterious substance, by any possibility injure the health of any consumer, it may not be condemned as adulterated under said provision. *United States* v. *Lexington Mill & Elevator Co*_____ 577

The act, as against adulteration, was intended to protect the public health from possible injury by adding to articles of food consumption poisonous and deleterious substances which might render such articles injurious to health. Id.

United States v. *Coca Cola Co*_____ 741

A coloring material *held* adulterated in that it contained an added poisonous or deleterious ingredient, arsenic, which might render it injurious to health. *United States* v. *One Pound Can Coal-Tar Color*_____ 1019

A coloring material was not, by reason of the presence of arsenic, within the provision of the act, section 7, subdivision 5, declaring an article of food adulterated if it contain any added poisonous or deleterious ingredient which may render it injurious to health, where, though the arsenic was "added" within the meaning of the act, the quantity present was so small that it did not render the coloring material "injurious to health." *W. B. Wood Manufacturing Co.* v. *United States*_____ 1070

The ordinary use of the word "adulteration" implies an actual addition to the original substance through human agency, but as used in the act, section 7, subdivision 6, the meaning is not restricted to an addition by the hand of man, and if the adulteration of filthy, decomposed, or putrid substance has been added by nature, and is contained in the article to be shipped, it is adulterated in the eyes of the law. *United States* v. *Sprague et al*_____ 508

A libel charging adulteration of a food product simply in the words of the act, that it "consists of a filthy, decomposed, and putrid animal and vegetable substance", *held* sufficient. The words of the act are as descriptive of what the adulteration consists of as any added description could be. *United States* v. *94 Dozen, More or Less, Half-Gallon Bottles of Capon Springs Water*_____ 1216

ADULTERATION—Continued. Page

In a prosecution for shipping eggs alleged to be decomposed and adulterated, *held*, that in order to convict, the jury must be convinced the eggs were decomposed to the extent that they were unfit for food, and that they were in such condition at the time they were shipped by defendant. *United States* v. *Wilson & Co*---------- 999
United States v. *Blazek*---------- 1074
On a libel for condemnation of a shipment of canned salmon alleging adulteration in that it consisted in whole or in part of a filthy, decomposed, or putrid animal substance, *held* that the jury, in order to return a verdict in favor of the Government, must find that the salmon was so filthy, decomposed, or putrid as to be "unfit for food", as that expression is ordinarily understood, and that such adulteration extended to the entire shipment. *United States* v. *1,974 Cases of Canned Salmon*---------- 1108
A shipment of numerous cases of canned salmon *held* adulterated within the meaning of the act, in that it consisted in part of a filthy, decomposed, or putrid animal substance in excess of reasonable and salutary requirements. *United States* v. *430 Cases of Canned Salmon*---------- 1037
In a proceeding for condemnation of a food product as adulterated within the provision of the act, section 7, that an article of food shall be deemed adulterated if it consist in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, proof that the article would be injurious to health is not required. *United States* v. *200 Cases of Adulterated Tomato Catsup*---------- 583
A. O. Andersen & Co. v. *United States*---------- 1053
In a proceeding to condemn canned pork and beans as adulterated in that it consisted in whole or in part of a decomposed vegetable substance, *held*, that the question whether or not the product was unfit for human food, or would be deleterious to health if eaten, was not involved in the case, and the Government was not required to establish either that the product was unfit for human food, or that it would be deleterious to health, if eaten. The sole issue with respect to the adulteration charged was: Did the product consist in whole or in part of a decomposed vegetable substance? *United States* v. *1,367 Cases of Pork and Beans*---------- 766
Oranges, frozen before shipment, which were undergoing decomposition because of the freezing and would ultimately become unfit for food, *held* adulterated within the meaning of the act, and subject to condemnation, even though they were not harmful, if eaten. *United States* v. *462 Boxes of Oranges*---------- 816
An article of food is adulterated and subject to condemnation and forfeiture if it is composed in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, and it is not necessary that it be shown to be unfit for food, or deleterious, if eaten. *United States* v. *200 Cases, More or Less, of Canned Salmon*---------- 1095
The test to determine whether an article of food is adulterated within the provision of the act, section 7, that an article of food shall be deemed to be adulterated if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, is not whether such article is unwholesome or injurious to health. *Knapp et al.* v. *Callaway et al.*---------- 1276
A shipment of cases of canned tuna labeled "Tuna for pets. Not intended for human consumption", *held* to be subject to condemnation and forfeiture, on evidence that the product in 21 percent of 96 cases examined was somewhat decomposed, and that 8 to 9 percent of the remaining number was tainted, the same standards of test being applied to the product as are applied to tuna for human consumption. *United States* v. *620 Cases of Canned Tuna Fish*---------- 1281
While proof that the contents of only 20 percent of cans in a shipment of salmon were filthy, decomposed, or putrid might authorize the inference that the whole product was bad, and therefore support a condemnation of the lot, where the same proof

ADULTERATION—Continued. Page

which establishes the adulteration of one-fifth establishes the lack of adulteration of the balance, the Government must fail except as to the cans particularly identified as adulterated. *United States* v. *200 Cases, More or Less, of Canned Salmon*_____ 1095

In order to warrant condemnation of an article of food as adulterated, it is necessary that it be shown that the adulteration charged extends to the whole product sought to be condemned. *United States* v. *2,995 Cases of Canned Salmon*_____ 1136

A shipment of canned cherries *held* adulterated in that they consisted in whole or in part of a filthy, decomposed, or putrid vegetable or animal substance, where, of 30 representative cans each contained worms or larvae and decomposed or spotted cherries, one group of 6 cans averaging 39.3 worms and 43 decomposed or spotted cherries, another group of 12 cans averaging 75 worms or larvae and 22.8 decomposed or spotted cherries, and another group of 12 cans averaging 25.6 worms or larvae and 32.4 decomposed or spotted cherries. *United States* v. *384 Cases of Canned Cherries*_____ 1176

The question whether an adulterated article of food shipped in interstate commerce should be condemned is not dependent on the degree of care exercised in manufacturing or producing it. A shipment of canned cherries which was adulterated in that they consisted in whole or in part of a filthy, decomposed, or putrid animal and vegetable substance because of the presence of worms or decomposed cherries, was subject to condemnation even though the canner was unable to procure cherries free from worms or from decomposition. Id.

On trial of an information charging shipment of milk adulterated in that it consisted in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, *held* that the jury, in order to convict, must find that the milk was adulterated as alleged, at the time it was delivered at the railway depot for shipment; and that the jury, in determining whether the milk was old and impure at that time, should regard as a standard that prescribed in a statute of the State where the trial was held, providing that "milk containing more than 1,000,000 bacteria per cubic centimeter shall be considered impure milk." *United States* v. *Hopkins*_____ 585

In a prosecution brought against the manufacturer of an article of food furnished by it to the shipper under a valid guaranty against adulteration, and charging adulteration of the article because it consisted in whole or in part of a filthy, decomposed, or putrid vegetable substance, *held* essential to a conviction that it be shown that the article was so adulterated at the time defendant turned it over to the shipper. *United States* v. *Glaser, Kohn & Co*_____ 601

In a prosecution charging the defendant with shipping decomposed and adulterated eggs, *held* that the jury, in order to convict, must find that the eggs were so adulterated at the time they were shipped. *United States* v. *Smith*_____ 1173

The act, section 8, subdivision 4, provides that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the case of mixtures or compounds known as articles of food under their own distinctive names and not an imitation of or offered for sale under the distinctive name of another article, etc. *Held*, that an article of food manufactured and sold under the distinctive name of "C. A. P.", and consisting of calcium acid phosphate and cornstarch, and not containing any poisonous or deleterious ingredient within the meaning of the act, was not adulterated or misbranded within the meaning of the act by reason of the presence of cornstarch. *United States* v. *100 Barrels of Calcium Acid Phosphate*_____ 58

Evidence *held* to establish that the name "Coca-Cola" is a trade name which for many years has been given by the manufacturer to a food product, and registered as a trade mark; that such product

ADULTERATION—Continued. Page

is an artificial compound used in the preparation of beverages, consisting of a sweet sirup having for one of its essential ingredients caffeine prescribed in definite proportions in the formula under which the compound has been manufactured for many years; that the compound, as made under such formula, has been extensively advertised and has become well known to the trade and to consumers under such trade-mark name; and that no other food or beverage has been manufactured or sold under such name. *Held*, that under such facts and the provision of the act, section 8, that mixtures or compounds known under their own distinctive names and not an imitation of or sold under the distinctive name of another article, if the name be accompanied by a statement of the place of manufacture, shall not be deemed to be adulterated or misbranded unless they contain some added poisonous or deleterious ingredient, a shipment of Coca-Cola labeled as required by such provision was not subject to condemnation as adulterated because of the presence of caffeine as one of the ingredients, even though such ingredient be deemed poisonous or deleterious. *United States* v. *40 Barrels and 20 Kegs of Coca-Cola*---------- 239
Affirmed, *United States* v. *40 Barrels and 20 Kegs of Coca Cola*-- 606
Judgment C. C. A. reversed, *United States* v. *Coca Cola Co*------ 741

The provision of the act, section 7, subdivision 5, that an article of food shall be deemed adulterated if it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health, is to be construed with the proviso of section 8 to the effect that an article which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated. The fact that a formula has been made up and followed and a distinctive name therefor adopted does not suffice to take an article from the said provision of section 7. In such a case the standard by which the combination is to be judged is not necessarily the combination itself. A poisonous or deleterious ingredient with the injurious effect stated by the statute may be an *added* ingredient in the statutory sense, although it is covered by the formula and made a constituent of the article itself. *United States* v. *Coca Cola Co*---------- 741
Reversing judgment in *United States* v. *40 Barrels and 20 Kegs of Coca Cola*---------- 606

In construing the provision of the act, section 7, that an article of food shall be deemed to be adulterated if it contains any added poisonous or other added deleterious ingredient which may render such article injurious to health, *held* that the term adulteration is used in a special sense and its ordinary meaning is not controlling; that an article may be adulterated by the adding of an injurious ingredient including a component part of the article itself; that adulteration must not be confused with misbranding and the provisions as to the latter do not limit the explicit provisions of section 7 as to adulteration; and that proprietary foods sold under distinctive names are within its provisions, including those which were in the market when the act was passed. Id.

Under the provision of the act that an article of food which does not contain any added poisonous or other added deleterious ingredient shall not be deemed to be adulterated in case of mixtures or compounds known as articles of food under their own distinctive names, and not an imitation of or offered for sale under the name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced, an article composed of milk, cocoa or chocolate, and sugar, containing no poisonous or deleterious ingredient, and sold under the label "milk chocolate" with a statement also of the place of its manufacture, is not adulterated within the meaning of the act because it contained cornstarch, the presence of which was not stated on the label. *United States* v. *Auerbach & Sons*---------- 357

A food product labeled "Grenadine Syrup", composed of sugar, citric and tartaric acid, and juices of certain fruits, and in the manufacture of which no pomegranates were used, *held* not adulterated in

ADULTERATION—Continued. Page

that a compound sugar sirup had been substituted wholly or in part for the product, since the word "grenadine" in its common acceptation does not mean a sirup made from pomegranates, but the term "grenadine syrup" is used in commerce to designate, not a sirup so made, but a sirup possessing a certain characteristic flavor and color, and a purchaser of sirup so labeled was not entitled to expect to receive a sirup actually made from pomegranates. *United States* v. *30 Cases Purporting to be Grenadine Syrup*_____ 394

The provision of the act, section 8, subdivision 4 (in case of food), that mixtures or compounds known as articles of food under their own distinctive names shall not be deemed adulterated when sold under such name, and not an imitation of or sold under the distinctive name of another article, does not apply to a case where the name used in its popular meaning is accurately descriptive of another well-known food product. A food product sold under the name of "Condensed Skimmed Milk" *held* to be adulterated, where it contained 42 percent of cane sugar, the presence of which was not indicated on the label; it being shown that condensed skimmed milk unsweetened is also made and sold. *Libby, McNeill & Libby* v. *United States*_____ 540

Affirming judgment in *United States* v. *Libby, McNeill & Libby*_ 442

In a prosecution charging adulteration of macaroons by the addition of glucose where the evidence showed that a macaroon is a mixed food composed of certain ingredients, that the name by which it is known is distinctive, and that the added glucose, producing the charged adulteration was not poisonous or deleterious to health, *held*, that the article was not adulterated within the meaning of the act, under the provision of section 8, subdivision 4 (1), that a mixture known by a distinctive name shall not be regarded as adulterated if it does not contain any added poisonous or deleterious ingredient. *F. B. Washburn & Co.* v. *United States*_____ 654

Reversing judgment in *United States* v. *F. B. Washburn & Co*__ 434

An article of food labeled "Fruit Wild Cherry Compound" *held* not adulterated under the act in that an imitation wild cherry essence had been mixed and packed with the article purporting to be fruit wild cherry compound so as to reduce and lower and injuriously affect the quality and strength of the article, or in that an imitation wild cherry essence had been substituted in part for fruit wild cherry essence which the article purported to be; since the description of the article on the label as "Fruit Wild Cherry Compound" plainly indicated that the article did not consist wholly of fruit wild cherry, but was a "compound" or combination of fruit wild cherry with some other ingredient or ingredients, and, in the absence of any poisonous or deleterious ingredient, there is nothing in the act to prevent the combination of fruit wild cherry with an imitation wild cherry essence, when labeled as stated; nor is it required by the act that the ingredients of such compound be stated. *United States* v. *Weeks*_____ 519

Judgment reversed, *Weeks* v. *United States*_____ 646

The provision of the act, section 8, that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated in enumerated cases, qualifies section 7, declaring that an article shall be deemed adulterated if it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed; and an article labeled "Fruit Wild Cherry Compound", and containing no "Fruit Wild Cherry", but containing a coal-tar color giving to the mixture the genuine color of wild cherry juice, but not any added poisonous or deleterious ingredient, is not adulterated. *Weeks* v. *United States*_ 646

Reversing judgment in *United States* v. *Weeks*_____ 519

An article of food, packed and sold in cases bearing labels describing the contents as a particular brand of molasses, but plainly stating that the product was a compound of molasses and corn sirup, and also containing all of the other information required by the act

ADULTERATION—Continued. Page

and the regulations thereunder, and which article was in fact a compound of molasses and commercial glucose, *held* not adulterated within the meaning of the act; it being shown that it contained nothing deleterious to health, and that under the rulings of the Department of Agriculture it was permissible to describe commercial glucose on labels or brands as made from corn sirup. *United States* v. *779 Cases of Molasses*---------- 65

Where an article sold under the name "Corno Horse and Mule Feed" was contained in packages labeled "Corno Horse and Mule Feed. Mixture of ground alfalfa, oats, corn, flax bran, oat and hominy feeds, made by the Corno Mills Company, East St. Louis, Illinois"—followed by a guaranteed analysis, *held* that such article, being a compound and so described on the package, was not adulterated because it contained a quantity of oat hulls mixed and packed therewith in excess of the amount normally present in oat feed consisting of whole ground oats. *United States* v. *One Carload of Corno Horse and Mule Feed*---------- 274

An article labeled "Perfection Mills Compound White Pepper" in large type, with the words "Composed of Ground White Pepper and Ground Cereals" in small and inconspicuous type, and consisting of 65 percent white pepper and 35 percent corn product, *held* adulterated in that corn product had been mixed and packed with the article so as to reduce and lower its quality and strength, since the term "Compound White Pepper" does not so naturally imply to the average purchaser a mixture of white pepper with an ingredient other than pepper as to make it a proper branding, where the statement of its ingredients is so placed and in such type as not to be readily noticed by the purchaser, and as to be calculated and intended to deceive and mislead the latter. *Frank et al* v. *United States*---------- 329

An article of food labeled "Compound Ess Grape", but which contains nothing from grapes and is a mere imitation, must, within the general terms of the act, section 7, be deemed adulterated, since some other substance has been substituted wholly for the one obviously indicated by the label, viz, "compound essence of grape"; and in such case the mere use of the word "compound" is not a compliance with the proviso in paragraph 4 of section 8 of the act, since it does not give notice that the article is a mere imitation but suggests the contrary. *United States* v. *Schider*--- 875

Under the provisions of the act, section 2, that no article shall be deemed misbranded or adulterated within the provisions of the act when intended for export to any foreign country and prepared and packed according to the specifications or directions of the foreign purchaser, a shipment of dried figs prepared for a foreign purchaser who purchased like fruit for coffee flavoring, *held* not subject to seizure as adulterated under the provisions of section 7 that an article of fruit shall be deemed adulterated if it consists in whole or in part of a filthy, decomposed, or putrid vegetable substance, although the figs were wormy in part, since the certificate introduced showing the law of the country to which the shipment was to be made prohibiting use of impure materials in coffee admixtures could not have the effect to put the shipper out of the class excepted in section 2, for the purchaser on receiving the figs might free them of all deleterious matter before converting them into coffee flavoring or he might divert them to other proper uses, and, in the absence of evidence to the contrary, it would be assumed he would comply with the law of his country. *United States* v. *Catz American Co., Inc*---------- 1282

See Added Poisonous and Added Deleterious Ingredients; Article; Blend; Colored; Compound; Confectionery; Construction and Interpretation; Damage or Inferiority; Distinctive Name; Export Articles; Filthy, Decomposed, and Putrid; Guaranty; Imitation; Indictment; Information; Injurious to Health; Knowledge and Intent; Libel; Misbranding; Mixed; Object of the Act; Purpose of the Act; Shipment; Standards; Substitution.

AFFIDAVITS: Page

Affidavits used in support of allegations of information for violating the act must contain a venue; and, if sworn to before a notary public, must have a certificate attached showing that the person certifying them was at the time a notary public and authorized by the laws of the State or district to take and certify oaths and affirmations, and that same is taken and subscribed as required by the laws of the State or district. If taken before a State judge or justice of the peace, there must be a like certificate, and so of commissioners outside the district where the affidavit is used. *United States* v. *Baumert et al*---------- 113

Notaries public have no authority under the laws of the United States to administer oaths in connection with criminal prosecutions; hence, affidavits attached to and filed with an information charging violation of the Food and Drugs Act and expressly stating that it was made upon the oath of parties whose affidavits were annexed, would not be considered by the court. *United States* v. *Schallinger Produce Co*---------- 623

See Information; Libel.

AGENTS.

The officers of a corporation which manufactured a food product shipped by its manager in interstate commerce, and which was adulterated or misbranded, are subject to prosecution therefor under the act, where they employed the manager and authorized him to operate the plant and sell the product without restriction, and the previous course of business had been to ship on orders to other States. *United States* v. *Mayfield et al*---------- 90

On trial of an information charging defendants, a partnership, with shipping from one State to another allegedly misbranded molasses, where there was uncontradicted testimony for the Government tending to show that defendants' plant was supervised and managed by a superintendent, and that in the usual course of business orders were forwarded to him by defendants and he filled such orders and made the shipments, and where there was undisputed testimony by one of the defendants that prior to the taking effect of the act he had instructed the superintendent not to ship such products unless they were branded as provided by the act, and testimony by the superintendent that he had received such instructions, but no evidence tending to show that any specific instruction was given with reference to the goods charged as shipped and misbranded; *held* that if the jury believe such testimony, and that the molasses was shipped and misbranded as charged, and that it was so shipped by defendants' superinntendent, then, under section 12 of the act, defendants would be liable and the instruction claimed by defendants to have been given to the superintendent would not relieve them of responsibility. *United States* v. *Hobart et al*---------- 171

A corporation maintained a sanatorium from which patients at a distance were treated through correspondence. The president of the corporation, who was also its medical director, had charge of the patients, and in every case where a patient applied for treatment a history of the case was obtained from the patient, a diagnosis was made, and a prescription prepared and sent by the medical director to meet the needs of the particular case. *Held*, in a prosecution of the corporation for shipping misbranded medicine in interstate commerce, that the acts of the medical director were performed for the corporation, and, in legal contemplation, by it. *Dr. J. L. Stephens Co* v. *United States*---------- 471

To sustain a prosecution against a shipper of misbranded drugs it is not necessary to show that defendant was also the owner thereof, or that he shipped them for his own profit; he would be equally liable as shipper under the act if he, as an officer, agent, or manager, of any company or corporation, made the shipment or caused the same to be made. *United States* v. *Kellett*---------- 711

If, in a prosecution for shipping an article of food which is adulterated or misbranded the evidence shows that defendant was en-

AGENTS—Continued. Page

gaged in the business of shipping such adulterated or misbranded articles, and that defendant's employees were specially or generally authorized to make such shipments, and that in pursuance of such authority they made the shipment complained of, then defendant is guilty as if he himself had made the shipment. *United States v. Monahos*---------- 935

A seller of an article of food so represented by his agent to the buyer as to be misbranded under the act is liable for the misbranding, although he told the agent not to misdescribe the article, since intent is not an element of the offense. *Weeks* v. *United States*--- 646

Affirmed, *Weeks* v. *United States*---------- 867

Upon a charge of misbranding an article of food by offering for sale under the name of another article, *held*, that the trial court properly received evidence that the shipment was made to fill an order obtained by defendant's agent by so misrepresenting the article. *Weeks* v. *United States*---------- 867

Where a creamery corporation shipped butter in regular course to a corporation in another State, and such shipments when received by the consignee were commingled with shipments from other sources and sold on the market in regular course, and payment by the consignee to the consignor for all such shipments was made weekly at schedule price, and there was no report to the consignor by the consignee of the latter's sales of butter so shipped and no accounting for moneys received in excess of the schedule price paid by it to the consignor, and there was no return of any of the money so paid, *held* such shipment was not made by a principal to a mere agent, or by a mere agent to a principal. *United States* v. *Boise Valley Cooperative Creamery Co*---------- 1203

See Corporations; Knowledge and Intent.

AKOZ:

A medicinal drug labeled "Akoz" alleged to be misbranded on the ground that statements contained on the labels and in the packages falsely and fraudulently represented that the article was a natural remedy for certain specified diseases and that it had proved effective in the treatment of such diseases and others named, *held* not so misbranded, upon evidence as to the beneficial effects of the medicine and that it had relieved all of the diseases specified. *United States* v. *Natura Co*---------- 836

ALCOHOL:

The amount of alcohol contained in a drug product the act requires to be stated on the label with substantial correctness. *United States* v. *Haltiwanger-Taylor Drug Co*---------- 822

ALETRIS ROOT:

A quantity of aletris root transported in interstate commerce *held* not adulterated under the act, as containing more than 16 percent of ash, the test for such drug prescribed in the National Formulary. *United States* v. *One Bale of Aletris Root*---------- 1212

ALMOND PASTE:

See Corn Sirup.

ANALYSIS.

See Examination; Investigation; Notice and Opportunity to be Heard; Samples; Standards; Tests.

ANTIKAMNIA TABLETS:

A drug labeled "Antikamnia Tablets" which contained acetphenetidin, *held* not misbranded because of a statement on the label that it contained no acetanilid and because of the failure to declare on the label that the acetphenetidin contained therein was a derivative of acetanilid. *United States* v. *100 Packages of Antikamnia Tablets*---------- 178

Judgment affirmed, *United States* v. *Antikamnia Chemical Co*--- 260

Judgment reversed, *United States* v. *Antikamnia Chemical Co*--- 552

See Acetanilid.

APPEAL AND ERROR: Page

The provision in section 10 of the act that proceedings for seizure of goods shall be by libel for condemnation and conform as near as may be to proceedings in admiralty, is not applicable to appellate proceedings; the action of the district court on the libel can be reviewed only as at common law, by writ of error and not by appeal.
443 Cans of Frozen Egg Product v. *United States* 416
United States v. *Hudson Manufacturing Co. et al* 420
United States v. *779 Cases of Molasses* 65
Lexington Mill & Elevator Co. v. *United States* 577
Goodwin et al. v. *United States* 1107
United States v. *10 Cases, More or Less, Bred Spred, Etc., et al* 1262

Where an appeal has been erroneously taken from a judgment of condemnation in a proceeding under section 10 of the act, the case will, under the act of September 6, 1916, section 4, be transferred to the law side, and to render the transfer effective, a statement of the evidence, conforming to equity rule 75, though not allowed and signed until after the term, and therefore not good as a bill of exceptions, may be treated and considered as such. *Goodwin et al.* v. *United States* 1107

A proceeding for condemnation and forfeiture, under section 10 of the act, in which either party is given the right to demand a trial by jury of any issue of fact, where such trial is demanded and had, is essentially an action at law and is reviewable only on writ of error. *United States* v. *779 Cases of Molasses* 65
Lexington Mill & Elevator Co. v. *United States* 443

Where the validity of a regulation made pursuant to section 3 of the act is denied, an authority exercised under the United States is drawn in question, and not merely the construction of the statute, and the Supreme Court has jurisdiction to review the judgment of the Court of Appeals of the District of Columbia. *United States* v. *Antikamnia Chemical Co* 552

Review by the Court of Appeals of the District of Columbia of the decree of the Supreme Court of the District in a condemnation proceeding under the act, tried by the court without the intervention of a jury, is confined to questions of law presented by the record proper and to such other questions as may have been reserved by exceptions duly noted during the progress of the trial, in view of provisions of the code of the District of Columbia (1919) sections 70, 71. *Goode* v. *United States* 698

Since a circuit court of appeals may not determine the weight of evidence or reverse on the ground of the verdict being against weight of the evidence, if it is sustained by substantial evidence, under Rev. St. Sec. 1011, a general verdict for the Government on a libel under section 10 of the Food and Drugs Act to condemn bottled water, charging misbranding in general terms, must be sustained. *Goodwin et al.* v. *United States* 1130

A conviction under the act, justified by evidence though conflicting, will not be disturbed on writ of error. *Weeks* v. *United States* 650

Whether bottled water was adulterated and misbranded, as alleged in a libel for condemnation, cannot be considered on appeal, where the record does not contain testimony supporting such allegations. *United States* v. *94 Dozen, More or Less, Half-Gallon Bottles Capon Springs Water* 1278

The refusal or granting of a motion for a new trial is in the sound discretion of the trial judge, and cannot be reviewed on writ of error. *Bradley* v. *United States* 964
Frank et al. v. *United States* 329

Where a decree condemning certain food products as in violation of the act, and ordering their destruction by the marshal, has been fully executed, and the costs taxed against the claimant have been voluntarily paid, there is nothing on which the decision of an appellate court can operate, and it will not review the case on appeal or writ or error. *Charles* v. *United States* 180

APPEAL AND ERROR—Continued. Page

No appeal lies from the discretion of the court in the matter of costs assessed against the claimant in a libel proceeding under section 10 of the act, unless perhaps in the case of gross abuse of such discretion. Id.

The opinion of the trial court in a libel proceeding for condemnation under the act, although not made a part of the record, may be considered by the appellate court. *Hall* v. *United States*_____ 978

In a libel proceeding for condemnation under the act, where issues of fact are tried by the court without a jury, and there is other evidence which supports the judgment, the admission of evidence which might be subject to objection as tending to mislead a jury is not ground for reversal. Id.

Where the Government (appellant) abides by its overruled demurrer to each of two paragraphs of an answer to a libel brought against claimant's (appellee's) food product, and admits that one of the paragraphs permits of a good defense, there can be no reversal, even though the ruling on demurrer may have been erroneous as to the other paragraph. *United States* v. *15 Cases of Bred Spred*_ 1236

An information under the act will not be ordered dismissed on appeal for the reason that it does not appear that there had been a notice and hearing as provided for by section 4 of the act, where no motion to dismiss for this reason was made below, nor was the question raised by any pleading or assignment of error. *Frank et al.* v. *United States*_____ 329

On a prosecution for violation of the act, record examined, and *held*, that the case was not heard in the district court solely upon an agreed statement of facts, and that, therefore, the final judgment embraced the determination of a question of fact, which was not reviewable. Id.

In a proceeding under section 2 of the act the question whether there was sufficient evidence to warrant the submission of the case to the jury cannot be raised for the first time in the appellate court. *Brina* v. *United States*_____ 104

The question of defects in the acknowledgment of an information under the act cannot be raised for the first time in the appellate court. *Abbott Bros. Co.* v. *United States*_____ 831

Unless an information is void, an objection that it was not made on the oath of the prosecuting officer, but solely upon oath of witnesses by affidavit, some of which were taken before notaries public, cannot be raised for the first time in the appellate court, unless a refusal to consider it would shock the judicial conscience. *Simpson* v. *United States*_____ 832

See Admiralty Proceedings; Information; Jurisdiction; Libel.

APPLES:

Apples are "food" within the meaning of the act. *United States* v. *3,192 Boxes of Apples et al*_____ 1199

Apples held misbranded as to the State where they were produced. *United States* v. *100 Cases of Tepee Apples et al*_____ 20

Apples *held* adulterated in that they consisted in whole or in part of a filthy, decomposed, or putrid vegetable substance by reason of being wormy and worm eaten; and misbranded in that they were labeled "Gano Extra", indicating that they were of the Gano type or variety and of extra or superior quality, when in fact they were Gano apples which were in whole or in part wormy and worm eaten. *United States* v. *Wedell*_____ 771

Apples *held* adulterated because they contained an added poisonous and deleterious substance, arsenate of lead, which might render them injurious to health. *United States* v. *630 Baskets of Apples*_ 1205
United States v. *3,192 Boxes of Apples et al*_____ 1199

ARSENIC:

Arsenic contained in an article composed of shellac for use for coating candy, must, in order to constitute adulteration under the provision of the act that an article of food shall be deemed adulterated

ARSENIC—Continued. Page

if it contains any added poisonous or other deleterious ingredient which may render such article injurious to health, be an added ingredient, and in such amount that it would reasonably have a tendency to injure the health of persons eating the candy coated with the article. *United States* v. *Weeks*---------- 528

Arsenic contained in an article composed of shellac, dissolved in alcohol, for use for glazing candy, may constitute adulteration under the act, section 7, declaring an article of food adulterated if it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health, though the amount of arsenic which could possibly be consumed by a person eating the candy glazed with the varnish would be minute. The only question is: Was there sufficient arsenic in the varnish to make it an article which may be injurious to health? *Weeks* v. *United States*---------- 650

Arsenic *held* to be an added poisonous and deleterious ingredient in a coloring material for use in coloring confectionery, etc. *United States* v. *One Pound Can Coal-Tar Color*---------- 1019

Arsenic contained in coloring materials for use in food preparations *held* not to constitute adulteration where there was no proof that the arsenic in the quantities present was in fact poisonous, hurtful, or injurious to health. *United States* v. *W. B. Wood Manufacturing Co*---------- 1002

A compound or compounds of arsenic on apples and pears, *held* to be an added poisonous or deleterious ingredient which might have rendered them injurious to health. *United States* v. *630 Baskets of Apples et al*---------- 1205

United States v. *3,192 Boxes of Apples*---------- 1199

See Added Poisonous and Added Deleterious Ingredients; Apples; Coloring Materials; Confectionery; Pears.

ARTICLE:

In section 2 of the act, declaring that any person who shall ship in interstate commerce any article of food or drugs adulterated or misbranded shall be guilty of a misdemeanor, and for the first offense fined not exceeding $200, and upon conviction of each subsequent offense not exceeding $300, etc., the article is clearly specified as the unit of the offense, as distinguished from the shipment; and the shipment of seven different articles, each of which was both adulterated and misbranded, constituted fourteen separate and distinct violations of the act, for which separate penalties might be imposed, though the aggregate exceeded $200. *United States* v. *Direct Sales Co*---------- 866

In proceedings to condemn shipments of numerous cases of canned salmon, alleged to be adulterated within the meaning of the provision of the act declaring an article of food adulterated if it consists in whole or in part of a filthy, decomposed, or putrid animal substance, *held*, that the word "article" in the act has reference to each individual can of salmon. *United States* v. *1,459 Cases of Canned Salmon*---------- 995

United States v. *1,974 Cases of Canned Salmon*---------- 1037

In the act, section 10, providing for condemnation of "any article of food" that is adulterated or misbranded, the word "article" is used in a broad and comprehensive sense, and as applied to a shipment of an allegedly adulterated food product in containers, as canned salmon, has reference to the shipment as a whole, and to authorize condemnation it is not necessary to prove that each individual can is adulterated. *A. O. Andersen & Co.*, v. *United States*---------- 1053

The word "article" in the act, section 10, providing for condemnation of any article of food adulterated or misbranded, applies to the food itself, and not to the case or package in and by means of which the shipment is effected. *United States* v. *200 Cases, More or Less, of Canned Salmon*---------- 1095

ARTICLE—Continued. Page

In a proceeding for condemnation of numerous cases of canned salmon as adulterated under the act providing that an article of food shall be deemed adulterated if it consists in whole or in part of a filthy, decomposed, or putrid animal substance, *held*, that the word "article" as used in the statute has reference to the case or cases seized, and does not have reference to the single individual case or cases. *United States* v. *1,195 Cases of Canned Salmon*---------- 1099

In a proceeding for condemnation of shipments of canned salmon as adulterated under the act, section 7, paragraph 6, providing that an article of food shall be deemed adulterated if it consists in whole or in part of a decomposed animal substance, *held*, that the word "article" as used in the act does not refer to the single, separate can, or to the single, separate case, of salmon in each shipment, but refers to each lot or shipment seized. *United States* v. *2,205 Cases of Canned Salmon*---------- 1133

See Offenses; Package; Penalties; Shipment.

ASAFOETIDA:

Asafoetida which did not comply with the tests prescribed by the United States Pharmacopoeia when shipped, *held* not adulterated or misbranded so as to be subject to condemnation where the article was tested by the consignee prior to seizure and correctly labeled by him before seizure to show its true standard of strength, quality, and purity. *United States* v. *Five Boxes of Asafoetida*---------- 160

United States v. *Nine Boxes of Asafoetida*---------- 165

ATHLOPHOROS:

A drug labeled "Athlophoros" *held* misbranded in that the package and label contained statements regarding the curative or therapeutic effect of the article which were false and fraudulent. *United States* v. *The Athlophoros Co*---------- 732

ATTORNEYS, UNITED STATES:

The Food and Drugs Act (sec. 5) does not repeal Revised Statutes Sections 701 or 1022 making it the duty of district attorneys of the United States to prosecute all offenders against the laws of the United States, nor does it limit his authority to the prosecution only of those offenders who have had a hearing before the Secretary of Agriculture. *United States* v. *Morgan et al*---------- 335

BACTERIA:

There may be bacteria or bacilli without decomposition, but there cannot be decomposition without the presence of bacteria or bacilli. *United States* v. *F. E. Rosebrock & Co*---------- 190

Various forms of plant life, such as yeasts, bacteria, and molds in tomato catsup, are evidences of decay and decomposition. *United States* v. *200 Cases of Adulterated Tomato Catsup*---------- 583

It is the action of bacteria, yeast germs, and mold spores in food products that eventually brings about decomposition thereof, and a point is reached when the article becomes rotten. *United States* v. *275 Cases Tomato Catsup*---------- 141

Though not in themselves filthy, decomposed, or putrid, living bacteria, including *Bacillus coli* and *B. streptococci*, when present in a food, such as milk, indicate that it consists in whole or in part of a filthy, decomposed, or putrid substance, and are therefore evidence of adulteration. *Dade* v. *United States*---------- 465

On trial of an information charging shipment of milk adulterated in that it consisted in whole or in part of a filthy, decomposed, and putrid animal or vegetable substance, *held* that the jury, in determining whether the milk was old and impure at the time of shipment, as bearing on the question whether the milk at that time was adulterated as alleged, should regard as a standard the provision in a statute of the state in which the trial was held, that "milk containing more than 1,000,000 bacteria per cubic centimeter shall be considered impure milk." *United States* v. *Hopkins*---------- 585

BACTERIA—Continued. Page

A substance containing bacilli liable to cause disease, to such an extent as to make it dangerous for food purposes, is "filthy", under the meaning of that word as generally used, and especially since the result of investigation has shown that filth or dirtiness is dangerous through the germs which it contains, and not solely because of offense to the senses. *United States* v. *Sprague et al*---- 508

See Filthy, Decomposed, and Putrid.

BAD-EMS SALZ:

An article labeled "Bad-Ems Salz" *held* misbranded in that statements appearing on the label, representing that the article was composed of substances derived from the springs at Ems, Germany, and that the article reproduced the medical properties of said springs, and that the article represented the medical agents obtained by evaporating the water from said springs, were false and misleading. Said article *held* further misbranded in that statements regarding the curative or therapeutic effects of the article, appearing on the labels and in a circular accompanying the package, were false and fraudulent. *United States* v. *The American Laboratories* ---------- 641

BEANS:

Horse beans held to be filthy and adulterated by reason of the presence of weevils and larvae or grubs. *United States* v. *Koshland*_ 777

Canned beans labeled "Red Kidney Beans", but consisting of long cranberry beans, *held* adulterated and misbranded. *United States* v. *100 Cases of Canned Red Kidney Beans*---------- 982

See Pork and Beans.

BEEMAN'S PEPSIN CHEWING GUM:

Chewing gum *held* misbranded because of a false and misleading statement on the label regarding the quantity of pepsin contained therein. *United States* v. *American Chicle Co*---------- 362

BETHESDA NATURAL MINERAL SPRING WATER:

Bottled water, *held* misbranded because the labels stating "Bethesda: For all kidney diseases, Bright's disease, diabetes, torpid liver, dyspepsia, insomnia, calculi, and nervous prostration", falsely and fraudulently represented the curative or therapeutic effect of the water with respect to the diseases named. *United States* v. *Bethesda Mineral Spring Co*---------- 841

BI-CARB-SODARINE:

An article labeled "Bi-Carb-Sodarine" *held* not misbranded by reason of a statement on the label to the effect that the article was better than any other bread preparation. *United States* v. *165 Cases of Bi-Carb-Sodarine* ---------- 202

BLACKBERRIES:

Canned blackberries *held* misbranded as to the State in which the fruit was grown. *United States* v. *100 Cases of Tepee Apples et al* ---------- 20

BLEND:

Under the proviso of section 8 of the act, that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed misbranded if labeled so as to plainly indicate that it is a compound, imitation, or blend, and the word "blend" is plainly stated on the package, which term shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for coloring or flavoring only, a sirup consisting of refined cane sugar flavored with an extract of maple wood and sold under a label describing it as "Western Reserve Ohio Maple Syrup" is a "blend" and not misbranded. *United States* v. *68 Cases of Syrup*---------- 62

Where sirup made from cane sugar, flavored to represent maple sirup by the introduction of an extract from maple wood after it had

BLEND—Continued.

Page

been chopped down, was labeled "Western Reserve Ohio Blended Maple Syrup", the words "Ohio" and "Maple Syrup" being in red, and between them the word "Blended", and then below that, in smaller type, the statement "This syrup is made from the sugar-maple tree and cane sugar", *held* that the label was misleading in that purchasers would ordinarily understand that the article contained in part maple sirup made from the boiled-down sap drawn from live maple trees, and constituted misbranding. *United States* v. *Scanlon*---------- 28

To the provision of the act, section 8, subdivision 4, paragraph 2, that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be misbranded if labeled or branded so as to plainly indicate that they are compounds, imitations, or blends, Congress added another requirement, "*Provided*, That the term blend as used herein shall be construed to mean a mixture of like substances, etc." If the substances mixed are not "like substances", the statement on the label that the product is a "blend" is not sufficient to secure immunity from seizure for misbranding. *Held* that a mixture consisting of distilled vinegar and boiled apple cider is not a mixture of "like substances" and therefore not a "blend", within the statutory definition, and, labeled "Saratoga Brand Vinegar, A Blend of Pure Boiled Apple Cider and Distilled Vinegar", is misbranded. *United States* v. *10 Barrels of Vinegar*---------- 254

An article composed of a mixture of black pepper and long pepper constituted a compound or "blend", within the meaning of subdivision 4, section 8, of the act, and should have been so marked as in such cases thereunder required; but not being so marked, and being labeled "Pure Pepper", was misbranded. *United States* v. *75 Boxes of Alleged Pepper*---------- 340

See Adulteration; Compound; Distinctive Name; Misbranding.

BOND:

In a suit on a bond made and given by defendant as claimant of a quantity of canned sardines which had been condemned and confiscated as adulterated in a forfeiture proceeding had under the act and which by authority of an order of the court had been delivered to and taken by claimant upon the execution and delivery of such bond, *held* that it was no defense that the act of defendant in afterwards selling the goods in their adulterated state, without inspection, and without segregating the good, if any, from the bad, in violation of conditions of the bond, was with the understanding and belief on its part that such conditions had been complied with when the goods were delivered to it by the United States marshal; and that the terms of the bond were absolute, and whether defendant acted mistakenly or intentionally was immaterial. *United States* v. *Seacoast Canning Co*---------- 1209

The act, section 11, provides for the examination of articles sought to be imported, suspected of being adulterated or misbranded, by the Department of Agriculture, and declares that, if they are found to be so, entry shall be forbidden, and they shall be destroyed unless exported within 3 months of the date of refusal of entry, except that, pending examination, the importer may obtain possession by executing a penal bond conditioned to return the goods to the Secretary of the Treasury when demanded, etc. *Held* that, where proceedings were instituted for the examination and exclusion of certain alleged adulterated or misbranded olives, the acceptance of a bond executed by the importer for possession under said section did not amount to an official declaration that the olives had been found to comply with the act. *United States* v. *Nine Barrels of Olives*---------- 128

See Costs; Importation; Libel; Release.

BOOKLETS.

See Circulars, Pamphlets, Booklets, Etc.

BORIC ACID: Page

Boric acid *held* to be an added deleterious ingredient of preserved whole eggs. *United States* v. *50 Cans of Preserved Whole Eggs*--- 74

See Added Poisonous and Added Deleterious Ingredients.

BOWMAN'S ABORTION REMEDY:

An article sold as a remedy for infectious abortion in cattle, the packages of which contained the words "Bowman's Abortion Remedy" and directions for administering the article, *held* misbranded under the provision of the act declaring drugs misbranded if the package or label bear or contain any false or fraudulent statement regarding curative or therapeutic effect, where it was shown that the so-called "abortion remedy" was composed of brown sugar and wheat product and that it could not possibly prevent, cure, retard, or in any way affect said disease. *United States* v. *100 Boxes of Bowman's Abortion Remedy*---------- 1187

BOURBON WHISKY.

See Whisky.

BRANDS.

See Label; Misbranding.

BRED SPRED:

An article of food labeled "Bred Spred", alleged to be adulterated by reason of the presence of pectin, and alleged to be misbranded for the reason that the words "Bred Spred Strawberry (or 'Raspberry') Flavor" and a design of fruit, appearing on the labels, represented the article to be strawberry or raspberry jam, when it was not, *held* not so adulterated or misbranded, on the ground that articles of food not labeled with the distinctive name of some other article come within the exception of the first proviso of section 8 of the act. *United States v. 49½ Cases of Bred Spred*---- 1204

Evidence *held* not to show that an article labeled "Bred Spred" and consisting essentially of berries, sugar, water, pectin, and tartaric acid was adulterated as being mixed, colored, or stained in a manner whereby damage or inferiority was concealed, or that the article was misbranded as being an imitation of another article, jam. *United States* v. *10 Cases, More or Less, Bred Spred, Etc., et al*----- 1262

BUFFALO LITHIA WATER:

Water taken from a spring at Buffalo Lithia Springs, Mecklenburg County, Va., and labeled "Buffalo Lithia Springs No. 2 * * * Buffalo Lithia Springs Water, Nature's Materia Medica," *held* misbranded because said water did not contain a sufficient quantity of lithium to entitle it to be called lithia water. *United States v. 7 Cases of Buffalo Lithia Water*---------- 573

Affirmed, *Goode* v. *United States*---------- 698

BULLETINS OF THE DEPARTMENT OF AGRICULTURE.

See Analysis; Estoppel.

BURDEN OF PROOF:

The burden is on the Government, in proceedings for violation of section 2 of the act, to establish its case beyond a reasonable doubt. *United States* v. *John A. Tolman Co*---------- 78

United States v. *Hobart et al*---------- 171

United States v. *S. Gumpert et al*---------- 182

United States v. *Italian Importing Co*---------- 187

United States v. *Hall-Baker Grain Co*---------- 291

United States v. *Bettman-Johnson Co*---------- 299

Von Bremen et al. v. *United States*---------- 338

United States v. *Gidden*---------- 360

United States v. *J. L. Hopkins & Co*---------- 401

United States v. *C. F. Blanke Tea & Coffee Co*---------- 432

United States v. *F. B. Washburn & Co*---------- 434

United States v. *Huyler's*---------- 455

United States v. *McConnon & Co*---------- 496

BURDEN OF PROOF—Continued.

Page
United States v. *Excelsior Baking Co* 501
United States v. *Weeks* 528
United States v. *Hopkins* 585
United States v. *Lowenthal* 626
United States v. *Matusow* 664
United States v. *Simpson* 700
United States v. *Kellett* 711
United States v. *Swift & Co* 717
United States v. *Abbott Bros. Co* 722
United States v. *Athlophoros Co* 732
United States v. *G. F. Harvey Co* 754
United States v. *Koshland* 777
United States v. *Russian Monopol Co* 784
United States v. *Atlantic Macaroni Co* 793
United States v. *Pulmonol Chemical Co* 806
United States v. *Bell & Co* 828
United States v. *Natura Co* 836
United States v. *Heimann* 840
United States v. *Dr. J. H. McLean Medicine Co* 850
United States v. *A. Skarzynski & Co* 860
United States v. *Kar-Ru Chemical Co* 900
United States v. *Tetz et al* 917
United States v. *Italian Importing Co* 922
United States v. *Newton Tea & Spice Co* 950
United States v. *Gandara* 984
United States v. *W. B. Wood Manufacturing Co* 1002
United States v. *Alban* 1014
United States v. *John Dobry Manufacturing Co* 1085
United States v. *Marmarelli et al* 1122
United States v. *South Hero Creamery Association* 1142
United States v. *Monotti-Larimer* 1144
United States v. *South Peacham Creamery Co* 1147
United States v. *Barnet Creamery Association* 1149
United States v. *Trinidad Creamery Co* 1152
United States v. *Gorman & Co* 1171
United States v. *Germack* 1178
United States v. *Morehouse* 1210
United States v. *South Peacham Creamery Co* 1266

The burden of proof is upon the Government, in proceedings instituted under section 10 of the act to prove the offense charged—

(a) By a preponderance of the evidence.

United States v. *625 Sacks of Flour* 129
United States v. *3,000 Pounds of Frozen Eggs* 198
United States v. *307 Cases of Confectionery* 353
United States v. *175 Boxes of Macaroni* 426
United States v. *539 Boxes and 322 Cartons of Wm. Radam's Microbe Killer* 511
United States v. *90 Boxes of Macaroni* 561
United States v. *60 Barrels of Wine* 658
United States v. *11 Gross Packages of Dr. Williams' Pink Pills* 680
United States v. *350 Bags of Shell Peanuts* 685
United States v. *1,000 Cases of Tomato Puree* 704
United States v. *408 Bushels of Oysters* 718
United States. v. *1,367 Cases of Pork and Beans* 766
United States v. *5,060 Cans of Tomato Pulp* 780
United States v. *720 Cases of Tomato Catsup* 877
United States v. *1,500 Cases of Tomato Pulp* 892
United States v. *One Gross Packages of "A Texas Wonder"* 910
United States v. *9 Cases of Sparkling White Seal* 1023
United States v. *1,600 Cases of Canned Salmon* 1105
United States v. *1,974 Cases of Canned Salmon* 1108
United States v. *1,000 Cases of Sardines* 1113
United States v. *243 Cases of Canned Salmon* 1131

BURDEN OF PROOF—Continued. Page

United States v. *2,205 Cases of Canned Salmon* 1133
United States v. *2,995 Cases of Canned Salmon* 1136
United States v. *4½ Cases of Creme de Menthe* 1191
United States v. *3,192 Boxes of Apples and 532 Boxes of Pears* 1199
United States v. *3,998 Cases of Canned Tomatoes* 1213
United States v. *60 Bottles of Dr. Hermance's Asthma and Hay Fever Medicine* 1324

(b) By a clear and satisfactory preponderance of the evidence. *United States* v. *275 Cases of Mineral Water* 920
United States v. *1,246 Cases of Tomato Catsup* 943

(c) By a balance of the probabilities. *United States* v. *Eleven Packages of B. & M. External Remedy* 1059

In forfeiture proceedings under section 10 of the act, *held* that the burden of proof was on the Government to establish the allegations of the libel by the weight of evidence which must be of a clear and convincing character. *United States* v. *443 Cans of Frozen Egg Product* 197
United States v. *300 Cases of Mapleine* 39

In forfeiture proceedings under section 10 of the act, the burden of proof is on the Government to establish its case by a higher degree of proof than a mere preponderance. It is not the ordinary burden of proof such as exists in a civil suit between two parties. *United States* v. *One Barrel of Desiccated Egg Product* 99
United States v. *10 Barrels of Olives* 125

Proceedings by libel for condemnation under section 10 of the act being civil and not criminal actions, the Government is not required to sustain the allegations of the libel by proof beyond a reasonable doubt as in criminal cases. *United States* v. *625 Sacks of Flour* 129
United States v. *5,060 Cans of Tomato Pulp* 780
United States v. *1,500 Cases of Tomato Pulp* 892
United States v. *275 Cases of Mineral Water* 920
United States v. 1,246 Cases of Tomato Catsup 943
United States v. *4½ Cases of Creme de Menthe* 1191

A seizure proceeding brought by the United States under section 10 of the act is not an ordinary civil suit, nor is it an ordinary criminal suit. It occupies a place between these two proceedings. It is a suit to enforce a penalty. The remedy is a severe one, and the burden is on the Government to offer better evidence than just the mere weight. The evidence of the Government must be clear and convincing to secure a favorable verdict. *United States* v. *36 Bottles of London Dry Gin* 489

In a proceeding to condemn drugs as misbranded in that the label, etc., stating the curative and therapeutic effect of the article was false and fraudulent, the burden of proof is upon the Government to show by a preponderance of the evidence which is clear and convincing that some one or more of the statements contained in the label, etc., and charged in the libel were false and fraudulent. *United States* v. *36 Bottles of Crab Orchard Mineral Water* 1011
United States v. *22 Bottles of Crab Orchard Concentrated Mineral Water* 1055
United States v. *23 7/12 Dozen Bottles, Etc., of "Lee's Save The Baby"* 1240
United States v. *9 Packages of Crisp's Tung-Tone, et al* 1268
United States v. *17 Bottles, Etc., of An Article of Drugs Labeled in Part "B. & M."* 1287

In a proceeding under section 10 of the act, for forfeiture of a food product for misbranding, *held* that the burden of proof was on the Government to establish by the evidence not merely a technical, but a substantial violation of the act, which might render the article injurious to health, or mislead the public to its prejudice or harm, or induce the purchase of an article different from the one desired. *Ninety-five Barrels, More or Less, Apple Cider Vinegar* v. *United States* 1079

BURDEN OF PROOF—Continued. Page

Where the claimant neither answered nor contested the allegations of a libel filed under section 10 of the act, it was held to be the duty of the court, before a decree of condemnation was entered, to see that a case was made out by the libelant. The burden held to be on the Government to show that the label contained a statement substantially false and misleading. *United States* v. *650 Cases of Tomato Catsup* 31

See Civil Cases; Criminal Cases; Evidence; Reasonable Doubt; Libel.

BUTTER:

Butter *held* adulterated for the reason that it contained less than 80 percent by weight of milk fat; *held*, not misbranded in that the weight of the contents of the package was not plainly and conspicuously marked on the outside thereof. *United States* v. *South Hero Creamery Association* 1142

Butter *held* misbranded because the packages contained less than the quantity stated thereon, and because the article contained less than 80 percent by weight of milk fat. *United States* v. *Trinidad Creamery Co* 1152

Butter *held* not adulterated in that it contained less than 80 percent by weight of butterfat. *United States* v. *South Peacham Creamery Co* 1147

Butter *held* not misbranded in that the weight of contents of the packages was less than stated thereon. *United States* v. *Monotti-Larimer* 1144

Allegation that an article branded "reworked butter", shipped in interstate commerce, was adulterated by reason of deficiency in milk fat, *held*, did not charge an offense against the act, in the absence of a law in force at the time of the shipment, or of a valid regulation, prescribing the amount of milk fat in butter. *United States* v. *Swift & Co* 1146

Allegation in an information that an article of food was adulterated by substitution of a product containing less than 80 per centum by weight of milk fat for "butter", *held* to charge adulteration in view of the Food and Drugs Act, section 7, and of act March 4, 1923, defining butter for the purposes of the Food and Drugs Act; and allegation that such article of food was misbranded in that statements "butter" and "one pound net", on the packages, represented that the article was "butter", to wit, a product which should contain not less than 80 per centum of milk fat, and that each of the packages contained 1 pound net of the article, whereas, the article contained less than 80 per centum by weight of milk fat, and the packages contained less than 1 pound net of the article, *held* to charge misbranding under the Food and Drugs Act, section 8, as amended by act March 3, 1913. *United States* v. *Centralia Dairy Co* 1336

In an action for the destruction of butter which contained impurities and a portion of which had become rancid, claimant will be allowed to "renovate" the butter—that is, to melt it to a fluid, so that all solid matter falls to the bottom, and then strain and blow it into spray, in which condition hot water is allowed to percolate through the oil, after which the water is drawn off and an emulsion made with milk, cooled into crystals, and packed, under a bond that, after renovating, the butter will be submitted to inspection, and destroyed if the renovation has not removed the impurities and the rancid oils—but will not be permitted to cleanse the butter by the process known as "ladling", which consists merely in picking out with a trowel such parts as show impurities to the eye, and then molding it into pats and coloring it for sale to bakers. *United States* v. *Nine Barrels of Butter* 826

The sale within the District of Columbia of process butter *held* within the purview of the Food and Drugs Act. *District of Columbia* v. *Coburn* 120

CAFFEINE:

Caffeine *held* to be an essential and normal ingredient of Coca-Cola, and not an added ingredient within the meaning of the act. *United States* v. *40 Barrels and 20 Kegs of Coca-Cola* 239

CAFFEINE—Continued. Page
Affirmed, *United States* v. *40 Barrels and 20 Kegs of Coca Cola* ---------- 606
Judgment reversed, *United States* v. *Coca Cola Co.*---------- 741
Caffeine in Coca Cola *held* to be an "added" ingredient within the meaning of the act. *United States* v. *Coca Cola Co*---------- 741
Caffeine *held* to be an added poisonous and deleterious ingredient of a beverage called "Celery Cola." *United States* v. *Mayfield et al*-- 90
See Added Poisonous and Added Deleterious Ingredients; Celery Cola; Coca Cola; Creme de Menthe Flavor Non-alcoholic Cordial.

CALCIUM ACID PHOSPHATE:
An article of food labeled "C. A. P.", which was composed of calcium acid phosphate and corn starch and which contained no added poisonous or deleterious ingredient, *held* not adulterated or misbranded by reason of the addition of corn starch the presence of which was not stated on the label, since it was an article manufactured and sold under its own distinctive name. *United States* v. *100 Barrels of Calcium Acid Phosphate*---------- 58
See Distinctive Name.

CANCERINE:
A medicinal preparation labeled "Cancerine" *held* not misbranded within the meaning of the act because of alleged false and misleading statements on its label regarding its curative effect. *United States* v. *Johnson* ---------- 85
Affirmed, *United States* v. *Johnson*---------- 267

CANDY.
See Confectionery.

CAPON SPRINGS WATER:
Bottled water taken from a spring in West Virginia, labeled "Capon Springs Water, Known to the Catauba Indians as 'Ca-Ca-Paon' Healing Water", *held* not misbranded as fraudulently represented by the term "healing water" to have curative or therapeutic effect, and not adulterated within the act, section 7, paragraph 6. *United States* v. *94 Dozen, More or Less, Half-Gallon Bottles of Capon Springs Water* ---------- 1216
Judgment affirmed, *United States* v. *94 Dozen, More or Less, Half-Gallon Bottles of Capon Springs Water*---------- 1278

CATSUP.
See Tomato Catsup.

CELERY COLA:
A beverage labeled "Celery Cola" *held* adulterated because it contained cocaine and caffeine, added poisonous and deleterious ingredients; and misbranded because the quantity or proportion of cocaine present was not stated on the label. *United States* v. *Mayfield et al*---------- 90

CERTIFICATE.
See Affidavits.

CERTIFICATION OF VIOLATIONS:
The provision of the act, section 4, that the Secretary of Agriculture, after an investigation of the alleged violation of the act, shall at once certify the facts to the *proper* United States attorney, requires the certification to the district attorney in whose district prosecution should be had. *United States* v. *J. L. Hopkins & Co*---------- 401
See Jurisdiction.

CHAMPAGNE:
The term "champagne," when used alone and apart from any qualifying or descriptive words, is commonly understood to describe an effervescent or sparkling wine produced in a Province in France, the gas therein being the result of natural fermentation. *Held*, a bottle containing wine produced in California and labeled "Extra

CHAMPAGNE—Continued. Page

Dry Champagne", without any other qualifying or descriptive words, tends to mislead and deceive the purchaser into the belief that he is buying a foreign product, and is misbranded under the provisions of the act. *United States* v. *Schraubstadter et al*_____ 237
Affirmed, *Schraubstadter et al.* v. *United States*_____ 398

A very cheap, ordinary, low-grade, carbonated white wine, is not champagne in any sense of the word. Such an article contained in bottles of the same shape and made in imitation of the ordinary champagne bottle, and corked and dressed about the neck the same as and in close imitation of the ordinary genuine champagne bottle, and having the same style of label and seal, both attached in the same manner, and the label bearing the name "Special Gold Cabinet, Superior Quality", with other designs and devices such as are ordinarily used in the labeling of genuine champagne, and the boxes in which the article was packed closely imitated in appearance, markings and labels the boxes in which genuine champagne is packed, is misbranded. *United States* v. *5 Cases of Champagne*__ 503

Apple juice artificially carbonated and containing capsicum contained in bottles which were labeled "Sparkling White Seal", and which in form and dress resembled a distinctive bottle used for champagne sold under the same name, *held* misbranded. *United States* v. *9 Cases of Sparkling White Seal*_____ 1023
Affirmed, *Duffy-Mott Co.* v. *United States*_____ 1078

See Wine.

CHERRIES, CANNED:

Canned cherries containing decomposed cherries and worms or larvae, *held* adulterated in that they consisted in whole or in part of a filthy, decomposed or putrid animal or vegetable substance. *United States* v. *384 Cases of Canned Cherries*_____ 1176

Canned cherries *held* to be adulterated because they contained cherries affected with rot and worms. *United States* v. *897 Cases of Canned Cherries*_____ 1183

See Maraschino Cherries.

CHEWING GUM.

See Beeman's Pepsin Chewing Gum.

CHOCOLATE.

See Confectionery.

CHROME YELLOW:

"Chrome yellow" is a metal largely used as a yellow pigment, and is an active poison. *United States* v. *R. C. Boeckel & Co. et al*____ 637

See Confectionery.

CIDER:

An article labeled "Sweet Cider Produced of Concentrated Pure Apple Juice" and consisting of diluted apple juice sweetened with saccharine and artificially colored with caramel, in imitation of genuine sweet cider, *held* misbranded. *United States* v. *Shucart*_____ 693

See Vinegar.

CINCHONA, FLUID EXTRACT:

A drug labeled "Fluid Extract Cinchona" *held* adulterated in that, being a drug sold under a name recognized in the United States Pharmacopoeia, it differed from the standard of strength, quality, and purity by the test laid down therein for such drug, and the standard of strength, quality, and purity of the said drug was not stated on the container thereof. *United States* v. *G. F. Harvey Co*__ 754

CIRCULARS, PAMPHLETS, BOOKLETS, ETC.:

Section 8 of the act, relating to misbranding, merely embraces any statement, design, or device regarding an article which appears on the outside of the package in which the article is offered for sale and does not include an advertising circular inclosed with an article inside the carton in which it is offered for sale. *United States* v. *American Druggists' Syndicate*_____ 250

CIRCULARS, PAMPHLETS, BOOKLETS, ETC.—Continued. Page

False representations regarding an article of food, contained in a circular and a poster inclosed within the package of the article, cannot be considered as violating the act. *United States* v. *Newton Tea & Spice Co* 950

Misbranding within the definition thereof in the act, section 8, as including cases where the package or label "bears" a false or misleading statement, *held* inapplicable to such statements in a booklet enclosed within a carton containing drugs. *United States* v. *17 Bottles, Etc., of An Article of Drugs Labeled In Part "B. & M."* 1287

Statements in a booklet inclosed in a carton of a drug may be the basis of a charge of adulteration under the act, section 7, in that the strength or purity of the drug fell below the professed standard under which it is sold. Id.

The provision of the act, section 8, as amended by act August 23, 1912, that drugs shall be deemed to be misbranded if the package or label shall bear or contain any statement, etc., regarding the curative or therapeutic effect of such article which is false and fraudulent, applies to such statements whether they appear on the package or in circulars or printed matter contained in the package. *Seven Cases of Eckman's Alterative* v. *United States* 707

Statements regarding the curative or therapeutic effect of drugs shipped in interstate commerce, if false and fraudulent, come within the act, as amended by act August 23, 1912, if they accompany the shipment and are intended for perusal by prospective purchasers, regardless of whether they appear on the label on the bottles containing the article, or on the cartons or containers in which the bottles were shipped, or in circulars, pamphlets, or booklets accompanying the shipment. *United States* v. *Eleven Packages of B. & M. External Remedy* 1059

United States v. *100 Boxes of Bowman's Abortion Remedy* 1187

United States v. *Athlophoros Co* 732

Simpson v. *United States* 832

See Contain; Judicial Notice; Label; Package.

CIVIL CASES:

Proceedings *in rem* under section 10 of the act are civil as distinguished from criminal cases. *United States* v. *300 Cases of Mapleine* 39

United States v. *625 Sacks of Flour* 129

United States v. *90 Boxes of Macaroni* 561

United States v. *1,367 Cases of Pork and Beans* 766

United States v. *5,060 Cans of Tomato Pulp* 780

United States v. *1,500 Cases of Tomato Pulp* 892

United States v. *1,195 Cases of Canned Salmon* 1099

United States v. *1,600 Cases of Canned Salmon* 1105

United States v. *4½ Cases of Creme de Menthe* 1191

United States v. *17 Bottles, Etc., of An Article Labeled in Part "B. & M."* 1287

United States v. *60 Bottles of Dr. Hermance's Asthma and Hay Fever Medicine* 1324

See Burden of Proof; Criminal Cases; Libel.

COAL-TAR COLOR.

See Coloring Materials.

COCA COLA:

An article labeled "Coca Cola", containing caffeine, *held* to be a mixture or compound sold under its own distinctive name, and not adulterated by reason of the presence of caffeine, or misbranded as being sold under the distinctive name of another article. *United States* v. *40 Barrels and 20 Kegs of Coca-Cola* 239

Affirmed, *United States* v. *40 Barrels and 20 Kegs of Coca Cola* 606

Judgment reversed, *United States* v. *Coca Cola Co* 741

See Added Poisonous and Added Deleterious Ingredients; Distinctive Name.

COCAINE: Page

An added poisonous and deleterious ingredient. *United States* v. *Koca Nola Co* 59
United States v. *Mayfield et al.* 90
See Added Poisonous and Added Deleterious Ingredients; Celery Cola; Koca Nola Syrup.

COCOANUT.
See Shred Cocoanut.

COFFEE:

Coffee shipped from Aden, Arabia, whether produced in Arabia or Abyssinia, may properly be labeled "Mocha", but is misbranded if the label fails to state in which of the two countries it was produced. *United States* v. *Thomson & Taylor Spice Co* 390
An article labeled "Blanke's Kafeka * * * is the nearest approach to coffee ever put on the market. It has all the merits without any objectionable features", *held* not misbranded by reason of said statements on the label. *United States* v. *C. F. Blanke Tea & Coffee Co* 432
An article composed almost entirely of Santos coffee, and labeled "Blanke's Mojav Coffee", *held* not misbranded as purporting to be a mixture of Mocha and Java coffee. *United States* v. *C. F. Blanke Tea & Spice Co* 439

COLOCYNTH APPLE, POWDERED:

An article labeled "Powdered Colocynth Apple", and containing 25 percent of seeds and yielding 11.39 percent of fixed oil, *held* adulterated in that it differed from the standard of strength, quality, and purity by the tests as laid down in the United States Pharmacopoeia, according to which colocynth apple should contain not more than 5 percent of seeds and yield not more than 2 percent of fixed oil, and the standard of the strength, quality, and purity of the article was not declared on the container thereof. The article was *held* misbranded in that the label was false and misleading, and in that the article was sold under the name of another article, to wit, colocynth apple. *United States* v. *McIlvaine Bros* 1127

COLORED:

The word "colored", as used in the act, section 7, subdivision 4, must be held to include any artificially produced change in the natural color of the substance in a manner whereby damage or inferiority is concealed. *Lexington Mill & Elevator Co.* v. *United States* 443
See Damage or Inferiority; Mixed.

COLORING MATERIALS:

A coloring material labeled "Red Color" *held* adulterated in that substances, to wit, ponceau 6R, fast red A, Bordeaux B, sodium chloride, sodium sulphate, and arsenic, had been mixed and packed with the article so as to lower and reduce and injuriously affect its quality and strength, and had been substituted in part for the article; and said article, *held* misbranded because it did not consist wholly of "Red Color", but consisted in part of ponceau 6R, fast red A, Bordeaux B, sodium chloride, sodium sulphate, and arsenic.
A coloring material labeled "Ponceau Red" *held* adulterated in that substances, to wit, ponceau 6R, orange II, fast red A, Bordeaux B, sodium chloride, sodium sulphate, and arsenic, had been mixed and packed with the article so as to lower and reduce and injuriously affect its quality and strength, and had been substituted in part for the article; and said article *held* misbranded because it did not consist wholly of "Ponceau Red", but consisted in part of ponceau 6R, orange II, fast red A, Bordeaux B, sodium chloride, sodium sulphate, and arsenic.
A coloring material labeled "Orange Yellow" *held* adulterated in that substances, to wit, sodium chloride, sodium sulphate, and arsenic, had been mixed and packed with the article so as to lower

COLORING MATERIALS—Continued. Page

and reduce and injuriously affect its quality and strength, and had been substituted in part for the article; and said article *held* misbranded because it did not consist wholly of "Orange Yellow", but consisted in part of sodium chloride, sodium sulphate, and arsenic.

A coloring material labeled "Amaranth Red" *held* adulterated in that substances, to wit, ponceau 6R, fast red A, Bordeaux B, sodium chloride, sodium sulphate, and arsenic, had been mixed and packed with the article so as to lower and reduce and injuriously affect its quality and strength, and had been substituted in part for the article; and said article *held* misbranded because it did not consist wholly of "Amaranth Red", but consisted in part of ponceau 6R, fast red A, Bordeaux B, sodium chloride, sodium sulphate, and arsenic.

A coloring material labeled "Lemon" *held* adulterated in that substances, to wit, sodium chloride, arsenic, and orange II had been mixed and packed with the article so as to lower and reduce and injuriously affect its quality and strength, and had been substituted in part for the article; and said article *held* misbranded because it did not consist wholly of "Lemon", that is to say, "Tartrazine", but consisted in part of sodium chloride, arsenic, and orange II.

United States v. *W. B. Wood Manufacturing Co*_____ 1002

Affirmed, *W. B. Wood Manufacturing Co.* v. *United States*_____ 1098

An article sold for coloring ice cream, soft drinks, candy, cakes, etc., *held* to be adulterated in that sodium chloride and sodium sulphate had been mixed and packed with the article so as to reduce or lower or injuriously affect its quality and strength, and had been substituted wholly or in part for the article; and in that the article contained an added poisonous or deleterious ingredient, arsenic, which might render the article injurious to health. Said article *held* to be misbranded in that the statement, "Warranted. Complies With All Requirements. Quality Color", appearing on the label, was false and misleading. *United States* v. *One Pound Can of Coal-Tar Color*_____ 1019

Affirmed, *W. B. Wood Manufacturing Co.* v. *United States*_____ 1070

Coloring material *held* not to be adulterated in that other substances had been mixed and packed therewith so as to reduce, lower, and injuriously affect its quality and strength, and had been substituted wholly or in part for the article. Said article *held* to be misbranded in that the statement "We guarantee the contents of this package to contain no coal tar color excepting our certified colors", borne on the label, was false and misleading. *United States* v. *37 One-Pound Packages of Colors*_____ 1165

Coloring materials *held* not adulterated because they contained arsenic as an added poisonous and deleterious ingredient, where there was no proof that the quantities of arsenic present were in fact poisonous, hurtful, or injurious to health. *United States* v. *W. B. Wood Manufacturing Co*_____ 1002

See Added Poisonous and Added Deleterious Ingredients; Arsenic; Regulations; Standards.

COMMISSIONERS, UNITED STATES.

See Affidavits.

COMPOUND:

An article of food bearing principal labels describing it as a particular brand of molasses, but plainly stating that the product is a compound of molasses and corn sirup, and also containing all the other information required by the act and the regulations thereunder, and which article is in fact a compound of molasses and commercial glucose, is not adulterated or misbranded within the meaning of the act; it being shown that the article contains nothing deleterious or injurious to health, and that under the rulings of the Department of Agriculture it is permissible to describe commercial glucose on labels as made from corn sirup. *United States* v. *779 Cases of Molasses*_____ 65

COMPOUND—Continued.

Page

The term "Compound White Pepper" does not so naturally imply to the average purchaser a mixture of white pepper with an ingredient other than pepper as to make it a proper branding where the statement of the ingredient is so placed and in such type as not readily to be noticed by the purchaser, and is calculated and intended to deceive and mislead the latter. *Frank et al.* v. *United States*---------- 329

A blend is a compound, but a compound may or may not be a blend; in other words, the term "compound" does not necessarily denote a mixture of unlike substances. Id.

Where pumpkin was added to tomato catsup as a filler, the fact that it was merely marked "Compound", without anything on the labels under which it was sold to show the substances composing the compound, did not constitute a compliance with the act. *William Henning & Co.* v. *United States*---------- 344

An article containing milk and chocolate *held* to be a mixture or compound, and, containing no added poisonous or deleterious ingredients and being labeled "Milk Chocolate", is within the provision of the act, section 8, that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated in the case of mixtures or compounds known as articles of food under their own distinctive names. *United States* v. *Auerbach & Sons*---------- 357

Under the provision of the act, section 8, that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed adulterated or misbranded in the case of compounds known as articles of food under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, and in case of articles labeled so as to plainly indicate that they are compounds, and the word "compound" is stated on the package in which it is offered for sale, an article labeled "Fruit Wild Cherry Compound", not containing any "Fruit Wild Cherry", but containing a coal-tar color giving the mixture the genuine color of wild cherry juice, but not containing any added poisonous or deleterious ingredients, is not adulterated or misbranded. *Weeks* v. *United States*---------- 646

Affirming *United States* v. *Weeks*---------- 519

Section 8 of the act contains a proviso that food which does not contain any poisonous or deleterious ingredients shall not be deemed adulterated or misbranded, in the case of mixtures or compounds known as articles of food under their own distinctive names, if such name be accompanied on the same label or brand with a statement of the place where the article has been manufactured or produced, and, in the case of articles labeled, branded, or tagged so as to indicate plainly that they are compounds, imitations, or blends, and the word "compound", "imitation", or "blend", as the case may be, is plainly stated on the package in which it is offered for sale. *Held*, that where an article known as "Corno Horse and Mule Feed" was contained in packages labeled "Corno Horse and Mule Feed. Mixture of ground alfalfa, oats, corn, flax bran, oat and hominy feeds. Made by the Corno Mills Company, East St. Louis, Illinois"—followed by a guaranteed analysis, such article, being a compound sold under its own distinctive name, and containing no deleterious ingredient, and the label showing it to be a mixture and truthfully stating its constituents and the place of manufacture, was not adulterated because it contained oat hulls in excess of the amount normally present in oat feed consisting of whole ground oats, and was not misbranded because it contained an excess of oat hulls in compound and not the whole ground oats. *United States* v. *One Carload of Corno Horse and Mule Feed*---------- 274

Within the general terms of the act, sections 7 and 8, an article labeled "Compound Ess Grape", but which contains nothing from grapes and is a mere imitation, is adulterated, since some other substance has been substituted wholly for the one obviously indi-

COMPOUND—Continued. Page

cated by the label, viz, "Compound essence of grape", and also misbranded, since the label carries a false and misleading statement; and in such case the use of the word "compound" is not a compliance with the proviso in paragraph 4 of section 8 of the act, since it does not give notice that the article is a mere imitation but suggests the contrary. *United States* v. *Schider*---------- 875

See Added Poisonous and Added Deleterious Ingredients; Adulteration; Blend; Distinctive Name; Imitation; Misbranding.

COMPOUND ESS GRAPE.

An article labeled "Compound Ess Grape", but containing nothing from grapes, *held* adulterated and misbranded. *United States* v. *Schider*---------- 875

CONDEMNATION.

See Libel; Release; Seizure.

CONDENSED MILK.

See Milk, Condensed Skimmed.

CONDIMENT:

A condimen ti sa food and not a medicine. *Savage* v. *Scovell*---------- 18

The condiments used in the manufacture of tomato catsup have the effect of concealing decomposition or putrefaction from the senses, and its existence can most readily be determined by a bacteriological analysis of the manufactured product to ascertain whether the organisms referred to are present in sufficient quantities to indicate a decomposed state. *United States* v. *200 Cases of Adulterated Tomato Catsup*---------- 583

CONFECTIONERY:

An article labeled "Pure Milk Chocolate, Manufactured by D. Auerbach & Sons, New York City", *held* not adulterated by reason of its containing wheat starch, the presence of which was not declared on the label. The article was *held* to be a mixture or compound sold under its own distinctive name and not an imitation of or offered for sale under the distinctive name of another article. *United States* v. *Auerbach & Sons*---------- 357

Confectionery labeled "Ghirardelli's Italian Chocolates, D. Ghirardelli Company, San Francisco, California", with colors and design of the Italian flag, which was manufactured in the United States, *held* not misbranded as purporting to have been manufactured in Italy. *United States* v. *D. Ghirardelli Co*---------- 397

The act, section 7, provides that confectionery shall be deemed to be adulterated "if it contain terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredients deleterious or detrimental to health." The words "deleterious or detrimental to health" are limited to the term "ingredient", and qualify that word only and not any preceding word or words. Coloring or flavoring matter is permissible, provided it is not poisonous, but any other ingredient, although not theretofore specified or classified, which is deleterious or detrimental to health, is prohibited. Certain specified articles are by the provision inferentially denominated minerals, and their use is prohibited; then, to the specific mineral substances whose use is prohibited, is added "or other mineral substances." Hence, the introduction into confectionery of mineral substances is prohibited, irrespective of the presence or absence of any poisonous, deleterious or detrimental quality, and notwithstanding such is not of the class of the specified mineral substances; they are prohibited because they are adulterants, and for that reason only. Confectionery labeled "Silver Dragées", coated with metallic silver, *held* adulterated in that it contained a mineral substance. *United States* v. *Oriental Dragée Co*---------- 35

The provision of the act, section 7, that confectionery shall be deemed to be adulterated if it contain terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, must be construed to prohibit the use in confectionery of all mineral substances of the same nature as those enumerated,

CONFECTIONERY—Continued. Page

and of those enumerated some are well known to be merely inert, possessing no poisonous qualities whatever (e. g., terra alba and talc). Silver is inert and is just as much a mineral substance as is terra alba, and is within the prohibition. Confectionery labeled "Silver Drageés", coated with metallic silver, *held* adulterated. *United States* v. *French Silver Dragée Co*---------- 43
Reversed, *French Silver Dragée Co.* v. *United States*---------- 121

The act, section 7, provides that confectionery shall be deemed to be adulterated "if it contain terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor or other ingredient deleterious or detrimental to health." The words "other mineral substance", under the doctrine of *ejusdem generis*, included other mineral substances which are deleterious or detrimental to health of the same nature as those specifically described preceding such words, and hence did not include a thin coating of pure silver covering candy, used principally by confectioners for decorative purposes, and not deleterious or detrimental to health. *French Silver Dragée Co.* v. *United States*---------- 121

Confectionery *held* not adulterated in that it contained talc. *Held* that in order to condemn confectionery as adulterated in that it contained talc, the burden was on the Government to establish by a preponderance of the evidence that the talc was present in a quantity beyond a mere chemical trace and sufficient to be regarded as significant or important for some possible practical purpose. *United States* v. *307 Cases of Confectionery*---------- 353
Reversed, *United States* v. *R. C. Boeckel & Co. et al*---------- 637

Under the provision of the act, section 7, that confectionery shall be deemed to be adulterated "if it contain terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt, or spiritous liquor or compound or narcotic drug", confectionery is adulterated when it contains any of the substances specifically named, such as talc, regardless of whether the amount of the added adulterant indicates an intention to deceive, or is liable to injure health or morals, and it was therefore error for the court to charge that a mere chemical trace of talc would not constitute adulteration, but that there must be enough to show some purpose of deception. *United States.* v. *R. C. Boeckel & Co. et al*---------- 637

In the provision of the act, section 7, that confectionery shall be deemed to be adulterated "if it contain terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color as flavor, etc.", the word "contain" is used in a general and not in a restricted sense, and confectionery may "contain" any of the prohibited substances if they are used as a compound, a filler, a flavor, a pigment to color it internally or externally, a coating, or other similar purpose, especially if purposely used for those or other similar purposes, even in minute quantities. Id.

Confectionery includes an article produced by the mixing or compounding of sugars, sweets, etc., and intended mainly for the purpose of pleasing the taste. An article in the form of tablets, composed of a mixture of sugar 93 parts, talc 5 parts, mineral oil one-half of 1 part, some starch, and wintergreen oil one-eighth of 1 part, *held* to be confectionery and not a drug, and adulterated by reason of the presence of a substantial amount of talc. *United States* v. *4 Boxes of Mulford's Wintergreens*---------- 592

An information charging that confectionery, commonly called candy, was adulterated in that it consisted in whole or in part of a filthy, decomposed, and putrid vegetable substance, *held*, sufficiently charged adulteration of "confectionery" within the terms of the act defining what constitutes adulteration of "confectionery", namely, "if it contains terra alba, etc., or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health." *United States* v. *Watson-Durand-Kasper Grocery Co*---------- 837

See Contain; Chrome Yellow; Construction, Rules of; Distinctive Name; Ejusdem Generis; Talc.

CONFISCATION.

See Libel; Release; Seizure.

CONFLICT OF LAWS.

See Constitutionality of the Food and Drugs Act; Constitutionality of State Laws; Interstate Commerce.

CONGRESS, JOURNALS OF: Page

In case of doubt or ambiguity, the journals of the legislature may be examined for the intent of the lawmakers to ascertain facts of which such journals are evidence. *United States* v. *Dr. J. L. Stephens Co*---------- 305

See Congressional Committee Reports; Construction and Interpretation; Debates in Congress; Legislative History of the Act.

CONGRESSIONAL COMMITTEE REPORTS:

Congressional committee reports explaining the bill considered by the court in determining the intent of Congress. *United States* v. *Coca Cola Co*---------- 741
United States v. *Lexington Mill & Elevator Co*---------- 577
United States v. *150 Cases of Fruit Puddine*---------- 557
French Silver Dragée Co. v. *United States*---------- 121

Reports of congressional committees explaining the bill may be considered in determining the meaning of a doubtful statute, but will not be used to support a construction contrary to the plain import of its terms. *United States* v. *Shreveport Grain & Elevator Co*---------- 1339

See Congress, Journals of; Construction and Interpretation; Debates in Congress; Legislative History of the Act.

CONSIST:

The term "consists of", as used in the provision of the act, section 7, that an article of food shall be deemed to be adulterated if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, means something more than the word "contains" used elsewhere in the statute. The word "contains" ordinarily means something added to or embraced within the original substance; the term "consist of", as used in said provision, means a part or a constituent element of the product. *United States* v. *1,367 Cases of Pork and Beans*---------- 766

Where an article of food, by reason of the presence of bacteria, or worms, insects, and beetles, is in a filthy, decomposed, or putrid condition, it is no defense to say that it does not *consist* in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, but that it *contains* such substances, and therefore it is not adulterated within the meaning of the act. Such article is adulterated whether its filthy, decomposed, or putrid condition is caused by an inherent condition or by a substance foreign to its proper constituents or ingredients, and if such foreign substance, though not filthy, decomposed, or putrid in itself, by its presence renders the article of food filthy, decomposed, or putrid. *Dade* v. *United States*---------- 465
Wm. M. Galt & Co---------- 422

See Contain; Filthy, Decomposed, and Putrid.

CONSTITUTIONALITY OF THE FOOD AND DRUGS ACT:

The constitutionality of the act is generally conceded and well established. *United States* v. *Sweet Valley Wine Co*---------- 468

Congress not only has the right to pass laws regulating legitimate commerce among the States and with foreign nations, but has full power to keep the channels of such commerce free from the transportation of illicit or harmful articles, to make such as are injurious to the public health outlaws of such commerce and to bar them from the facilities and privileges thereof. Congress may itself determine the means appropriate to this purpose, and so long as they do no violence to other provisions of the Constitution it is itself the judge of the means to be employed in exercising the powers conferred upon it in this respect. *McDermott et al.* v. *Wisconsin*---------- 473

CONSTITUTIONALITY OF THE FOOD AND DRUGS ACT—Contd. Page

The act is not unconstitutional as an attempt by Congress to exercise police power belonging to the States. The act is not unconstitutional as depriving persons of property without due process of law. The act is not void for uncertainty and indefiniteness, in that no standard of grade, quality, or purity is prescribed, but that the determination of the standard is left to the courts as such objection may be obviated by requiring specific and properly drawn pleadings. *United States* v. *420 Sacks of Flour* 96

The act is not an exercise of police power within the exclusive jurisdiction of the States, but is within the power of Congress as a proper regulation of interstate commerce. *Shawnee Milling Co.* v. *Temple et al* 106

The act is a legitimate exercise of the power of Congress to regulate interstate commerce. *United States* v. *74 Cases of Grape Juice* 144

United States v. *65 Casks of Liquid Extracts* 47

United States v. *100 Cases of Tepee Apples et al* 20

United States v. *Bethesda Mineral Spring Co* 841

United States v. *11 Packages of B. & M. External Remedy* 1059

The act is sanctioned by the power given to Congress by the Constitution to regulate commerce and to pass all laws necessary and proper to carry that power into effect. *United States* v. *8 Packages and Casks of Drugs* 149

Congress had the power under the Constitution to pass the Food and Drugs Act prohibiting interstate commerce in food or drugs that do not comply with certain standards established by the act. *United States* v. *Atlantic Macaroni Co* 793

The act is not void for uncertainty because it fails to specify definitely the extent to which decomposition of an article of food must have progressed to bring the article within the prohibition of food defined as adulterated if it consists in whole or in part of a "decomposed substance." *A. O. Andersen & Co.* v. *United States* 1053

Congress has the right in the interest of the general public and in the exercise of its control over interstate commerce to prescribe the standard up to which certain drugs must come when they are shipped in interstate commerce. *United States* v. *G. F. Harvey Co.* 754

Congress can use appropriate means to execute the powers conferred upon it by the Constitution, and the seizure and condemnation of adulterated articles of food which have been transported in interstate commerce at their point of destination in the original, unbroken packages is an appropriate means. *Hipolite Egg Co.* v. *United States* 223

The act is not unconstitutional as being ex post facto, or as containing an improper delegation of legislative authority by reason of section 7, declaring that a drug shall be deemed to be adulterated when "sold under or by a name recognized in the United States Pharmacopoeia (and differing) from the standard of strength, quality, or purity as determined by the test laid down in (said) Pharmacopoeia * * * * official at the time of investigation". *United States* v. *Lehn & Fink* 229

A drug containing alcohol used as an inhalant for head colds, *held* to be subject to regulation by Congress in interstate commerce, though constituting a harmless substance not detrimental to health. *United States* v. *11 Cartons of Drug Labeled in Part "Vapex"* 1332

The Sherley amendment (act Aug. 23, 1912) to the Food and Drugs Act, prohibiting false and fraudulent statements as to the curative properties of drugs, is within the power of Congress to enact, and is constitutional. *United States* v. *American Laboratories* 641

The act of August 23, 1912, amending the Food and Drugs Act, section 8, under which misbranding includes false and fraudulent statements regarding curative or therapeutic effects of drugs, is within the power of Congress to regulate interstate and foreign commerce. Such regulation of interstate commerce is within the power of Congress whether the statement be contained in the original package or on the container of the article. *Seven Cases of Eckman's Alterative* v. *United States* 707

CONSTITUTIONALITY OF THE FOOD AND DRUGS ACT—Contd. Page

The act of August 23, 1912, amending the Food and Drugs Act, section 8, does not by reason of uncertainty operate as a deprivation of property without due process of law in violation of the Fifth Amendment of the Constitution, nor does it prevent the laying of definite charges as required by the Sixth Amendment, as it in terms requires that the statements to fall within the prohibition of the act must be false and fraudulent. *Id.*

The provision of the act, section 8, paragraph 3, as amended by act March 3, 1913, that the quantity of the contents of packages of food be plainly marked on the package in terms of weight, measure, or numerical count, and that reasonable variations shall be permitted, etc., *held* not unconstitutional for uncertainty. *United States* v. *The Merchants Biscuit Co*_____ 1129

The provision of the act, section 8, paragraph 3, as amended by act March 3, 1913, that an article of food shall be deemed misbranded if in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count, with the proviso that "reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provisions of section 3 of the act", *held* unconstitutional because it is too indefinite, not setting up any ascertainable standard of guilt. *United States* v. *Shreveport Grain & Elevator Co*_____ 1239

Reversed, *United States* v. *Shreveport Grain & Elevator Co*____ 1339

The provision of the act, section 8, paragraph 3, as amended by act March 3, 1913, declaring food misbranded if in package form, the quantity of the contents thereof is not marked on the outside thereof in terms of weight, measure, or numerical count, with the proviso that "reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with section 3 of the act", *held* unconstitutional in that the provision, and particularly the proviso as to "reasonable variations", constituted a fixing by Congress of an unascertainable standard of guilt, and was inadequate to inform persons accused of violations thereof, of the nature and cause of the accusation against them. *United States* v. *American Maid Flour Mills*_____ 1286

The provision of the act, section 8, paragraph 3, as amended by act March 3, 1913, that food shall be deemed misbranded if the quantity of the contents of the package be not plainly and conspicuously marked thereon, and that reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations, *held* not invalid for uncertainty in describing the offense. *United States* v. *Centralia Dairy Co*_____ 1336

Section 2 of the act punishes shipment in interstate or foreign commerce of any article of food which is misbranded; and section 8, as amended by act March 3, 1913, declares that such an article in package form shall be deemed misbranded if the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count; with the proviso "That reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with section three." Section 3 provides that executive officers designated shall make uniform regulations for carrying out the act. *Held* that the executive regulations are to fix the variations allowable, as well as tolerances and exemptions, hence the statute is not open to the constitutional objection of uncertainty in defining the offense. *United States* v. *Shreveport Grain & Elevator Co*_____ 1339

Reversing *United States* v. *Shreveport Grain & Elevator Co*_____ 1239

The provision of the act, section 8, paragraph 3, for defining by executive regulations the reasonable variations that are permissible from the quantities marked on the packages, is not unconstitutional as an attempted delegation of legislative power. Id.

CONSTITUTIONALITY OF THE FOOD AND DRUGS ACT—Contd. Page

Section 9 of the act, which provides that no dealer shall be prosecuted under the act when he can establish a guaranty signed by the party from whom he purchased the article to the effect that it is not adulterated or misbranded within the meaning of the act, and providing that in such case the party giving the guaranty shall be amenable to the prosecutions and penalties which would attach under the act in due course to the dealer, is within the power vested in Congress to exclude adulterated and misbranded foods from interstate commerce. *United States* v. *Charles L. Heinle Specialty Co*---------- 82

See Constitutionality of State Laws; Interstate Commerce; Police Regulation; Standards.

CONSTITUTIONALITY OF STATE LAWS:

A law of Kentucky which requires articles of food sold in the State to be labeled so as to disclose the ingredients, and authorizes the taking of samples from packages for analysis, is not unconstitutional, but is a valid inspection law. Nor is it invalidated by the enactment of the national Food and Drugs Act, which does not conflict with its provisions. *Savage* v. *Scovell*---------- 18

A statute of Indiana regulating the sale and requiring disclosure of formula of concentrated commercial food for stock, *held* valid as a proper and reasonable exercise of legislative police authority, and not unconstitutional as a burden on interstate commerce or as being in conflict with the Federal Food and Drugs Act. *Savage* v. *Jones*---------- 376

A statute of Wisconsin prescribing a label for corn sirup and prohibiting all other forms of labeling is invalid so far as it relates to articles properly branded on the immediate container thereof under the Federal Food and Drugs Act and brought into the State in interstate commerce, so long as they remain unsold by the importer, whether in the original outside package or not. *McDermott et al.* v. *Wisconsin*---------- 473

A statute of the State of Florida prohibiting the sale or shipment of citrus fruits immature or otherwise unfit for consumption is not invalid as in contravention of the Federal Food and Drugs Act, since Congress has not included green or immature fruit in its regulation under that act. *Sligh* v. *Kirkwood*---------- 634

CONSTRUCTION AND INTERPRETATION:

As the act is a criminal statute, creating a new offense, it must be strictly construed and applied. It must be restrained to its expressed reasonable intendment; otherwise the courts, by mere construction, may extend its operation far beyond the legislative intent. *United States* v. *Johnson*---------- 85

The act (sec. 2) provides that any person who shall ship or deliver from any State to another, or who shall receive in any State from another, and having so received shall deliver, in original unbroken packages, or offer to deliver to any other person, any article of food which is adulterated or misbranded, shall be guilty of a misdemeanor. The act (sec. 10) provides that any article of food, drug, or liquor that is adulterated or misbranded and is being transported from one State to another, shall be liable to be proceeded against and seized for confiscation by a process of libel for condemnation. *Held* that these provisions must be strictly construed. *United States* v. *65 Casks of Liquid Extracts*---------- 47

In determining the constitutionality of the act, a much stricter construction is required in criminal actions for violation of the statute than in civil actions. *United States* v. *Shreveport Grain & Elevator Co*---------- 1239

The act, while it contains penal provisions without which it could not be enforced, was enacted to remedy the great mischief resulting from the unrestricted sale of adulterated drugs and food, and ought to be given, where possible, a construction that will effect the general legislative intention. *United States* v. *Antikamnia Chemical Co*---------- 260

CONSTRUCTION AND INTERPRETATION—Continued. Page

The fact that the act has a penal character does not mean that it should not be given its reasonable intendment. *United States* v. *Antikamnia Chemical Co* 552

The act, although penal in its nature, is not given a strict construction, but one which will reasonably tend to accomplish its general object and purposes. *United States* v. *95 Barrels, More or Less, Alleged Apple Cider Vinegar* 1047

The rule of strict construction does not apply to statutes like the Food and Drugs Act, designed to promote the public health or safety. *A. O. Andersen & Co.* v. *United States* 1053

The act should be liberally construed to effect its beneficent purposes. *United States* v. *One Carload of Corno Horse and Mule Feed* 274

The act is essentially remedial, and its evident purpose is not to be defeated by any narrowness of construction. *Lexington Mill & Elevator Co.* v. *United States* 443

The act is a police regulation, enacted to conserve the public health. It will be construed liberally to meet the evils intended to be embraced within its provisions. *Dade* v. *United States* 465

The purpose of the act is the ever insistent consideration in its interpretation. *United States* v. *Antikamnia Chemical Co* 552

United States v. *150 Cases of Fruit Puddine* 557

The purpose of the act is to secure the purity of food and drugs and to inform purchasers of what they are buying. Its provisions are directed to that purpose and must be construed to effect it.

United States v. *Antikamnia Chemical Co* 552

United States v. *Schider* 875

United States v. *95 Barrels, More or Less, Alleged Apple Cider Vinegar* 1047

The primary purpose of the act is to prevent injury to the public health, and while the test of misbranding of a food product is whether it is true to name, there should not be overstrictness in applying this test in a case where the public health cannot possibly be jeopardized. *Ninety-five Barrels, More or Less, Apple Cider Vinegar* v. *United States* 1079

The act should be read favorably to the accomplishment of its purpose, and not only any branding which is misleading or liable to mislead, but also any which is ambiguous, should be visited with the condemnation of the act. *United States* v. *95 Barrels, More or Less, Alleged Apple Cider Vinegar* 1118

United States v. *McIlvaine Bros* 1127

The act was passed by Congress under its authority to exclude from interstate commerce impure and adulterated food and drugs and to prevent the facilities of such commerce being used to enable such articles to be transported throughout the country from their place of manufacture to the people who consume and use them, and it is in the light of the purpose and of the power exerted in its passage by Congress that the act must be considered and construed. *McDermott et al.* v. *Wisconsin* 473

Glaser, Kohn & Co. v. *United States* 651

The primary purpose of Congress in enacting the Food and Drugs Act was to prevent injury to the public health by the sale and transportation in interstate commerce of misbranded and adulterated food. As against misbranding, the statute was intended to make it possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was and not upon misrepresentations as to character and quality. As against adulteration, the statute was intended to protect the public health from possible injury by adding to articles of food consumption poisonous and deleterious substances which might render such article injurious to the health of consumers. Where such a purpose has been effected by plain and unambiguous language by an act within the power of Congress, the only duty of the courts is to give the act effect according to its terms. *United States* v. *Lexington Mill & Elevator Co* 577

CONSTRUCTION AND INTERPRETATION—Continued. Page

The purpose of Congress in the enactment of the statute was the better protection of the people of the United States from adulterated or deleterious foods, drugs, medicines, and liquors. It is the duty of the court, in interpreting such statutes, to keep in mind the legislative intent, the evils sought to be overcome, and, if possible, to give substantial force and effect to that intent. *Wm. M. Galt & Co.* v. *United States*---------- 422

In the interpretation of statutes such as the Food and Drugs Act the purposes intended by Congress to be accomplished, the benefits it had in mind, and the evils it sought to remedy, must be borne in mind. *United States* v. *Joslin-Schmidt Co*---------- 881

The act should be given a fair and honest construction for the purpose of accomplishing that for which it was intended. It should not be given a construction or an effect purely theoretical as opposed to a practical construction. *United States* v. *307 Cases Confectionery*---------- 353

It is the duty of the court to give the act a fair and reasonable construction for the accomplishment of its object; that object is the exclusion from interstate commerce of food products so adulterated as to endanger health. *United States* v. *1,950 Boxes of Macaroni et al*---------- 112

Congress by the enactment of the statute intended to promote honesty and fair dealing in trade and secure to the public pure and wholesome food and drugs, and manifestly there must be a reasonable construction of the act to carry out the intention of Congress in this regard. *United States* v. *Buffalo Cold Storage Co*---------- 103

In applying a statute, such as the Food and Drugs Act, to particular facts, and when it becomes necessary to construe language to which the parties give different meanings, it is vital that the court have in mind the essential scope and purpose of the act. *United States* v. *40 Barrels and 20 Kegs of Coca Cola*---------- 606

The act should be construed in the light of its purpose, to secure the purity of food and drugs, and to inform purchasers of what they are buying; and as between the dealer, to whom the purity of food is guaranteed, and the manufacturer, who has the better opportunity of ascertaining the facts, the act throws the ultimate responsibility on the latter, and the act should be interpreted, if reasonably possible, so as to carry out this purpose. *Glaser, Kohn & Co.* v. *United States*---------- 651

Letters of guaranty should receive a liberal, fair, and reasonable interpretation, so as to attain the object for which the instrument is designed and the purpose to which it is applied. Id.

It is a fair and reasonable construction of the act to include within the scope of section 9 relating to guaranty, continuing guaranties as well as those given at the time of sale of and in reference to specific goods. Id.

It is especially necessary, in administering a statute like the Food and Drugs Act, that there should be reasonable definiteness and accuracy, not only in the statement of offenses against the act, but in conceptions of what is and what is not within the intent of Congress. In the administration of such an act it is particularly essential that it should not be given forced or strained construction. *United States* v. *650 Cases of Tomato Catsup*------ 31

Technical rules of construction must give way to the avowed purpose and intention of the act. If it be that an act admits of more than one construction, then that one will be adopted which best serves to carry out the purpose of the act. The rule of ejusdem generis or other technical rule of construction should not be adopted where it limits the scope of the act. *United States* v. *Oriental Dragée Co*---------- 35

The provision of the act, section 7, that confectionery shall be deemed to be adulterated "if it contain terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, etc.", construed to prohibit the use in confectionery of a mineral substance

CONSTRUCTION AND INTERPRETATION—Continued. Page

irrespective of the presence or absence of any poisonous, deleterious, or detrimental quality of such substance, and although such substance is not of like character or the same class, or ejusdem generis, with the mineral substances specifically enumerated in the provision. *Id.*

The provision of the act, section 7, that confectionery shall be deemed adulterated "if it contain terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, etc.", must be construed as prohibiting the use in confectionery of all mineral substances of the same nature as those specifically enumerated, including such substances having no poisonous qualities whatever, such as silver. *United States* v. *French Silver Dragée Co*_____ 43
Reversed, *French Silver Dragée Co.* v. *United States*_____ 121

The act, section 7, provides that confectionery shall be deemed adulterated if it contain terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health. *Held* that, since the purpose of the act was to protect the purchaser of food products from having inferior and different articles passed off on him in place of those he desired, and to protect him from injury by prohibiting the addition to foods of substances poisonous or deleterious to health, the words "other mineral substances", under the doctrine of ejusdem generis include other mineral substances which are deleterious or detrimental to health of the same nature as those specifically described preceding such words, and hence did not include a thin coating of pure silver covering candy, used principally by confectioners for decorative purposes, and not deleterious or detrimental to health. *French Silver Dragée Co.* v. *United States*_____ 121

In the provision of the act, section 7, that confectionery shall be deemed to be adulterated "if it contain terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound or narcotic drug", the phrase "or other ingredient deleterious or detrimental to health", is not limited by or restricted to the preceding phrase, "or other mineral substance or poisonous color or flavor", but under said provision there are three distinct and separate general modes of adulteration, namely, (1) by containing "terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor", (2) by containing any "other ingredient deleterious or detrimental to health", or (3) by containing "any vinous, malt, or spirituous liquor or compound or narcotic drug;" and an information alleging that confectionery, commonly called candy, was adulterated in that "it consisted in whole or in part of a filthy, decomposed, or putrid vegetable substance", charges adulteration of confectionery. *United States* v. *Watson-Durand-Kasper Grocery Co*_____ 837

Pure food laws are enacted to protect the public, whose members may be and usually are ignorant of the technical significance which ordinary words may have acquired in particular trades or industries. The true rule of construction with reference to such statutes is that words are to be given their ordinary meaning as understood by the general public. *Libby, McNeill & Libby* v. *United States*___ 540

All the words and terms used in the act should be given their proper and usual signification and effect. *United States* v. *Lexington Mill & Elevator Co*_____ 577
United States v. *95 Barrels, More or Less, Alleged Apple Cider Vinegar*_____ 1047

The words used in the act must be given their ordinary and common meaning in the absence of something to demand a special definition. *United States* v. *Sweet Valley Wine Co*_____ 468

The act was framed in ordinary language which any man of reasonable education can understand, and this is to govern in construing

CONSTRUCTION AND INTERPRETATION—Continued. Page

words used in the act, such is "filthy", "decomposed", and "putrid" (sec. 7). Said words are to be given their ordinary meanings and not their scientific meanings or definitions. *United States* v. *350 Bags of Shell Peanuts* 685

The statute, like a written instrument, is to be construed by its express terms, from its four corners. In case of doubt and ambiguity the journals of Congress may be examined for the intent of the lawmakers to ascertain facts of which such journals are evidence. The act, however, is not so obscure as not to be susceptible of interpretation without recourse to the journals of Congress. *United States* v. *Dr. J. L. Stephens Co* 305

A construction placed on the act by the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce, in the rules and regulations for the enforcement of the act, may be considered by the court, not as controlling on the court by way of construing the act, but as being a reasonable construction which the court may adopt if it sees proper. *United States* v. *Piso Co* 319

Practical and long continued construction of the act by the executive departments charged with its administration and with the duty of making the rules and regulations to carry it out is to be accepted where the statute is doubtful, unless there are cogent and persuasive reasons for rejecting it. *United States* v. *Shreveport Grain & Elevator Co* 1339

The act being highly penal, a district court cannot read into it the imposition of anything which partakes of the nature of punishment, not to be found in the law. *United States* v. *1,590 Cases of Tomato Pulp* 914

See Added Poisonous and Added Deleterious Ingredients; Adulteration; Congress, Journals of; Congressional Committee Reports; Consist; Contain; Curative or Therapeutic Effect of Drugs; Debates in Congress; Drugs; Ejusdem Generis; False and Fraudulent; False and Misleading; Filthy, Decomposed, or Putrid; Food; Injurious to Health; Label; Legislative History of the Act; Misbranding; Object of the Act; Original Package; Package; Purpose of the Act.

CONTAIN:

The word "contain", in the provisions of the act, section 7, that confectionery shall be deemed to be adulterated if it contain terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, is used in a general and not in a restricted sense, and confectionery may "contain" any of the prohibited substances if they are used as a compound, a filler, a flavor, a pigment to color it internally or externally, a coating, or other similar purpose, especially if purposely used for those or other similar purposes, even in minute quantities. *United States* v. *R. C. Boeckel & Co. et al* 637

It appears from the legislative history of the act of August 23, 1912, amending the Food and Drugs Act, section 8, that the word "contain" was inserted in the amendment to hit precisely the case of circulars or printed matter placed inside the package. *Seven Cases of Eckman's Alterative* v. *United States* 707

Where packages of a so-called remedy for contagious abortion in cattle were so wrapped that the printed statement "Bowman's Abortion Remedy. This package contains one 9½ pounds treatment of Bowman's Abortion Remedy. Read the directions carefully before administering", and printed directions appeared only upon removal of the wrapping, *held* that said printing and labeling were a branding within the meaning of the phrase, "If the package or label shall bear or contain any statement, etc", in the act, section 8, paragraph 3. *United States* v. *100 Boxes of Bowman's Abortion Remedy* 1187

See Added Poisonous and Added Deleterious Ingredients; Circulars, Pamphlets, Booklets, Etc.; Confectionery; Consist; Label; Package.

CONTAINER. Page

See Article; Label; Original Package; Original Unbroken Package; Package; Shipment.

CORDIAL NON-ALCOHOLIC ROCK & REY.

An article labeled "Cordial Non-Alcoholic Rock & Rey", which was a sirup containing sugar, commercial glucose, prune juice, and artificial coloring matter, *held* to be an article sold under an arbitrary and fanciful name, and not adulterated or misbranded. *United States* v. *Goodman*---------- 484

See Distinctive Name.

CORN MEAL:

Corn meal labeled "Choice water-ground plain meal", *held* misbranded in that it was not ground by a mill operated by the direct application of water power, and because said article was not ground at the Hazel Green Mills as represented on the label. *United States* v. *58 Sacks and 70 Sacks Corn Meal*---------- 322

See Water-Ground Meal.

CORNO HORSE AND MULE FEED:

Where a substance sold under the name "Corno Horse and Mule Feed" was contained in a package labeled "Corpo Horse and Mule Feed. Mixture of ground alfalfa, oats, corn, flax, bran, oat, and homing feeds, made by the Corno Mills Co., East St. Louis, Ill.", followed by a guaranteed analysis; *held* that such substance, being a compound and so described on the package, was not adulterated or misbranded because it contained a quantity of oat hulls mixed and packed therewith in excess of the amount normally present in oat feed consisting of whole ground oats. *United States* v. *One Carload of Corno Horse and Mule Feed*---------- 274

See Distinctive Name.

CORN SIRUP (GLUCOSE):

An article of food composed of molasses and corn sirup, described on the principal label as molasses, but plainly stated on the labeling to be a compound of molasses and corn sirup, *held* not misbranded. *United States* v. *779 Cases of Molasses*---------- 65

An article *held* misbranded in that it was sold as molasses when in fact it was a compound of molasses and commercial glucose. *United States* v. *Hobart et al*---------- 171

An article labeled "Compound: Pure Comb and Strained Honey and Corn Syrup", *held* not misbranded, although the percentage of corn sirup largely exceeded that of strained honey. *United States* v. *Boeckmann*---------- 88

Almond paste *held* not to be adulterated by reason of the presence of 5 percent of glucose (corn sirup). *United States* v. *Heide*---- 325

See Macaroons; Molasses.

CORPORATIONS:

The right of a corporation to be sued only in the district where it has its principal place of business and home office relates to civil actions, and not to prosecutions under the Food and Drugs Act. *United States* v. *J. L. Hopkins & Co*---------- 401

The officers of a corporation which manufactures an adulterated and misbranded food product shipped by its manager in interstate commerce *held* to be subject to prosecution under the act, section 2, where they employed the manager and authorized him to operate the plant and sell the product without restriction, and the previous course of business had been to ship on orders to other States. *United States* v. *Mayfield et al*---------- 90

A corporation maintained a sanitorium in Ohio where patients were treated and from which patients at a distance were treated by correspondence. The president of the corporation, who was also its medical director, had charge of the patients at the sanitorium and of those treated at a distance, and in every case where a patient applied for treatment, either at the sanitorium or from a

CORPORATIONS—Continued. Page

distance, a history of the case was obtained from the patient, a diagnosis was made, and a prescription was prepared by the medical director. *Held*, that the acts of the medical director in prescribing and furnishing medicine to persons in Washington, D. C., were performed for the corporation, and in legal contemplation, by it. *Dr. J. L. Stephens Co.* v. *United States*---------- 471

One who, as officer, agent, or manager of a corporation, makes or causes to be made an interstate shipment of a misbranded drug, is equally liable under the act as if he was the owner of the article or made the shipment for his own profit. *United States* v. *Kellett*_ 711

A corporation is liable for violation of the act committed by its officers, agents, or employees acting within the scope of their authority or employment. *United States* v. *Trinidad Creamery Co*_ 1152

In a proceeding against a proprietary medicine for misbranding by alleged false and fraudulent representations as to curative or therapeutic effects, where the proprietor and claimant was a corporation, *held* that the jury, in determining whether the representations, if found to be untrue, i. e., false, were also fraudulent, must look to the knowledge or lack of knowledge of claimant corporation's several officers who acted in making such false representations; and that in the event the jury find that any one of such officers who, acting within the scope of his official authority had a substantial part in making the false representations, had knowledge of their falsity or did not honestly believe them to be true, then the jury might find that claimant corporation acted fraudulently and that the representations were both false and fraudulent; and that it is not a sufficient defense that one or more of such officers had an honest opinion that the false representations were true. *United States* v. *17 Bottles, Etc., of An Article Labeled In Part "B. & M."*__ 1287

See Agents; Jurisdiction.

COSTS:

In proceedings in rem under section 10 of the act the court has jurisdiction to enter personal judgment for costs against the claimant. *United States* v. *50 Cans of Preserved Whole Eggs*-------- 74
Affirmed, *Hipolite Egg Co.* v. *United States*---------- 223

Costs in personam may be assessed against the claimant in proceedings in rem under section 10 of the act, even if the principles of admiralty law are made applicable by the provision of that section that the proceedings shall conform as near as may be to the proceedings in admiralty. *Hipolite Egg Co.* v. *United States*------ 223

In libel proceedings under section 10 of the act, costs, conformably with admiralty practice, are within the discretion of the court, from which no appeal lies, unless perhaps in case of gross abuse of discretion. In no case can costs be adjudged against the United States. *Charles* v. *United States*---------- 189

Under the act, on a libel of an article of food, intervening claimants who did not stipulate to pay costs and expenses, expense of custody having exceeded all money value involved, so that they acquiesced in the Government's securing a decree of destruction, were not subject to decree in personam for costs, despite rule 26 of the Supreme Court. *United States* v. *1,590 Cases of Tomato Pulp*---- 914

See Admiralty Proceedings; Jurisdiction; Libel.

COTTONSEED OIL.

See Oil, Cottonseed.

COURTS OF THE UNITED STATES.

See Police Court, District of Columbia.

CRAB ORCHARD CONCENTRATED MINERAL WATER:

An article labeled "Crab Orchard Concentrated Mineral Water" *held* misbranded in that the label on the bottles containing the article, and cartons inclosing the bottles, contained statements regarding the curative or therapeutic effect of the article which were false and fraudulent. *United States* v. *22 Bottles of Crab Orchard Concentrated Mineral Water*---------- 1055
Affirmed, *Goodwin et al.* v. *United States*---------- 1130

CRAB ORCHARD MINERAL WATER: Page

Water *held* misbranded in that the package and label contained statements regarding the curative or therapeutic effect of the article with respect to various diseases and ailments, which were false and fraudulent. *United States* v. *36 Bottles of Crab Orchard Mineral Water* 1011

CREAMTHICK:

An article labeled "Creamthick. It is guaranteed to contain no gelatin, gum arabic, egg albumen, or similar article", *held* misbranded in that it contained an article similar to gum arabic, to wit, Indian gum. *United States* v. *Weeks* 485
Affirmed, *Weeks* v. *United States* 613

CREAM VANILLA.

See Fruit Puddine.

CREME DE MENTHE FLAVOR NON-ALCOHOLIC CORDIAL:

An article labeled "Creme de Menthe Flavor Non-Alcoholic Cordial", *held* not to be adulterated or misbranded because it contained added caffeine. *United States* v. *4½ Cases of Creme de Menthe* 1191

CRIME, INFAMOUS:

The act, section 2, prohibits the shipping of adulterated or misbranded food or drugs in interstate commerce, and provides a fine not exceeding $200 on conviction for the first offense, and for each subsequent offense a fine not exceeding $300, or imprisonment not exceeding 1 year, or both, in the discretion of the court. Where, for the commission of an offense the accused may be imprisoned for more than 1 year, the confinement must be in the penitentiary, and constitutes an infamous crime; where the period of imprisonment is for 1 year or less, the confiinement must be in a county jail, and in such case the offense is not an infamous crime. Since imprisonment that may be imposed under section 2 of the act cannot exceed 1 year, violation of that section is not an infamous crime. *United States* v. *J. Lindsay Wells Co* 169

See Indictment; Information; Petty Offense.

CRIMINAL CASES:

Cases arising under section 2 of the act are criminal cases and subject to the same rules regarding presumption of innocence and reasonable doubt as other criminal cases. *United States* v. *Harper* 11
United States v. *Edward Westen Tea & Spice Co* 69
United States v. *John A. Tolman & Co* 78
United States v. *Mayfield et al* 90
United States v. *Hobart et al* 171
United States v. *S. Gumpert et al* 182
United States v. *Italian Importing Co* 187
United States v. *F. E. Rosebrock & Co* 190
United States v. *Schuch* 209
United States v. *Hall-Baker Grain Co* 291
United States v. *Bettman-Johnson Co* 299
United States v. *Piso Co* 319
United States v. *Heide* 325
Von Bremen et al. v. *United States* 338
United States v. *J. L. Hopkins & Co* 366
United States v. *C. F. Blanke Tea & Coffee Co* 432
United States v. *German American Specialty Co* 459
United States v. *Scudder Syrup Co* 461
United States v. *Hudson Manufacturing Co* 462
United States v. *McConnon & Co* 496
United States v. *Excelsior Baking Co* 501
United States v. *Weeks* 519
United States v. *Weeks* 528
United States v. *Finlayson et al* 535

CRIMINAL CASES—Continued.

Page

United States v. *Hopkins* 585
United States v. *Glaser, Kohn & Co* 601
United States v. *Lowenthal* 626
United States v. *American Laboratories* 641
United States v. *Matusow* 664
United States v. *C. M. C. Stewart Sulphur Co* 669
United States v. *Shucart* 693
United States v. *Simpson* 700
United States v. *Kellett* 711
United States v. *Swift & Co* 717
United States v. *Abbott Bros. Co* 722
United States v. *Athlophoros Co* 732
United States v. *G. F. Harvey Co* 754
United States v. *Bowers* 763
United States v. *Wedell* 771
United States v. *Koshland* 777
United States v. *Russian Monopol Co* 784
United States v. *Pulmonol Chemical Co* 806
United States v. *Bell & Co* 828
United States v. *Natura Co* 836
United States v. *Heimann* 840
United States v. *Bethesda Mineral Spring Co* 841
United States v. *Johnson et al* 847
United States v. *Dr. J. H. McLean Medicine Co* 850
United States v. *A. Skarzynski & Co* 860
United States v. *Joslin-Schmidt Co* 881
United States v. *Kar-Ru Chemical Co* 900
United States v. *Tetz et al* 917
United States v. *Paraskevopolus* 925
United States v. *Gamanos et al* 927
United States v. *Monahos* 935
United States v. *Scaduto* 947
United States v. *Newton Tea & Spice Co* 950
United States v. *Gandara* 984
United States v. *Wilson & Co* 999
United States v. *W. B. Wood Manufacturing Co* 1002
United States v. *Alban* 1014
United States v. *Golden & Co* 1033
United States v. *Blazek* 1074
United States v. *John Dobry Manufacturing Co* 1085
United States v. *Marmarelli et al* 1122
United States v. *South Hero Creamery Association* 1142
United States v. *Monotti-Larimer* 1144
United States v. *South Peacham Creamery Co* 1147
United States v. *Barnet Creamery Association* 1149
United States v. *Gorman & Co* 1171
United States v. *Smith* 1173
United States v. *Germack* 1178
United States v. *Morehouse* 1210
United States v. *South Peacham Creamery Co* 1266

Seizure proceedings under section 10 of the act are not criminal cases.

United States v. *10 Barrels of Olives* 125
United States v. *625 Sacks of Flour* 129
United States v. *539 Boxes and 322 Cartons of Wm. Radam's Microbe Killer* 511
United States v. *735 Cases of Pork and Beans* 766
United States v. *720 Cases of Tomato Catsup* 877
United States v. *275 Cases of Mineral Water* 920
United States v. *1,246 Cases of Tomato Catsup* 943
United States v. *11 Packages of B. & M. External Remedy* 1059
United States v. *4½ Cases of Creme de Menthe* 1191

See Burden of Proof; Civil Cases; Crimes, Infamous; Evidence; Offenses; Penalties; Petty Offenses; Prior Conviction; Reasonable Doubt; Limitations, Statute of.

CRISP'S BLACK TONGUE: Page

An article of drugs known as "Crisp's Black Tongue" *found* to be misbranded in that the package, etc., bore statements regarding the curative and therapeutic effect of the article, which were false and fraudulent. *United States* v. *9 Packages of Crisp's Tung-Tone et al*---- 1268

CRISP'S DISTEMPERTE:

An article of drugs known as "Crisp's Distemperte" *held* to be misbranded in that the package, etc., bore statements regarding the curative and therapeutic effect of the article, which were false and fraudulent. *United States* v. *9 Packages of Crisp's Tung-Tone et al*---- 1268

CRISP'S HOT SHOT:

An article of drugs known as "Crisp's Hot Shot" *held* to be misbranded in that the package, etc., bore statements regarding the curative and therapeutic effect of the article, which were false and fraudulent. *United States* v. *9 Packages of Crisp's Tung-Tone et al*---- 1268

CRISP'S TUNG-TONE:

An article of drugs known as "Crisp's Tung-Tone" *held* to be misbranded in that the package, etc., bore statements regarding the curative and therapeutic effect of the article, which were false and fraudulent. *United States* v. *9 Packages of Tung-Tone et al*-- 1268

CURATIVE.

See Curative and Therapeutic Effects of Drugs.

CURATIVE AND THERAPEUTIC EFFECTS OF DRUGS:

False and misleading statements borne on the package or label of a drug, as to the curative or therapeutic effect of the article, constitute misbranding under the Act. *United States* v. *Harper*---- 11
United States v. *Schuch*---- 209

The definition of misbranding, in section 8 of the act, as including articles of food or drugs "the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading", is inapplicable to misrepresentations as to curative or remedial effects. *United States* v. *Johnson*---- 85
Affirmed, *United States* v. *Johnson*---- 267
United States v. *American Druggists' Syndicate*---- 250

The section regarding misbranding (section 8) in the act, as originally enacted, was aimed only at false statements as to identity, possibly including strength, quality, and purity, of the article, and not at statements as to its curative effect; and Congress, by the act of August 23, 1912, known as the Sherley Amendment, amended the statute to provide that an article shall be deemed to be misbranded in case of drugs if its package or label bear or contain any statement, etc., regarding the curative or therapeutic effect, which is false and fraudulent. *United States* v. *17 Bottles, Etc., of an Article Labeled in Part "B. and M."*---- 1287
United States v. *539 Boxes and 322 Cartons of Radam's Microbe Killer*---- 511

The words "curative" and "therapeutic", as used in the act, section 8, as amended by act August 23, 1912, have substantially the same meaning. *United States* v. *Pulmonol Chemical Co.*---- 806

The words "curative" and "therapeutic", in the act, section 8, as amended by act August 23, 1912, are practically synonymous. *United States* v. *Abbott Bros. Co*---- 722

In the phrase "curative or therapeutic effect", contained in the act, section 8, as amended by act August 23, 1912, the word "curative" is defined as "relating to, or employed in, the cure of diseases", and the word "therapeutic" is defined as "of, or pertaining to, the healing art." The term "therapeutic", as used in medicine, borders a little more on the realm of experimentation than the word "curative." But as used in the statute, the expression "therapeutic effect" is the effect that might with reason be expected to be pro-

CURATIVE AND THERAPEUTIC EFFECTS OF DRUGS—Continued. Page

duced upon the human system by any given drug. If a drug is represented to have a curative effect, while it might not always cure, it must be a drug that either does cure, or such as is generally recognized and employed in the effort to cure a certain disease or certain diseases; and if it is represented as a cure for certain diseases, when it is not, and is not recognized as a specific or as a remedy for such diseases, then such representation is false. *United States* v. *Eleven Packages of B. & M. External Remedy*---- 1059

The words "therapeutic" and "curative", as used in the act, section 8, as amended by act August 23, 1912, providing that drugs shall be deemed misbranded if the package or label bear or contain any statement, etc., regarding the curative or therapeutic effect of such article which is false and fraudulent, were intended to be given their ordinarily accepted meaning, and while they have a certain meaning to the medical expert, the physician, nevertheless they are a part of the vocabulary of any intelligent person. "Therapeutic" to the medical world means to heal; to make well; to restore to health. The ordinary definitions found in the dictionaries are as follows: "Having healing qualities; curative; alleviative; a medicine efficacious in curing or alleviating disease." The word "curative" is not found in medical dictionaries. The regular dictionaries define the word as "possessing power or tending to cure; relating to the cure of disease; relating to or employed in the cure of disease; tending to cure." In none of the definitions is there a suggestion that the words "therapeutic" or "curative" convey the meaning of absolute cure. *United States* v. *23 7/12 Dozen Bottles, Etc., of An Article of Drugs Labeled In Part "Lee's Save the Baby"*---- 1240

United States v. *9 Packages of Crisp's Tung-Tone et al*---- 1268

"Curative" is defined as an agency possessing power or the tendency to cure. "Therapeutic" is defined as an agency having healing qualities, as an alleviator of a diseased condition. *United States* v. *60 Bottles of Dr. Hermance's Asthma and Hay Fever Medicine*-- 1324

The word "therapeutic", as used in the act, section 8, as amended by act August 23, 1912, means healing or curative properties of any substance to which it may be applied. *United States* v. *Simpson*-- 700

The word "remedy" is defined in Webster's International Dictionary as "that which relieves or cures a disease"; and as "that which is used in any way for the cure or relief of bodily disease; a medicine; also remedial treatment." It cannot, therefore, in a criminal action under the act, charging defendant with falsely and fraudulently misbranding its medicine as a "remedy" for specified diseases, be concluded that defendant used the word "remedy" as synonymous with "cure," nor that the word would be understood by the public to mean cure. *United States* v. *Natura Co*---- 836

The words "remedy" and "cure" should be taken in their ordinary sense, as understood by people in the ordinary walks of life, and not as they are understood by doctors, druggists, and chemists. The word "remedy" in its ordinary and usual meaning, signifies something that cures or alleviates a disease and benefits health. Another recognized definition of "remedy" is something that is curative in tendency only, and not absolutely. The ordinary and usual meaning of the word "curative" is that which cures, a remedy. *United States* v. *A. Skarzynski & Co*---- 860

The word "remedy", as used on the labels, etc., of a proprietary medicine, describing it as a remedy for diseases specified, is to be taken in its common and ordinary meaning—that is to say, in the meaning that would naturally be attributed to it by the public and particularly those persons who would be inclined to purchase and use the medicine if they were suffering, or thought they were suffering, from any of the diseases named. The primary signification of the word "remedy", as defined in Webster's New International Dictionary, is "that which relieves or cures disease; any medicine or application which puts an end to disease and restores health." The word "remedy" does not import a guarantee of a cure, but it

CURATIVE AND THERAPEUTIC EFFECTS OF DRUGS—Continued. Page

does necessarily imply, as used on the medicine, a substantial curative tendency with respect to the diseases mentioned. *United States* v. *17 Bottles, Etc., of An Article Labeled in Part "B. and M."* 1287

The term "remedy" used in connection with drugs claimed to be misbranded by reason of false and fraudulent statements regarding their curative or therapeutic effects, *held* to imply a curative tendency, though not guaranteeing a cure. *Simpson* v. *United States* 832

Averments in a libel under the act, section 8, as amended by Act August 23, 1912, that statements regarding curative or therapeutic effect of a drug, accompanying the article in interstate commerce, were false and fraudulent as stating that the article "has cured" and "will cure" diseases, whereas "in truth and in fact" it would "not cure", and that there were no "medicinal substances nor mixtures known at present" which could be relied upon to effect a cure, are sufficient to sustain the libel. *Seven cases of Eckman's Alterative* v. *United States* 707

In a prosecution for misbranding a medicinal preparation in that statements regarding its curative or therapeutic effect, appearing on the labels, etc., were false and fraudulent, where the evidence of medical experts was that, exept in few cases, drugs or medicines do not work a cure, but are administered for the relief of the patient, *held*, that if the jury find that if the statements made on defendant's preparation in no case assert a curative property for the same, there could be no conviction. *United States* v. *Matusow* 664

The statement on the label of a drug compound, "For kidney and bladder troubles, diabetes, weak and lame backs, rheumatism", *held*, not a statement that the compound is a specific for the cure of the diseases named, but a statement that the compound is recommended to have a therapeutic or curative effect in the treatment of said diseases. The further statement on the label of the compound that it "dissolves gravel" and "regulates bladder trouble in children" is a statement of fact that it will have the effect of dissolving gravel in the human body and it will have the effect of regulating bladder trouble in children. *United States* v. *One Gross Packages of "A Texas Wonder"* 910

A label on mineral water stating that it was "recommended in the treatment of" certain diseases, and containing directions for its use, was susceptible of the construction that it meant that the use of the water in the treatment of such diseases would effect a cure or alleviation. *Bradley* v. *United States* 964

A libel in a proceeding to condemn bottled water, based on the amendment of 1912 to the act, section 8, which, after quoting from the label a long list of ailments for which the water was said to be beneficial, with "healing powers" and a "reliable remedy", declared that the water was capable of producing the therapeutic effects so claimed, stated a case under the statute. *Goodwin et al.* v. *United States* 1107

Statement on the labels of drugs alleged to be misbranded under the act, section 8, as amended by act August 23, 1912, that "we have received many letters from physicians reporting", followed by what was represented to be the substance of such "reports", constituted direct statement or representation that the drugs were of curative or therapeutic value, and would be misbranding under the act, if the drugs were worthless. *United States* v. *John J. Fulton Co.* 1229

A drug mixture alleged to be misbranded in that the labels and packages contained false and fraudulent representations that it contained ingredients effective against certain diseases, *held* not misbranded, where the evidence showed that the ingredients of the mixture had curative or therapeutic value in the treatment of such diseases. *United States* v. *23 7/12 Dozen Bottles, Etc., of An Article of Drugs Labeled "Lee's Save The Baby"* 1240

See Circulars, Pamphlets, Booklets, Etc.; Constitutionality of the Food and Drugs Act; Evidence; False and Fraudulent; Knowledge and Intent; Label; Misbranding.

DAMAGE OR INFERIORITY: Page

In the provision of the act, section 7, that an article of food shall be deemed adulterated if it be mixed, colored, etc., whereby its damage or inferiority is concealed, the use of the word "damage" in connection with the word "inferiority" is significant. The word "damage" in this connection means that an ingredient has suffered loss of strength or quality. The word "inferiority" means that an ingredient is of low grade or quality. *United States* v. *10 Cases, More or Less, Bred Spred, Etc., et al*---------- 1262

See Colored; Mixed.

DAMIANA:

An article labeled "Damiana Nerve Invigorator", held misbranded because it contained little or no damiana. *Steinhardt Bros. & Co.* v. *United States*---------- 327

DANGEROUS TO HEALTH:

It is not necessary that an article of food, in order to be unlawfully adulterated or misbranded within the act, be dangerous to the public. *United States* v. *Krumm*---------- 993

See Added Poisonous and Added Deleterious Ingredients; Adulteration; Confectionery; Injurious to Health; Misbranding.

DEBATES IN CONGRESS:

Debates in Congress considered by the court in arriving at the intent of Congress in the act. *United States* v. *Johnson*---------- 85

United States v. *Buffalo Cold Storage Co*---------- 103

United States v. *Dr. J. L. Stephens Co*---------- 305

United States v. *150 Cases of Fruit Puddine*---------- 557

United States v. *Lexington Mill & Elevator Co*---------- 577

See Congress, Journals of; Congressional Committee Reports; Construction and Interpretation; Legislative History of the Act.

DECOMPOSED:

See Filthy, Decomposed, and Putrid.

DEFENSES:

In a libel proceeding for forfeiture of distilled spirits alleged to be misbranded, it is no defense that the brand was placed upon the packages containing such liquor by the United States gauger upon information received from the distiller in accordance with the usual practice, or that the same kind of liquor had for a number of years been so branded and sold under such brand to the knowledge of the agents and officers of the United States. *United States* v. *50 Barrels of Whiskey*---------- 22

It is no defense to a charge of shipping sirup misbranded as to measure of contents of the can, that the cans were filled while the sirup was hot and the shortage in measure was caused by shrinkage on cooling. If the can were short in measure at the time they were shipped, then the sirup was misbranded. *United States* v. *Scudder Syrup Co*---------- 461

It is no defense to a prosecution for shipping an adulterated article of food that the article was not shipped for sale, where the shipment was for any purpose which constitutes interstate commerce. *Philadelphia Pickling Co.* v. *United States*---------- 451

Where decomposed canned eggs, which were not denatured and therefore could have been used either for food or tanning purposes, were shipped in interstate commerce from one warehouse of the owner to another, they constituted an adulterated article of food within the definition and meaning of the act, and it was no defense to a proceeding to condemn them that the owner intended that they should be sold only for tanning purposes.--*United States* v. *13 Crates of Frozen Eggs*---------- 531

Affirmed, *United States* v. *13 Crates of Frozen Eggs*---------- 605

That a defendant ceased the use of labels on packages containing food which were misleading as to quantity of contents went only to the question of mitigation. *United States* v. *Rigney & Co*---- 632

See Estoppel; Guaranty; Knowledge and Intent; Res Judicata; Sale.

DELEGATION OF LEGISLATIVE POWER. Page

See Constitutionality of the Food and Drugs Act; Executive Officers; Pharmacopoeia; Regulations.

DELETERIOUS:

The term "deleterious", as used in the act, means hurtful, harmful, tending to destroy. *United States* v. *One Pound Can Coal-Tar Color*---- 1019

See Added Poisonous and Added Deleterious Ingredients; Dangerous to Health; Injurious to Health.

DELETERIOUS INGREDIENTS.

See Added Poisonous and Added Deleterious Ingredients.

DELETERIOUS TO HEALTH.

See Added Poisonous and Added Deleterious Ingredients; Confectionery; Dangerous to Health; Injurious to Health.

DELIVERY FOR SHIPMENT.

See Shipment.

DEPOSITIONS AND INTERROGATORIES:

In a proceeding to condemn drugs under the act, *held* that the testimony of Government witnesses, taken either by depositions, or by interrogatories, notice thereof having been duly given by the Government, was, under the statutory provision for the taking of testimony of persons residing over 100 miles from the place of trial by means of depositions and interrogatories, admissible in evidence. *United States* v. *Nine Packages of Crisp's Tung-Tone et al*---- 1268

DERIVATIVES:

In addition to the trade names of the derivatives of the drugs mentioned in section 8 of the act, in the case of drugs, paragraph 2, the names of the parent substances of such derivatives must also be stated on the labels of medicines in which they are contained. *United States* v. *Antikamnia Chemical Co*---- 552

Reversing *United States* v. *Antikamnia Chemical Co*---- 260

See Acetanilid; Regulations.

DESIGNS AND DEVICES:

The act was intended to reach all forms of misrepresentations by misbranding by the use of words, or by the use of designs or devices, pictures, etc., calculated to mislead and deceive, cheat, or defraud the purchasers. Designs and devices on bottles of imitation champagne which give them the appearance of bottles of genuine imported champagne, *held* misleading and deceptive and to constitute misbranding. *United States* v. *5 Cases of Champagne*---- 503

An indictment for misbranding of a domestic product as a known Rhine wine by means of a device representing a German village, *held* to be sufficient. More particular description of the picture *held* unnecessary. *United States* v. *Sweet Valley Wine Co*---- 468

See Label; False and Misleading; False and Fraudulent.

DIGESTER TANKAGE:

An article labeled "Digester Tankage" *held* misbranded because the label represented that it contained 60 to 70 percent of protein, when in fact it contained only 43 to 45 percent of protein. *United States* v. *Swift & Co*---- 717

DISTINCTIVE NAME:

A distinctive name is either one so arbitrary or fanciful as to clearly distinguish the article to which it is applied from all other things, or one which by common use has come to mean a substance clearly distinguishable by the public from everything else. *United States* v. *300 Cases of Mapleine*---- 39

DISTINCTIVE NAME—Continued. Page

A "distinctive name" may of course be purely arbitrary or fanciful, and thus being the trade description of the particular thing, may satisfy the statute, provided the name has not already been appropriated for something else so that its use would tend to deceive. *United States* v. *Coca Cola Co*---------- 741
United States v. *24⅞ Gallons of Smack*---------- 1181

While a distinctive name may be purely arbitrary it must be one that distinguishes the article; and where more than one name, each descriptive of an article, are united, it amounts to misbranding if the article does not contain any of the articles generally known individually by any of such names. *United States* v. *Coca Cola Co*---------- 741

A distinctive name is one ordinarily used to distinguish clearly it or the article to which it is applied from all others, or one which has become generally recognized by the public as meaning something different from any other article. The term "Maple Flavo" *held* not to be a distinctive name of an article made in imitation of a maple product. *United States* v. *S. Gumpert et al*---------- 182

Even though an article of food is sold under its own distinctive name, it is misbranded within the meaning of the act if the label contains a false statement regarding the ingredients of the article. *United States* v. *American Chicle Co*---------- 362
United States v. *Weeks*---------- 485
United States v. *150 Cases of Fruit Puddine*---------- 557
United States v. *40 Barrels and 20 Kegs of Coca-Cola*---------- 239

The proviso of the fourth subsection of section 8 of the act, providing that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed adulterated or misbranded in case of mixtures or compounds known as articles of food under their own distinctive names, and not an imitation of or offered for sale under the name of another article, etc., goes only to the branding or the name of the article, and does not furnish a refuge for one who has on the label otherwise fasely stated the nature of the contents of the package. *United States* v. *Newton Tea & Spice Co*---------- 950

The proviso of the act, section 8, that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the case of mixtures or compounds known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, etc., does not apply to a case where the charge is misbranding, and is not directed against the name, but against false statements on the label. *Newton Tea & Spice Co.* v. *United States*---------- 1089

The clause "if it be an imitation of or offered for sale under the distinctive name of another article", in the act, section 8, declaring food in such case misbranded, deals, first, with imitations, that is, things patterned after, or a copy of, or made in simulation of, another article, and, as such, offered or put out as genuine; second, articles, whatever they may be, whether imitations or not, which are put out under the distinctive name of another article. The statute condemns the use of means to arouse the belief that one thing is really another. *United States* v. *24⅞ Gallons of Smack*---------- 1181

It is not sufficient to remove an imitation and misbranded article from the condemnation of the act that it has a distinctive name applied to it, as the very language of the proviso of section 8 requires that if known under its own distinctive name it, the article, must not be either an imitation of another article or offered for sale under the distinctive name of another article. Ordinary, cheap, low-grade, carbonated white wine contained in bottles in shape, dress, corking, and label closely imitating the ordinary genuine champagne bottle, but without the word "champagne", and shipped to fulfill an order for champagne, *held* to be an article sold

DISTINCTIVE NAME—Continued. Page

under the distinctive name and an imitation of another article, champagne, and hence not within the said proviso. *United States* v. *5 Cases of Champagne*---- 503

The provision of the act that mixtures or compounds known as articles of food under their own distinctive names shall not be deemed adulterated or misbranded when sold under such name, and not an imitation of another article, does not apply to a case where the name used in its popular meaning is accurately descriptive of another well-known food product. An article of food labeled "Condensed Skimmed Milk", and composed of skimmed milk and cane sugar, *held* not to be a mixture or compound sold under its own distinctive name, where it was shown that condensed skimmed milk unsweetened was also made and sold. *Libby, McNeil & Libby* v. *United States*---- 540

An article consisting of calcium acid phosphate and starch, labeled "C. A. P.", *held* to be a compound sold under its own distinctive name and not adulterated or misbranded within the meaning of the act. *United States* v. *100 Barrels of Calcium Acid Phosphate*- 58

An article labeled "Coca Cola", consisting of a sirup used in the preparation of beverages, *held* to be a compound sold under its own distinctive name, and, the name being accompanied on the label by the name of the manufacturer and the place of manufacture, not adulterated or misbranded. *United States* v. *40 Barrels and 20 Kegs of Coca-Cola*---- 239

Affirmed, *United States* v. *40 Barrels and 20 Kegs of Coca Cola*-- 606

Judgment reversed, *United States* v. *Coca Cola Co*---- 741

An article labeled "Grant's Hygienic Crackers" *held* to be an article sold under its own distinctive name and not misbranded. *United States* v. *Hygienic Health Food Co*---- 259

An article composed of cherries bleached and rendered wholly or partly tasteless, artificially colored red, and packed in liqueur flavored with essence of bitter almond, is not sold under its own distinctive name when labeled "Maraschino Cherries." *United States* v. *Bettman-Johnson Co*---- 299

An article labeled "Pure Milk Chocolate", *held* to be a mixture or compound sold under its own distinctive name and not adulterated or misbranded by reason of the fact that it contained wheat starch, the presence of which was not declared on the label. *United States* v. *Auerbach & Sons*---- 357

The use of the words "Hudson's Extract" on an imitation of vanilla extract, without giving any indication of what the article was composed, constituted misbranding, where there was no proof that the words "Hudson's Extract" had a well-known trade meaning. *Hudson Manufacturing Co.* v. *United States*---- 344

Under the proviso of section 8 of the act, that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be misbranded in specified cases, a compound sold under the name of Coca Cola, which is the distinctive name of the product of the manufacturer thereof and nothing else, is not misbranded, "Coca" being indicative of one article, "Cola" being indicative of another distinct article, and the combination not being descriptive of any substance or combination known until adopted by the manufacturer, and still unknown as an appellation for any other substance on the market. *United States* v. *40 Barrels and 20 Kegs of Coca Cola*---- 606

A proprietary food product consisting largely of cornstarch was labeled "Fruit Puddine, Fruit Flavored", and with the words "Cream Vanilla" and "Rose Vanilla" to designate the different colors as a trade mark, the product being flavored with vanillin or synthetic vanilla obtained from oil of cloves. *Held:* That the terms "Puddine" and "Fruit Puddine" were distinctive names of the product and did not constitute misbranding; that the first proviso of section 8 of the act was limited to the distinctive name and as so limited the proviso applied to the first paragraph of said section and protected distinctive names from constituting misbranding,

DISTINCTIVE NAME—Continued. Page

and hence the words "Fruit Flavored" on the label, when the article was not fruit flavored, constituted misbranding; and that the words "Cream Vanilla" and "Rose Vanilla" were distinctive names the use of which was protected by the proviso and did not constitute misbranding. *United States* v. *150 Cases of Fruit Puddine*_ 557

In a prosecution for misbranding so-called macaroons, if the jury found that a macaroon, as commonly understood, consists of ground cocoanut, sugar, and the white of eggs, defendant's product containing glucose in addition, and branded "Macaroons", was "an imitation of or offered for sale under the distinctive name of another article", and misbranded within the meaning of the act. *F. B. Washburn & Co.* v. *United States*_____ 654

An article composed of alcohol and citral derived from lemon grass, and an imitation of lemon oil, and labeled "Special Lemon", and represented by the seller's agent to the buyer as pure lemon oil, was misbranded within the meaning of the act, section 8, defining misbranding as offering an article for sale under the distinctive name of another article, though no label describing it as such article was affixed to it. *Weeks* v. *United States*_____ 646

Affirmed, *Weeks* v. *United States*_____ 867

An artificial or intentional mixture of oats containing 23 percent of foreign material, a percentage of which was wild oats, which had been intentionally added, branded "sample grade star oats", *held* misbranded as sold under the distinctive name of another article, to wit, a natural mixture of cultivated and wild oats, even assuming that the wild oat seed is a food, and that such brand was not deceptive, and notwithstanding that, under the Grain Standards Act and regulations thereunder, a natural mixture containing the same ingredients could have been branded "sample grade oats." *United States* v. *154 Sacks of Oats*_____ 1039

Vinegar made from evaporated apples by adding water equivalent to that removed by evaporation, and fermenting the resulting solution, even though it be similar to vinegar produced directly from fresh apple cider and equally wholesome, is not the same thing and a label describing it as "Apple Cider Vinegar Made from Selected Apples" is false and misleading, and the vinegar must be held to be offered for sale under the distinctive name of another article as that name is popularly and commonly understood. *United States* v. *95 Barrels, More or Less, Alleged Apple Cider Vinegar*_____ 1047

Judgment reversed, *Ninety-five Barrels, More or Less, Apple Cider Vinegar* v. *United States*_____ 1079

Judgment C. C. A. reversed, *United States* v. *95 Barrels, More or Less, Alleged Apple Cider Vinegar*_____ 1118

An article labeled "Smack", a manufactured, synthetic concentrate, containing water, sugar, tartaric acid, vanillin, and other ingredients, and used as a base for a beverage resembling grape juice in fluid consistency, color, and taste, *held* to be an article sold under its own distinctive name and not misbranded. The term "Smack", being arbitrary and not at all representative of any other known product, its consistency, ingredients, food, or other qualities, place of manufacture, etc., is distinctive of the particular article within all the positive and negative tests recognized in the administration of the act and its consideration by the courts. *United States* v. *24⅞ Gallons of Smack*_____ 1181

The name "Lee's Save The Baby", used to designate a certain medicinal preparation, *held* a distinctive and not descriptive name. *United States* v. *23 7/12 Dozen Bottles, Etc., of "Lee's Save The Baby"*_____ 1240

An article of food labeled "Bred Spred Strawberry Flavor", *held* not adulterated or misbranded on the ground that the article was not labeled with the distinctive name of another article, to wit, jam, and therefore came within the first proviso of section 8 of the act. *United States* v. *49½ Cases of Bred Spred*_____ 1204

See Added Poisonous and Added Deleterious Ingredients; Adulteration; Compound; Imitation; Misbranding.

DISTRICT OF COLUMBIA: Page

The Food and Drugs Act of June 30, 1906, defining when an article of food shall be deemed to be adulterated within the meaning of the act supersedes and repeals section 3 of the local act of Congress of February 17, 1898 (30 Stat. 246, ch. 25), covering the same subject; and the appropriation in the District of Columbia Appropriation Act of May 18, 1910, to enforce the act of February 17, 1898, merely indicates the intention of Congress to repeal that act only to the extent that it was repugnant to the later act. *District of Columbia* v. *Coburn*---------- 120

See Jurisdiction; Police Court, District of Columbia.

DOBRY'S POSITIVE HOG CURE:

An article labeled "Dobry's Positive Hog Cure" *held* misbranded in that the package bore false and fraudulent statements regarding the curative and therapeutic effects of the article with respect to certain diseases in hogs. *United States* v. *John Dobry Manufacturing Co*---------- 1085

DRUG:

In a prosecution for shipping adulterated turpentine, *held* unnecessary for the Government, in order to convict, to show that the article was intended for use as a drug rather than for mechanical purposes. *United States* v. *Lorick & Lowrance*---------- 202

Where a claimant shipped mineral water under a label representing that it possessed curative or alleviative properties for diseases named he could not deny that it was a drug within the meaning of the act, section 8, subdivision 3, as to misbranding of drugs. *Bradley* v. *United States*---------- 964

Mineral water, not being in its original state, and processes of separation of the constituent drug elements being carried to the extent that the commercial water can no longer be used as a beverage, but only in small quantities or doses as a medicine, is to be classified as a "drug", and not a "food", within the meaning of the act. *Goodwin et al.* v. *United States*---------- 1130

An article recommended on the label for treatment of colds and similar ailments is a "drug" within the definition of the term in the act, section 6. *United States* v. *23 7/12 Dozen Bottles, Etc., of An Article of Drugs Labeled "Lee's Save The Baby"*---------- 1240

An article used as an inhalant for the treatment of head colds *held* to be a "drug" within the definition of the act, section 6. *United States* v. *11 Cartons of Drug Labeled in Part "Vapex"*---------- 1332

See Adulteration; Confectionery; Curative and Therapeutic Effects of Drugs; Election; False and Fraudulent; Food; Knowledge and Intent; Misbranding; Physicians' Prescriptions.

DRUG HABIT CURE:

A drug sold as a cure for drug habit *held* misbranded in that the quantity or proportion of morphine present was not properly declared on the label. *United States* v. *The Richie Co*---------- 286

DUE PROCESS OF LAW.

See Constitutionality of the Food and Drugs Act; Notice and Opportunity to be Heard.

DUTCH TEA RUSK.

See Rusk.

ECONOMY SPECIAL HOG FEED:

An article labeled "Economy Special Hog Feed" *held* misbranded in that the labels contained false and misleading statements as to the percentages of its ingredients. *United States* v. *426 Bags of Economy Special Hog Feed*---------- 1001

EGG FOR CUSTARD:

An article sold as "Egg for Custard" and bearing no label, *held* adulterated because skimmed milk had been substituted in part for the article. *United States* v. *German American Specialty Co.*- 459

EGGS AND EGG PRODUCTS:

Page

A frozen egg product containing added sugar and alleged to consits in whole or in part of a decomposed animal substance, *held*, not adulterated. *United States* v. *443 Cans of Frozen Egg Product*---------- 197
Reversed, *United States* v. *443 Cans of Frozen Egg Product*---- 345
Judgment C. C. A. reversed, *443 Cans of Frozen Egg Product* v. *United States*---------- 416

A frozen egg product *held* to be adulterated in that it contained formaldehyde, an added deleterious ingredient which might render the product injurious to health, and in that the product consisted in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance. *United States* v. *F. E. Rosebrock & Co.*--- 190

Frozen eggs *held* to be adulterated because they were "decomposed and filthy and of a poisonous and deleterious character." *United States* v. *3,000 Pounds of Frozen Eggs*---------- 198

Frozen eggs *held* adulterated in that they consisted in whole or in part of a filthy, decomposed, or putrid animal substance. *United States* v. *Excelsior Baking Co*---------- 501

Decomposed frozen eggs which could have been used either for food or tanning purposes and which had not been denatured or labeled so as to prevent their use as food, *held* to be a "food" within the meaning of the act, and adulterated for the reason that they consisted of a filthy, decomposed, and putrid animal substance. *United States* v. *13 Crates of Frozen Eggs*---------- 531
Affirmed, *United States* v. *13 Crates of Frozen Eggs*---------- 605

Decayed frozen eggs taken from the shell and mixed together are within the prohibition of the act which prohibits the transportation from one State to another of any adulterated food, and the question of intent of either the shipper or the consignee is immaterial. *United States* v. *13 Crates of Frozen Eggs*---------- 605

Where a libel against frozen eggs described them as articles of food, it was not objectionable for failure to allege negation that they were intended for other than food purposes. *United States* v. *300 Cans of Frozen Eggs*---------- 283

Section 10 of the act, authorizing proceedings to forfeit adulterated food transported from one State to another, is applicable to eggs shipped from one State to another, not for resale, but solely to be used as raw material in the manufacture of some other product. *United States* v. *Two Barrels of Desiccated Eggs*---------- 232

Preserved whole eggs containing 2 percent of boric acid, *held* to be adulterated in that they contained an added deleterious ingredient which might render them injurious to health. *United States* v. *50 Cans of Preserved Whole Eggs*---------- 74
Judgment affirmed, *Hipolite Egg Co.* v. *United States*---------- 223

A desiccated egg product containing an excessive number of bacterial organisms, *held* adulterated in that it consisted in whole or in part of a filthy, decomposed, or putrid animal substance. *United States* v. *One Barrel Desiccated Egg Product*---------- 99

Defendant *held* not guilty of a violation of the act in shipping eggs alleged to be adulterated in that they consisted in whole or in part of a filthy, decomposed, and putrid animal substance on the ground that they were so spoiled or decayed as to be unfit for food, where the only evidence of the alleged condition of the eggs at the time of shipment was as to their spoiled or decayed condition 16 and 18 days afterward. *United States* v. *Wilson & Co*---------- 999

Defendant *held* not guilty of a violation of the act in shipping eggs alleged to be adulterated in that they consisted in whole or in part of a filthy, putrid, and decomposed animal substance, where the only evidence bearing on the alleged condition of the eggs at the time of shipment was as to their decomposed condition 12 days afterward. *United States* v. *Blazek*---------- 1074

Defendant *held* not guilty of violation of the act in shipping eggs alleged to be adulterated in that they consisted in whole or in part of a filthy, decomposed, or putrid animal substance, upon conflicting evidence as to whether the eggs were decomposed at the time they were shipped. *United States* v. *Smith*---------- 1173

EGGS AND EGG PRODUCTS—Continued. Page

See Added Poisonous and Added Deleterious Ingredients; Filthy, Decomposed, and Putrid; Food; Tests.

EJUSDEM GENERIS:

To come within the prohibition of the act, section 7, declaring confectionery adulterated "if it contain terra alba, barytes, talc, chrome yellow, or other mineral substance, etc.", a mineral substance need not be ejusdem generis with the substances specifically prohibited by name, or a poisonous substance; it is sufficient if it be a mineral substance. *United States* v. *Oriental Dragée Co*__ 35

In the provision of the act, section 7, declaring confectionery adulterated if it contain terra alba, barytes, chrome yellow, or other mineral substance, etc., the phrase "or other mineral substance" is properly construed to refer only to other mineral substances ejusdem generis with those specifically enumerated. *United States* v. *French Silver Dragée Co*_____ 43

French Silver Dragée Co. v. *United States*_____ 121

In the provision of the act, section 7, that confectionery shall be deemed to be adulterated "if it contain terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, etc.", the phrase, "or other ingredient deleterious or detrimental to health", is not limited by or restricted to the preceding phrase, "or other mineral substance or poisonous color or flavor." *United States* v. *Watson-Durand-Kasper Grocery Co*_____ 837

Where, upon an issue of misbranding, a drug was described as "a standard and reliable remedy for amenorrhea (suppression of the menses due to colds, ill-health, and other morbid causes)", the language, "other morbid causes", may fairly be construed to mean "other *like* causes", that is to say, other irregularities of the menstrual function of the same general nature as those particularly specified. *Chichester Chemical Co. et al.* v. *United States*____ 1258

See Confectionery; Construction and Interpretation.

ELECTION:

In a prosecution for violation of the act by misbranding, the Government cannot be required to elect between counts, one of which describes the article as a drug and the other of which describes it as a food or drink, where the question is in controversy and the article would be misbranded under the act whether it was a drug or a drink. *Steinhardt Bros. & Co.* v. *United States*_____ 327

In a prosecution of an information charging misbranding of an article in two counts which differed only in that the article was described as a food in one count and as a drug in the other, *held* that whether the article was a food or a drug within the meaning of the act was a question of fact for determination by the jury, and that they could find a verdict of guilty on only one or the other of the two counts. *United States* v. *American Chicle Co*___ 362

ENTRAPMENT:

It is the duty of officers charged with the enforcement of acts of Congress such as the Food and Drugs Act to use whatever means they think most successful in enforcing the act and suppressing what Congress intended to be suppressed; hence, in a prosecution for shipping misbranded drugs, the fact that the shipment was induced by an agent of the Government by means of letters written under an assumed name was immaterial and not to be considered by the jury in arriving at a verdict. *United States* v. *Schuch*____ 209

The fact that the only interstate shipment of a misbranded article by defendants was secretly induced by an agent of the Department of Agriculture is not a defense to a prosecution therefor, the reasons for the action of such agent not appearing. *United States* v. *Morgan et al*_____ 146

EQUITY:

See Injunction; Mandamus.

ESTOPPEL:

Page

In a libel proceeding to forfeit certain misbranded whisky which had been shipped in interstate commerce, *held* to be no defense that the brand was placed on the packages containing such whisky by the United States gauger on information received from the distiller in accordance with the usual practice; or that the same kind of liquor had been for a number of years branded and sold under such brand to the knowledge of the agents and officers of the United States. *United States* v. *50 Barrels of Whisky*---------- 22

Where a certain degree of decomposition of food products was permitted in bulletins published by the Department of Agriculture in the course of the administration of the act, the Government, in a libel proceeding against such food product allegedly decomposed in whole or in part, may not be heard to complain that the product was decomposed within the strict requirement of the statute in such respect, if the degree of decomposition be shown to be within the toleration permitted in such bulletins. *United States* v. *1,246 Cases of Tomato Catsup*---------- 943

The Government is not estopped from maintaining forfeiture proceedings against an intentional mixture of cultivated and wild oats by acts of a licensed inspector in certifying the oats. *United States* v. *154 Sacks of Oats*---------- 1039

See Defenses; Res Judicata.

EVIDENCE:

In a libel proceeding under section 10 of the act against drugs as misbranded under section 8, as amended by act August 23, 1912, in that the labels on the package and containers and a pamphlet contained in the package contained statements regarding the curative or therapeutic effect of the article which were false and fraudulent, *held* that the jury, in determining the issue of misbranding, was not entitled to take into consideration all of the statements contained in the labels or in the pamphlet, but only such statements as were set forth in the libel. *United States* v. *539 Boxes and 322 Cartons of Wm. Radam's Microbe Killer*------ 511

On trial of an information charging misbranding of drugs by false and fraudulent statements regarding curative or therapeutic effects, appearing on the cartons containing the bottles and in a circular inclosed in the carton, where the language charged as falsely and fraudulently used was not all that appeared upon the carton or in the circular, *held* that it was proper for the jury, in determining whether the language especially set out in the information was or was not falsely and fraudulently used, to consider the whole inscription, and to look to any other part of the matter appearing on the carton or in the circular. *United States* v. *Simpson*---------- 700

In a prosecution of an information charging drugs misbranded by false and fraudulent statements regarding the curative or therapeutic effect of the article, *held*, as to such statements contained in a pamphlet inclosed in the package, that the jury should not consider any portion of the pamphlet except such as to which there was evidence tending to show the falsity of a statement regarding the curative or therapeutic effect of the drugs, which was charged in the information to be false and fraudulent. *United States* v. *Matusow*---------- 664

In proceedings on libels seeking condemnation of drug products alleging misbranding under the act, section 8, as amended, in that certain statements regarding their curative or therapeutic effect, appearing on the labels on the packages and containers and in accompanying circulars, were false and fraudulent, where certain words and directions contained on the labels and in the circulars were omitted from the allegations of the libels, *held* that the Government was precluded, by well-accepted rules of pleading and evidence, from complaining of the omitted words, but that, in order to reach a proper conclusion respecting the issues presented, it was proper to consider the labels in their entirety and all that was

EVIDENCE—Continued. Page

contained in the circular, as bearing on the good faith of the manufacturer of the product. *United States* v. *237/12 Dozen Bottles, Etc., of An Article of Drugs Labeled in Part "Lee's Save The Baby"* 1240
United States v. *9 Packages of Crisp's Tung-Tone et al* 1268
United States v. *17 Bottles, Etc., of An Article of Drugs Labeled in Part "B. & M."* 1287
Testimony of Government witnesses in a condemnation proceeding under the act, taken either by deposition or by interrogatory, due notice thereof having been given by the Government, *held* admissible in evidence, under the statutory provision for the taking of testimony of persons residing over 100 miles from the place of trial by means of depositions and interrogatories. *United States* v. *9 Packages of Crisp's Tung-Tone et al* 1268
Testimony by an agent of the Department of Agricultulre that he opened packages of an article of food deposited in the mails for interstate transportation and took therefrom samples for examination, with the consent of the postmaster, but without a search warrant, *held* inadmissible because the agent's act was a violation of the Fourth Amendment of the Constitution. *United States* v. *Myers* 1159
In a prosecution alleging misbranding of defendant's medicinal preparation by false and fraudulent statements regarding its curative or therapeutic effect, evidence as to the good character of the defendant *held* proper for consideration by the jury, particularly on the question of intent to do right; since good character, when thoroughly established, is sufficient of itself, in a proper case, to raise a reasonable doubt. *United States* v. *Haltiwanger-Taylor Drug Co* 822
United States v. *Dr. J. H. McLean Medicine Co* 850
Dr. J. H. McLean Medicine Co. v. *United States* 907
Testimony as to the reputation of defendant for honesty and fair dealing *held* competent in a prosecution under the act, section 8, as amended by act August 23, 1912, for misbranding a shipment of drugs. *United States* v. *Dr. J. H. McLean Medicine Co* 850
In a prosecution for misbranding of an article as labeled and branded so as to deceive and mislead the purchaser, in that sesame oil not made from olives was branded as "Imported Salad Oil", it was error to refuse to permit dealers in salad oil not made from olives to say whether they had ever heard any complaints from purchasers to the effect that they had been misled or deceived. *Von Bremen et al.* v. *United States* 338
In a prosecution charging sesame oil not made from olives, labeled "Imported Salad Oil", was misbranded, it was error to refuse to permit large dealers in such oil to state the understanding of the trade as to the meaning of the words "salad oil." Id.
In a prosecution for misbranding sesame oil as "Imported Salad Oil", it was error to permit the Government to cross-examine defendants' witnesses as to whether they thought the words "salad oil" would be less misleading if the words "pressed from cotton seed", on some of the labels were in larger type, or if the cans had been labeled simply "cotton seed oil." Id.
In a prosecution for adulteration and misbranding of a coloring powder used in food preparations, testimony of a qualified chemist, who had made a quantitative analysis, that the improper proportions of the ingredients lowered the quality and strength of the powder as a coloring substance, *held* competent. *W. B. Wood Manufacturing Co.* v. *United States* 1098
In a prosecution charging adulteration and misbranding of a coloring powder used in food preparations, testimony as to whether it was customary to dilute a certain substance when using it in the manufacture of food colors, was properly excluded. The standard set by the statute is not what is customarily done by manufacturers, but what is properly done by them. Id.

EVIDENCE—Continued. Page

In a libel proceeding against a food product for misbranding, a grocer's testimony that a product consisting of ingredients and proportions found in respondent's product was an imitation of jam, *held* properly excluded. *United States* v. *10 Cases, More or Less, Bred Spred, Etc., et al*---------- 1262

On trial of an information charging misbranding of a medicinal preparation in that the package and label contained statements as to its curative or therapeutic effect which were false and fraudulent, letters or testimonials purporting to have been received by defendant as to the efficacy of the preparation, *held* not competent as proof of the truth of the statements therein, but merely as bearing on the question of defendant's intent, that is, as tending to show defendant's good faith in making the representations charged as false and fraudulent. *United States* v. *Athlophoros Co*---------- 732

In a prosecution for misbranding a shipment of drugs, under section 8 of the act, as amended by act August 23, 1912, testimonials, etc., are admissible on the question of defendant's good faith, without proof of their execution or of the truth of their subject matter, where the officer in charge of defendant's business testified that he relied thereon, but not where no such reliance was asserted. *Dr. J. H. McLean Medicine Co.* v. *United States*---------- 907

In a proceeding to condemn a medicinal preparation for alleged misbranding on the ground that the packages and labels contained false and fraudulent statements regarding its curative or therapeutic effect with respect to certain diseases, *held* that testimonials read to the jury were proper for their consideration only as bearing upon the state of mind and belief of the claimant when he put the statements with the preparation, that is, upon the question whether or not he intended thereby to deceive and defraud, and were not to be considered as proof of the effect of the preparation on the diseases mentioned therein, and that where the authors of such testimonials personally appeared and testified, then it was the testimony of the witness, and not the language of the testimonial, that was competent as bearing upon the truth of the claims of curative or therapeutic effects made for the preparation. *United States* v. *11 Packages of B. & M. External Remedy*---------- 1059

In a proceeding to condemn claimant's drugs as misbranded by alleged false and fraudulent statements regarding their curative or therapeutic effects, letters in the form of testimonials *held* competent evidence as bearing on the question of intent, where it had been shown that they had been received by claimant in due course through the mails and that claimant believed in their genuineness, and that they related to matters in controversy. *United States* v. *9 Packages of Crisp's Tung-Tone et al*---------- 1268

On a libel to condemn pills as misbranded in that a booklet placed in each package contained statements which were false and fraudulent, within the act, section 8, as amended by act August 23, 1912, the exclusion of letters from the owner of the formula to his attorney, written long before the institution of the libel, requesting him to confer with Government officials as to necessary changes in the booklet to make it comply with the law, and requesting the attorney to carefully scan advertising matter so that it would not conflict with existing laws, regulations, or decisions, was error, even though the court permitted letters of counsel in response to the excluded letters to be introduced in evidence, because it was important in protecting the libelee's rights that its good faith in so advertising its pills be tested by motives and actions in preparation thereof, and there was no evidence that the excluded letters were written for any other purpose than an honest desire to obey the law. A manufacturer should, on the issue of good faith in branding patent drugs, be permitted to show he sought advice of counsel who consulted proper Government officers in an effort to bring his advertising matter within the law. *Chichester Chemical Co. et al.* v. *United States*---------- 1258

EVIDENCE—Continued. Page

In a proceeding by libel for condemnation of claimant's drug product for misbranding in that statements borne on the labels of the packages and containers and appearing in an accompanying booklet, regarding the curative or therapeutic effect of the article, were false and fraudulent, papers relating to a similar condemnation proceeding against such product alleged to be similarly misbranded, tried ten years previous, in which there was a verdict for the claimant, admitted in evidence as tending to show claimant's good faith. *United States* v. *17 Bottles, Etc., of An Article of Drugs Labeled in Part "B. & M."* ---------- 1287

In proceedings charging drugs misbranded by false and fraudulent statements regarding their curative or therapeutic effects with respect to specified diseases, ailments, or disorders, testimony of witnesses for the defense that they have used or been treated with the drug with beneficial, remedial, or curative effect as to diseases, ailments, or disorders with which they state they are or have been afflicted, is admissible. *United States* v. *Matusow*-- 664
United States v. *C. M. C. Stewart Sulphur Co*---------- 669
United States v. *Simpson*---------- 700
United States v. *Kellett*---------- 711
United States v. *Abbott Bros. Co*---------- 722
United States v. *60 Dozen Bottles of "A Texas Wonder"*------ 888
United States v. *One Gross Packages of "A Texas Wonder"*---- 910
United States v. *22 Bottles of Crab Orchard Concentrated Mineral Water* ---------- 1055
United States v. *Eleven Packages of B. & M. External Remedy*- 1059
United States v. *17 Bottles, Etc., of An Article of Drugs Labeled in Part "B. & M."*---------- 1287

In a prosecution charging misbranding of certain drugs in that the packages and labels bore and contained statements representing that the article contained ingredients effective for disorders specified, which were false and fraudulent, testimony of medical experts for the Government that the ingredients found upon analysis of the article would not be effective for the disorders named, and that in their opinion there were no drugs which would be so effective, *held* proper for consideration by the jury in determining whether or not the statements were false. *United States* v. *Matusow* ---------- 664

In prosecutions charging a proprietary medicine misbranded in that statements as to its therapeutic effect as to certain diseases and ailments, appearing on the label, etc., were false and fraudulent, testimony of medical experts for the Government, as to the therapeutic effect of the several ingredients contained in the medicine, as disclosed by evidence as to its analysis, and as to the therapeutic effect of such drugs in combination, *held* proper for consideration by the jury in determining whether or not the statements on the label, etc., were false. *C. M. C. Stewart Sulphur Co*------- 669
United States v. *Athlophoros Co*---------- 732

In a prosecution charging misbranding of a proprietary medicine in that the labels and packages bore and contained statements regarding the curative or therapeutic effect of the article with respect to diseases and disorders specified, which were false and fraudulent, testimony of physicians for the Government, that in their opinion, the ingredients found on analysis of the article would not be effective in the treatment of the diseases or disorders named, and that, in their opinion, there was no single combination of substances or drugs that would be effective in the treatment of all the diseases enumerated, *held* proper for consideration by the jury in determining whether or not the statements were false. *United States* v. *Simpson*---------- 700

In a prosecution of an information charging certain medicinal preparations misbranded in that the labels and packages bore and contained statements regarding the curative or therapeutic effects of the articles with respect to certain specified disorders, which were false and fraudulent, testimony of medical experts that, in their opinion, the preparations, and the ingredients thereof found upon

EVIDENCE—Continued. Page

analysis, would not be effective in the treatment of the disorders for which they were stated to be effective and in respect to which it was charged that such statements were false and fraudulent, and that, in their opinion, there were no substances or drugs that would be effective in the treatment of said disorders, *held* proper for consideration by the jury in determining whether or not the statements were false. *United States* v. *Kellett*_____ 711

In a prosecution of an information charging misbranding of a medicinal preparation by false and fraudulent statements regarding its curative or therapeutic effect with respect to specified diseases, testimony of physicians for the Government that, while the ingredients of the preparation possessed curative properties, yet a compound of all of them would not cure, or arrest or retard the progress of, any of the diseases named, *held* proper for consideration by the jury on the question of the falsity of the statements charged. *United States* v. *Dr. J. H. McLean Medicine Co*_____ 850

In a proceeding by libel alleging misbranding of a certain medicinal compound in that the label stating its therapeutic effect with respect to specified diseases was false and fraudulent, testimony of physicians for the Government as to the therapeutic effect of the ingredients of the compound, as disclosed by chemical analysis, would not be effective in the treatment of the diseases named, and that they would probably have no curative effect as to such diseases, and that some of such diseases were in their nature incurable by any known medicine, *held* proper for consideration by the jury upon the question of the alleged falsity of the label. *United States* v. *One Gross Packages of "A Texas Wonder"*_____ 910

On trial of a libel charging misbranding of a medicine by false and fraudulent statements regarding its curative or therapeutic effect with respect to specified diseases, proof by reputable physicians, both upon the nature and character of the diseases named and upon the alleged medicinal properties and effect of the medicine itself, *held* to establish that there was no medicinal treatment which would aid or relieve certain of the diseases named, and that there was no single substance or drug or combination of substances or drugs that could be helpful in the treatment of all forms of the diseases named. *United States* v. *141 Bottles of Drug Products*_____ 931

In a prosecution charging misbranding of drugs as to their curative or therapeutic effects, the testimony of a doctor that preparations analyzed by another witness and shown to him were absolutely worthless and had no food, curative, or medical value, was admissible. *Kar-Ru Chemical Co.* v. *United States*_____ 970

On trial of a libel for forfeiture of a quantity of a certain medicinal preparation on the ground of misbranding by false and fraudulent statements regarding its curative or therapeutic effect with respect to specified diseases, testimony of physicians for the Government, as to the characteristics of certain of the diseases named, as to the treatment recognized among medical men for such diseases, and as to the use of drugs with reference to such diseases, and as to the effect upon the human system of the different substances entering into the composition of the preparation in the case at bar, and that by no possibility could the drugs entering into the composition of said preparation, either singly or in mechanical mixture or chemical compound with the other substances enterng into the composition of such preparation, have the curative or therapeutic effects claimed for the preparation as to some of the diseases named, and that this was the generally recognized opinion of the medical profession, *held* proper for consideration by the jury on the issue of falsity of the statements contained in the label, etc. *United States* v. *Eleven Packages of B. & M. External Remedy*____ 1059

In a prosecution charging misbranding of articles of drugs in that the labels contained statements regarding their curative or therapeutic effects, which were false and fraudulent, the opinions of medical experts are admissible in evidence as bearing on the issue of the falsity of such statements. *United States* v. *Gandara*_____ 984

EVIDENCE—Continued. Page

On the issue of misbranding of mineral water as to curative or therapeutic effects of commercial concentrated mineral water, expert testimony is admissible. The opinion of one learned in the science of chemistry or regularly admitted to the practice of medicine, having knowledge of the drug elements and their efficacy or lack thereof as curative agents, separately or in combination, is competent, regardless of whether witness has had actual experience or observation of the effect of the use of such drugs in the exact form in question. *Goodwin et al.* v. *United States* ---------- 1130

In a proceeding to forfeit drugs as being misbranded under the act, section 8, as amended by act August 23, 1912, testimony by a medical expert that in the opinion of doctors generally such drugs would not have any curative effect, is admissible, over objection that it was opinion evidence. *Eleven Gross Packages, More or Less, of Dr. Williams' Pink Pills* v. *United States* ---------- 752

In a prosecution for misbranding a medicinal preparation under the act, section 8, as amended by act August 23, 1912, testimony of physicians that there was a general agreement as to the therapeutic effect of such a preparation, and what that general medical opinion was, was properly admitted to show the falsity of the statements on the labels, etc., representing the article to be effective for the treatment of disease. The testimony of the physicians as to their individual opinions of the efficacy of the preparation would have been properly rejected, if there had been disclosed a difference of medical opinion on the subject, as a conviction could not properly rest upon an allegation of fraudulent statements when based upon mere matters of opinion on such debatable subjects; but a mere concurrence of such witnesses' opinions with the uniform course of medical opinion was not open to that objection. *Dr. J. H. McLean Medicine Co.* v. *United States* ---------- 907

On a libel to condemn drug products alleging that the label, etc., stating the curative or therapeutic effect of the article with respect to certain ailments were false and fraudulent, falsity of the statement being one of the elements required to be proved, expert evidence was admissible on that issue. On such issue the opinions of persons whose occupations, training, and experience are such as to make them acquainted with the qualities of the ingredients of the article in question is admissible; and it is permissible to prove that those comprising such a class generally regard the ingredients of the article in question as ineffective, singly or in combination, in the treatment of ailments for which the article is claimed to be effective, and would in practice refrain from using it in such treatment because of the futility of doing so. *Hall* v. *United States* ---------- 978

In an action for forfeiture of a quantity of a certain medicinal preparation as misbranded in that the label, etc., contained false and fraudulent statements regarding the curative or therapeutic effect of the article with respect to various diseases, where physicians, qualified as experts, on being asked to give their individual opinions as to the efficacy of the preparation and its effect as a curative upon certain of the diseases, testified that in their opinion it would not be efficacious, *held* that the personal opinion of the witnesses would not, standing alone, be sufficient evidence upon which the jury could reach a conclusion that the statements in the labels, etc., were false, since it is recognized that there is oftentimes a difference of opinion even among medical men, and if the individual opinion of one weighed against the individual opinion of another equally skilled, it could not be said that there was such a balance of probabilities as to permit the jury to determine the issue one way or the other, but when the individual opinion of the witnesses is in accord with the generally recognized opinion of medical men skilled in the profession, such opinions may, as aliquot parts of the crystallized opinion of medical men, be considered in connection with other evidence. *United States* v. *Eleven Packages of B. & M. External Remedy* ---------- 1059

EVIDENCE—Continued.

Page

In a libel proceeding for condemnation of pills for misbranding under the act, section 8, as amended by act August 23, 1912, a physician may testify as to the consensus of medical opinion relative to the therapeutic properties of the ingredients of the pills. *United States* v. *Chichester Chemical Co*---- 1115

The opinion of doctors testifying as experts is evidence of a fact, just as the testimony of an ordinary witness to a fact within his observation is evidence of a fact, and is binding on the jury only insofar as it produces a conviction of the truth or falsity of a certain fact. *United States* v. *American Laboratories*---- 641

In a prosecution for adulteration and misbranding of a coloring powder for use in food preparations, testimony of a qualified chemist, who had made a quantitative analysis, that the proportions of the ingredients found by him in the powder would have the effect of lowering and lessening the quality and strength of the powder as a coloring substance, *held* competent. *W. B. Wood Manufacturing Co.* v. *United States*---- 1002

A statement on the label of an article of food that it is an excellent substitute for eggs, and is to be used for baking and cooking purposes, 1 teaspoonful in place of each egg called for in a recipe, is not a statement of opinion, but one of fact, and is a representation to ordinary purchasers that 1 teaspoonful of the article is substantially equivalent to 1 egg for all the purposes, including nutrition, involved in the use of egg in baking and cooking, and in a prosecution for misbranding evidence of their comparative value is competent. *Newton Tea & Spice Co.* v. *United States*---- 1089

While expert opinion evidence should be received with caution, it is within the province of the jury to determine its weight; and a conviction, sustained by opinion evidence not inherently impossible nor improbable, together with other evidence, will not be disturbed. *Glaser, Kohn & Co.* v. *United States*---- 651

The testimony of expert witnesses as to conclusions with relation to what they believe to be fact is not conclusive upon the jury. While their testimony should be considered by the jury, their conclusions must be based upon facts disclosed by the evidence which would justify the conclusions, and the jury should take into consideration all the facts and determine whether the conclusions are justified by the facts upon which they are predicated. *United States* v. *C. M. C. Stewart Sulphur Co*---- 669

The statements of physicians testifying as experts are merely statements of their opinion, and those opinions are to be considered by the jury as evidence from which they may draw inferences of fact as the testimony warrants. *United States* v. *11 Gross Packages of Dr. Williams' Pink Pills*---- 680

In a prosecution of an information or libel charging drugs misbranded by false and fraudulent statements regarding their curative or therapeutic effects, the jury is not bound to accept as conclusive the opinion of an expert witness as to any fact of the case. *United States* v. *Matusow*---- 664

United States v. *539 Boxes and 322 Cartons of Wm. Radam's Microbe Killer*---- 511

United States v. *C. M. C. Stewart Sulphur Co*---- 669

United States v. *11 Gross Packages of Dr. Williams' Pink Pills*---- 680

United States v. *Athlophoros Co*---- 732

United States v. *Dr. J. H. McLean Medicine Co*---- 850

United States v. *141 Bottles of Drug Products*---- 931

United States v. *Gandara*---- 984

United States v. *36 Bottles of Crab Orchard Mineral Water*---- 1011

United States v. *22 Bottles of Crab Orchard Concentrated Mineral Water*---- 1055

United States v. *Eleven Parkages of B. & M. External Remedy*---- 1059

United States v. *17 Bottles, Etc., of An Article of Drugs Labeled in Part "B. & M."*---- 1287

EVIDENCE—Continued. Page

The jury is not necessarily bound by the testimony of expert witnesses, but such testimony should be considered in connection with all other evidence in the case. *United States* v. *Athlophoros Co*__ 732

Opinion evidence is not binding upon the jury, but is to be given consideration in connection with other evidence in the case. *United States* v. *36 Bottles of Crab Orchard Mineral Water*_____ 1011

United States v. *22 Bottles of Crab Orchard Concentrated Mineral Water* _____ 1055

In a prosecution for misbranding drugs, under the act, section 8, as amended by act of August 23, 1912, testimony of medical experts, admissible to aid the court in determining the curative or therapeutic effect of the article, is not conclusive though uncontradicted. *United States* v. *Dr. J. H. McLean Medicine Co*_____ 850

In a prosecution charging adulteration and misbranding of coloring materials for use in food preparations, *held* that the testimony of persons learned in the science of chemistry as to their expert opinions relative to matters within the scope and range of that science, was competent, but such opinions were not to be considered by the jury as binding, but as advisory only. *United States* v. *W. B. Wood Manufacturing Co*_____ 1002

In a proceeding by libel for condemnation of an article of food as adulterated and misbranded, *held* that the testimony of experts having knowledge of the science of chemistry as to their opinions is competent for consideration by the jury, though such testimony is not binding upon them, but merely to assist them in reaching their conclusions. *United States* v. *4½ cases of Crème de Menthe*_ 1191

See Burden of Proof; Criminal Cases; Curative and Therapeutic Effects of Drugs; Depositions and Interrogatories; Entrapment; False and Fraudulent; Filthy; Decomposed, and Putrid; Judicial Notice; Knowledge and Intent;; Reasonable Doubt; Samples; Search Warrant; Standards.

EXAMINATION:

The examination provided for by section 4 of the act *held* to be a necessary condition precedent to proceedings under the act, instituted at the instance of the Department of Agriculture, whether such proceedings are *in personam* or for a forfeiture of goods under section 10. *United States* v. *74 Cases of Grape Juice*_ 144

Affirmed, *United States* v. *74 (or 20) Cases of Grape Juice*____ 256

United States v. *Certain Cans of Syrup*_____ 328

United States v. *Mohn Wine Co*_____ 316

A preliminary examination by the Department of Agriculture, as provided for by section 4 or the act, *held* not to be a necessary condition precedent to the filing of a libel *in rem* for condemnation under section 10. *United States* v. *50 Barrels of Whiskey*_____ 22

United States v. *65 Casks of Liquid Extracts*_____ 47

Section 4 of the act, providing for preliminary examination by the Department of Agriculture for alleged adulteration or misbranding of food or drug products, does not apply to a libel for forfeiture under section 10 which provides for a hearing in court in accordance with proceedings in admiralty; so that a preliminary examination before the Department of Agriculture is not a necessary condition precedent to the maintenance of a libel for condemnation of such product. *United States* v. *Nine Barrels of Olives*__ 128

The findings and conclusions of officers of the Department of Agriculture with respect to adulteration or misbranding of foods or drugs, under section 4 of the act, are merely tentative and have no binding or obligatory force in themselves. They are merely the the assertion of an opinion that the law has been violated and that proceedings in the name of the United States as directed by the statute should be instituted for the violation. *National Remedy Co.* v. *Hyde, Secretary of Agriculture, et al* _____ 1272

See Analysis; Investigation; Notice and Opportunity to be Heard; Samples; Tests.

EXECUTIVE OFFICERS:

Page

Congress may delegate to executive officers matters of detail looking to the promulgation of regulations for carrying its statutes into effect, such as providing for the proceedings thereunder, the fixing of standards, brands, and labels, or the ascertainment of necessary facts upon which the law may operate. *United States* v. *Antikamnia Chemical Co*---- 260

The authority vested in the Secretaries of Treasury and Agriculture by the act, section 11, to determine whether drugs offered to be imported into the United States are adulterated or misbranded, calls for a finding of facts and exercise of judgment on facts found, and the exercise of such authority will not be reviewed by the courts unless capricious or arbitrary. *Ambruster* v. *Mellon, Secretary of Treasury, et al*---- 1236

See Injunction; Mandamus; Regulations; Standards.

EXPERT OPINION.

See Evidence.

EXPORT ARTICLES:

An article intended for export if "prepared or packed according to the specifications or directions of a foreign purchaser, etc.," is not subject to seizure even though adulterated when judged by the standard for such article in the United States. *Philadelphia Pickling Co.* v. *United States*---- 451

A shipment of dried figs prepared for a foreign purchaser, who processed like fruit to make coffee flavoring, *held* not subject to seizure under the act, although the shipment contained deleterious matter and the law of the purchaser's country prohibited use of impure materials in coffee admixtures, since a certificate introduced showing such law, could not have the effect to put the shipper out of the class excepted in section 2 of the act, for the purchaser, on receiving the figs, might free them from all deleterious matter before converting them into coffee flavoring, or he might divert them to other proper uses, and, in absence of evidence to the contrary, it would be assumed that he would comply with the law of his country. *United States* v. *Catz American Co. Inc*---- 1282

See Prepared and Packed.

EXTRACTS.

See Hudson's Extract; Lemon Extract or Flavor; Vanilla Extract or Flavor.

FALSE AND FRAUDULENT:

The phrase "false and fraudulent" in the act, section 8, which, as amended by act August 23, 1912, provides that drugs shall be deemed to be misbranded if the package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article, which is false and fraudulent, must be taken with its accepted legal meaning, and thus it must be found that the statement contained in the package was put there to accompany the goods with actual intent to deceive, an intent which may be derived from the facts and circumstances, but which must be established. *Seven Cases of Eckman's Alterative* v. *United States*---- 707

United States v. *Athlophoros Co*---- 732

United States v. *Dr. J. H. McLean Medicine Co*---- 850

Dr. J. H. McLean Medicine Co. v. *United States*---- 907

United States v. *Gingerole Co*---- 977

United States v. *Eleven Packages of B. & M. External Remedy*---- 1059

United States v. *23 7/12 Dozen Bottles, Etc., of an Article of Drugs Labeled in part "Lee's Save The Baby"*---- 1240

Chichester Chemical Co. et al. v. *United States*---- 1258

United States v. *9 packages of Crisp's Tung-Tone et al*---- 1268

United States v. *17 Bottles, Etc., of An Article of Drugs Labeled in Part "B. & M."*---- 1287

FALSE AND FRAUDULENT—Continued. Page

That false and fraudulent representations may be made with respect to the curative effect of substances is obvious. It is said that the owner has the right to give his views regarding the effect of his drugs. But state of mind is itself a fact and may be a material fact, and false and fraudulent representations may be made about it; and persons who make or deal in substances, or compositions, alleged to be curative, are in a position to have superior knowledge and may be held to good faith in their statements. *Seven Cases of Eckman's Alterative* v. *United States* ---- 707
United States v. *Athlophoros Co* ---- 732
United States v. *Dr. J. H. McLean Medicine Co* ---- 850
United States v. *A. Skarzynski & Co* ---- 860
United States v. *141 Bottles of Drug Products* ---- 931
United States v. *17 Bottles, Etc., of An Article of Drugs Labeled in Part "B. & M."* ---- 1287

The expression "false and fraudulent", in the act, section 8, as amended by act August 23, 1912, has a well-defined meaning in the criminal law. The word "false" means untruthful in its ordinary sense. The word "fraudulent", as used in the statute and in an allegation in an information charging defendant with misbranding a medicinal preparation by statements regarding its curative or therapeutic effects which were false and fraudulent, is given its legal meaning, and that is that the defendant deliberately planned, and it was its purpose and intent, to deceive the public; in other words, that it made such false statements regarding the curative or therapeutic effect of its preparation, well knowing that the preparation contained nothing in its ingredients which could operate beneficially as a remedy for the various ailments it pretended to benefit, and this for the sole purpose of deceiving the public. *United States* v. *Athlophoros Co* ---- 732

In order to come within the act, section 8, as amended by act August 23, 1912, providing that drugs shall be deemed misbranded if the package or label bear or contain any statement, etc., regarding the curative or therapeutic effect of such article, which is false and fraudulent, the statement must be found to be both false and fraudulent. *United States* v. *Matusow* ---- 664
United States v. *C. M. C. Stewart Sulphur Co* ---- 669
United States v. *Eleven Gross Packages of Dr. Williams' Pink Pills* ---- 680
United States v. *Simpson* ---- 700
United States v. *Kellett* ---- 711
United States v. *Abbott Bros. Co* ---- 722
United States v. *Tuberclecide Co* ---- 729
United States v. *Athlophoros Co* ---- 732
Eleven Gross Packages of Dr. Williams' Pink Pills v. *United States* ---- 752
United States v. *Pulmonol Chemical Co* ---- 806
United States v. *Haltiwanger-Taylor Drug Co* ---- 822
United States v. *Bell & Co* ---- 828
United States v. *Natura Co* ---- 836
United States v. *Bethesda Mineral Spring Co* ---- 841
United States v. *Dr. J. H. McLean Medicine Co* ---- 850
United States v. *A. Skarzynski & Co* ---- 860
United States v. *60 Dozen Bottles of "A Texas Wonder"* ---- 888
United States v. *Kar-Ru Chemical Co* ---- 900
United States v. *One Gross Package of "A Texas Wonder"* ---- 910
United States v. *275 Cases of Mineral Water* ---- 920
United States v. *141 Bottles of Drug Products* ---- 931
Kar-Ru Chemical Co. v. *United States* ---- 970
United States v. *Gingerole Co* ---- 977
United States v. *Long* ---- 989
United States v. *36 Bottles of Crab Orchard Mineral Water* ---- 1011
United States v. *22 Bottles of Crab Orchard Concentrated Mineral Water* ---- 1055
United States v. *Eleven Packages of B. & M. External Remedy* ---- 1059

FALSE AND FRAUDULENT—Continued. Page

United States v. *17 Bottles, Etc., of An Article of Drugs Labeled in Part "B. & M."* 1287
United States v. *60 Bottles of Dr. Hermance's Asthma and Hay Fever Medicine* 1324

In a proceeding alleging drugs misbranded under the act, section 8, as amended by act of August 23, 1912, declaring drugs misbranded if the package or label bear or contain any statement regarding the curative or therapeutic effect of the article which is false or fraudulent, in order to find that the statement, if false, is also fraudulent, it must be found that it was made with intent to deceive and defraud the public, and this may be inferred from the fact, if proved—

(*a*) That the statement was made with knowledge of its falsity.

United States v. *Matusow* 664
United States v. *C. M. C. Stewart Sulphur Co* 669
United States v. *Eleven Gross Packages of Dr. Williams' Pink Pills* 680
United States v. *Simpson* 700
United States v. *Kellett* 711
United States v. *Abbott Bros. Co* 722
United States v. *Tuberclecide Co* 729
United States v. *Athlophoros Co* 732
Eleven Gross Packages of Dr. Williams' Pink Pills v. *United States* 752
United States v. *Pulmonol Chemical Co* 806
United States v. *Haltiwanger-Taylor Drug Co* 822
United States v. *Bell & Co* 828
Simpson v. *United States* 832
United States v. *Bethesda Mineral Spring Co* 841
United States v. *Dr. J. H. McLean Medicine Co* 850
United States v. *A. Skarzynski & Co* 860
United States v. *Kar-Ru Chemical Co* 900
Dr. J. H. McLean Medicine Co. v. *United States* 907
United States v. *275 Cases of Mineral Water* 920
United States v. *141 Bottles of Drug Products* 931
Kar-Ru Chemical Co. v. *United States* 970
Hall v. *United States* 978
United States v. *Gandara* 984
United States v. *Long* 989
United States v. *36 Bottles of Crab Orchard Mineral Water* 1011
United States v. *John Dobry Manufacturing Co* 1085
United States v. *9 Packages of Crisp's Tung-Tone et al* 1268
United States v. *17 Bottles, Etc., of An Article of Drugs, Labeled in Part "B. & M."* 1287

(*b*) That the person making the statement did not believe it to be true.

United States v. *Bell & Co* 828

(*c*) That the person making the statement should have known or must have known that it was false.

United States v. *Dr. J. H. McLean Medicine Co.* 850
United States v. *Kar-Ru Chemical Co* 900
United States v. *Eleven Packages of B. & M. External Remedy* 1059
United States v. *17 Bottles, Etc., of an Article of Drugs Labeled in Part "B. & M."* 1287

(*d*) That the person making the statement, acting as an ordinary prudent person under the circumstances, should have known that the statement was false.

United States v. *C. M. C. Stewart Sulphur Co* 669
United States v. *Tuberclecide Co* 729

(*e*) That the person making the statement, acting as a reasonably prudent man would act under the circumstances, had reason to believe that the statement was false.

United States v. *C. M. C. Stewart Sulphur Co* 669
United States v. *Tuberclecide Co* 729

(*f*) That the person making the statement had no reasonable ground to believe it to be true.

United States v. *C. M. C. Stewart Sulphur Co* 669

FALSE AND FRAUDULENT—Continued. Page
United States v. *Kellett* 711
United States v. *Tuberclecide Co* 729
United States v. *Kar-Ru Chemical Co* 900
United States v. *17 Bottles, Etc., of an Article of Drugs Labeled in Part, "B. & M."* 1287
(*g*) That the statement was made recklessly and without a firm and honest belief in its truth. *United States* v. *141 Bottles of Drug Products* 931
(*h*) That the statement was made with reckless and wanton disregard as to whether it was true or false. *United States* v. *Matusow* 664
United States v. *Eleven Gross Packages of Dr. Williams' Pink Pills* 680
United States v. *Kellett* 711
Eleven Gross Packages of Dr. Williams' Pink Pills v. *United States* 752
United States v. *Pulmonol Chemical Co* 806
United States v. *Haltiwanger-Taylor Drug Co* 822
United States v. *Bell & Co* 828
United States v. *Bethesda Mineral Spring Co* 841
United States v. *Kar-Ru Chemical Co* 900
Dr. J. H. McLean Medicine Co. v. *United States* 907
United States v. *Gandara* 984
United States v. *Long* 989
United States v. *36 Bottles of Crab Orchard Mineral Water* 1011
United States v. *9 Packages of Crisp's Tung-Tone et al* 1268
United States v. *17 Bottles, Etc., of An Article of Drugs Labeled in Part "B. & M."* 1287
United States v. *60 Bottles of Dr. Hermance's Asthma and Hay Fever Medicine* 1324
(i) That the statement was made recklessly and without caring whether it was true or false. *United States* v. *Dr. J. H. McLean Medicine Co* 850
Kar-Ru Chemical Co. v. *United States* 970
(*j*) That the person making the statement did so in reckless disregard to its truth or falsity and without taking steps to ascertain whether it was true or false. *United States* v. *22 Bottles of Crab Orchard Concentrated Mineral Water* 1055
(*k*) That the person making the statement acted with wilful and gross negligence to ascertain the truth. *United States* v. *Eleven Gross Packages of Dr. Williams' Pink Pills* 680
(*l*) That the person making the statement acted with gross carelessness and indifference as to its truth or falsity. *United States* v. *9 Packages of Crisp's Tung-Tone et al* 1268
(*m*) That the statement was made recklessly and without knowledge of the truth. *United States* v. *C. M. C. Stewart Sulphur Co* 669
United States v. *Abbott Bros. Co* 722
(*n*) That the person making the statement did so carelessly and recklessly without sufficiently apprising himself of the true facts. *United States* v. *A. Skarzynski & Co* 860
(*o*) That the statement was made in reckless disregard of the truth which could have been ascertained upon reasonable inquiry from authoritative and reliable sources. *United States* v. *17 Bottles, Etc., of An Article of Drugs Labeled in Part "B. & M."* 1287
(*p*) That the person making the statement knew that he did not know that the statement was true. *United States* v. *Long* 989
(*q*) That the person making the statement did not act as honest, fair-minded, average person would act under like circumstances. *United States* v. *C. M. C. Stewart Sulphur Co* 669
United States v. *Athlophoros Co* 732
A fraudulent statement is a statement which is recklessly made without knowledge of its truth, but which is really false, and an unqualified statement of that which one does not know to be true, or has no reasonable ground to believe to be true, is equivalent to a statement of that which one knows to be false. *United States* v. *C. M. C. Stewart Sulphur Co* 669
United States v. *Athlophoros Co* 732

FALSE AND FRAUDULENT—Continued. Page

One who makes a false statement, not knowing whether it is false or true, is as guilty of wrong as one who makes a false statement knowing it to be false. *United States* v. *Dr. J. H. McLean Medicine Co*---- 850
Reversed, *Dr. J. H. McLean Medicine Co.* v. *United States*---- 907

In a prosecution under the act, section 8, as amended by act August 23, 1912, for misbranding drugs, an actual intent to deceive, which may be inferred from the circumstances, is essential to conviction, so an instruction that one who makes a statement, not knowing whether it is false, is as guilty as one knowingly making a false statement, was erroneous. *Dr. J. H. McLean Medicine Co.* v. *United States*---- 907

In a proceeding alleging drugs misbranded by false and fraudulent statements regarding their curative or therapeutic effect with respect to certain diseases and ailments, the word "fraudulent" requires the Government to prove such a state of facts regarding the curative or therapeutic effect of the drug which imply knowledge that the drug will not do the thing asserted in the label, etc.; in other words, it must so show that the drug is worthless as to the curative or therapeutic effect claimed for it upon the diseases or ailments named, or any of them, as to justify an inference of knowledge that the drug was so worthless. *United States* v. *539 Boxes and 322 Cartons of Wm. Radam's Microbe Killer*---- 511
United States v. *Athlophoros Co*---- 732
United States v. *Eleven Packages of B. & M. External Remedy*---- 1059
United States v. *17 Bottles, Etc., of An Article of Drugs Labeled in Part "B. & M."*---- 1287

In a proceeding to condemn a medicinal preparation on the ground that the labels, etc., falsely and fraudulently represented its curative or therapeutic effects, *held* that a verdict for the Government cannot properly rest upon claims of fraudulent statements when such claims are based upon mere matters of opinion on debatable subjects, but it must stand upon a finding that the representation was false in fact, that is, that the preparation was worthless for the use represented, or that such representation was so grossly exaggerated as to be false; and that the evidence as to worthlessness or exaggeration justified an inference of purpose and intent to deceive the public. *United States* v. *11 Packages of B. & M. External Remedy*---- 1059
United States v. *539 Boxes and 322 Cartons of Wm. Radam's Microbe Killer*---- 511
United States v. *Athlophoros Co*---- 732

A finding that a drug product shipped in interstate commerce in bottles contained in cartons, the labels and cartons bearing statements representing that it would be effective in the treatment of certain ailments named, whereas it contained no ingredient which could possibly have any remedial or beneficial effect in the treatment of such ailments, as was known to the shipper, who was the manufacturer, *held* sufficient to justify the conclusion of an actual intent, on the part of the shipper, to deceive purchasers and users of the article, and the further conclusion that the label or package contained a statement regarding the curative or therapeutic effect of the article which was false and fraudulent within the meaning of the act. *Hall* v. *United States*---- 978

Statements regarding the curative or therapeutic effect of an article of drugs, made by the owner in his labels and in a circular accompanying the packages, *held* to be false and fraudulent where the evidence showed that the statements were made knowingly and with intent to deceive. *United States* v. *186 Bottles of Tratamiento Zendejas*---- 998

A libel for condemnation of a drug, alleging that false and fraudulent statements regarding its curative or therapeutic effect were applied to the article knowingly or in reckless or wanton disregard of their truth or falsity, *held* sufficient as alleging that the statements were fraudulent within the act, section 8, as amended by act August 23, 1912, since the accepted legal meaning of the term "fraudulent" includes false statements made in reckless and

FALSE AND FRAUDULENT—Continued. Page

wanton disregard of their truth or falsity. *United States* v. *17 Bottles, Etc., of An Article of Drugs Labeled in Part "B. & M."* 1287

On a libel to condemn packages of pills for misbranding under the act, section 8, as amended, refusal of a request to instruct that persons who deal in compositions alleged to be curative are in a position to have superior knowledge, and if the statements in their booklet are false the jury may infer that they are fraudulently made, *held* proper. *United States* v. *Chichester Chemical Co* 1115

An information charging a shipment of an article of drugs misbranded in that the packages and an accompanying circular contained false and fraudulent statements regarding its curative or therapeutic effects, alleged that the shipment was made by S., the defendant, trading as S.'s Medical Institute, that the name of the article given on the label was S.'s Nerve Compound, and that the representations were false and fraudulent in that they were applied to such article knowingly and in reckless and wanton disregard of their truth or falsity. *Held*, that the information sufficiently showed that it was defendant's knowledge and defendant's wanton and reckless disregard of the truth that was intended to be charged, and sufficiently charged the alleged false and fraudulent character of the statements made. *Simpson* v. *United States* 832

In a prosecution charging misbranding of drugs under the act, as amended by act August 23, 1912, declaring drugs misbranded if the package or label shall bear or contain any statement regarding the curative or therapeutic effect of such article which is false and fraudulent, it is not necessary for the Government to prove or even introduce any evidence tending to prove that any particular person has been defrauded. The prohibited misbranding constitutes the crime, and not the fact that some particular person had been deceived. *United States* v. *John Dobry Manufacturing Co* 1085

On the issue of misbranding of drugs, under the act, section 8, as amended, declaring drugs misbranded if the package or label bear or contain any statement, etc., regarding the curative or therapeutic effect of such article which is false and fraudulent, the opinions of physicians and others qualified to testify as experts with regard to the curative or therapeutic effects of drugs, are competent as bearing on the question whether the claims made for the drugs are true or false. *United States* v. *Matusow* 664

United States v. *Eleven Gross Packages of Dr. Williams' Pink Pills* 680

United States v. *Kellett* 711

United States v. *Abbott Bros. Co* 722

Eleven Gross Packages of Dr. Williams' Pink Pills v. *United States* 752

United States v. *Dr. J. H. McLean Medicine Co* 850

United States v. *One Gross Packages of "A Texas Wonder"* 910

Hall v. United States 978

United States v. Gandara 984

United States v. *36 Bottles of Crab Orchard Mineral Water* 1011

United States v. *22 Bottles of Crab Orchard Concentrated Mineral Water* 1055

Goodwin et al. v. *United States* 1130

United States v. *17 Bottles, Etc., of an Article of Drugs Labeled in Part "B. & M."* 1287

On a charge in an information that statements regarding the curative or therapeutic effect of an article of drugs, appearing on the cartons containing the article and in an inclosed circular, were false and fraudulent, where the language set out and charged in the information as falsely and fraudulently used was not all that appeared on the carton or in the circular, *held* that it was proper for the jury, in determining whether the language especially set out in the information was or was not falsely and fraudulently used, to consider the whole inscription, and to look to any other part of the matter appearing on the carton or in the circular. *United States* v. *Simpson* 700

FALSE AND FRAUDULENT—Continued. Page

In proceedings on libels seeking condemnation of drugs on the ground of misbranding under the act, section 8, as amended, in that certain statements regarding the curative or therapeutic effect of the article, appearing on the labels on the package and container and in an accompanying circular, were false and fraudulent, where certain words and directions contained on the labels and in the circular were omitted from the allegation of the libel, *held* that, in order to reach a proper conclusion respecting the issues presented, it was proper to consider the labels in their entirety and all that was contained in the circular, as bearing on the good faith of the manufacturer of the product. *United States* v. *9 Packages of Crisp's Tung-Tone et al*_____ 1268

United States v. *23 7/12 Dozen Bottles, Etc., of An Article of Drugs Labeled in Part "Lee's Save The Baby"*_____ 1240

United States v. *17 Bottles, Etc., of An Article of Drugs Labeled in Part "B & M."*_____ 1287

See Construction and Interpretation; Curative and Therapeutic Effects of Drugs; Evidence; False and Misleading; Knowledge and Intent; Label; Misbranding; Object of the Act; Purpose of the Act.

FALSE AND MISLEADING:

The two words "false" and "misleading", as used in the act, section 8, are of the same import, and one or the other, or both, may be used indifferently. The appropriate meaning of the word "false" is adapted or intended to mislead; and the word "misleading" means tending to lead astray, deceptive. *United States* v. *Lehn & Fink*_____ 229

"False" means, of course, untrue. "Misleading" means calculated to deceive, actually tending to deceive. *United States* v. *Von Bremen et al*_____ 193

A statement regarding an article of food, which appears on the label thereof, constitutes misbranding under the act if it is shown to be either false or misleading; it is not required that it be shown to be both false and misleading. Id.

An article of food is misbranded within the meaning of the act if its label is false or misleading to the ordinary purchaser, even though it is not false or misleading to people in the trade. Id.

In a prosecution charging misbranding of a shipment of drugs, *held* it was unnecessary to show that the label actually misled the consignee, but that it was necessary to show that the label was of such a character as to deceive the consignee; since the drugs were being shipped to men familiar with the trade and the drug business, the question was whether or not the label was of such a character as to be calculated to deceive the ordinary man in the trade. *United States* v. *J. L. Hopkins & Co*_____ 366

It is not necessary, in order to forfeit an article of food as misbranded within the definition of the act in respect to false or misleading statement on the label, that it be found that any person was actually deceived or misled by the label; it is sufficient if it be found that the label is calculated to deceive or mislead in any particular. *United States* v. *300 Cases of Mapleine*_____ 39

In determining whether an article of food is misbranded the question is not whether the brand would deceive jobbers, wholesalers, retailers, and people who trade in such articles, but whether it is liable to deceive the consuming public. *United States* v. *1,459 Cases Canned Salmon*_____ 995

It is not a necessary condition to a finding of guilt, in a prosecution on a charge of misbranding by false or misleading statements, that the statement should be flatly and boldly false, but the word "misleading", in the act, has its function, which is to bring the statement within the inhibition of the statute if it is such as to create or lead to a false impression in the mind of the reader as to the ingredients or composition of the article. *United States* v. *American Laboratories*_____ 641

FALSE AND MISLEADING—Continued. Page

The statute is plain and direct. Its comprehensive terms condemn every statement, design, and device which may mislead or deceive. Deception may result from the use of statements not technically false or which may be literally true. The aim of the statute is to prevent that resulting from indirection and ambiguity, as well as from statements which are false. It is not difficult to choose statements, designs, and devices which will not deceive. Those which are ambiguous and liable to mislead should be read favorably to the accomplishment of the purpose of the act. *United States* v. *95 Barrels, More or Less, Alleged Apple Cider Vinegar*---------- 1118
United States v. *John J. Fulton Co*---------- 1229

A branding which is misleading because of its ambiguity is as much within the inhibition of the statute as if it was misleading in statement. *United States* v. *McIlvaine Bros*---------- 1127

Under the act, section 8, declaring that the term "misbranded" shall apply to drugs the package or label of which shall bear any statement which shall be false and misleading in any particular, a statement regarding a drug cannot be false or misleading unless it relates to some one or more of the various particulars expressly enjoined or prohibited by the act. *United States* v. *American Druggists' Syndicate*---------- 250

See Construction and Interpretation False and Fraudulent; Knowledge and Intent; Label; Misbranding; Object of the Act; Purpose of the Act.

FIGS:

Dried figs prepared for a foreign purchaser who processed like fruit to make coffee flavoring, *held* not subject to seizure under the act, although the shipment contained deleterious matter and the law of the purchaser's country prohibited the use of impure materials in coffee admixtures. *United States* v. *Catz American Co., Inc*---------- 1282

FILTHY, DECOMPOSED, AND PUTRID:

The word "filthy" is capable of a variety of meanings. It is the superlative degree of such a condition as we refer to as "soiled." The word "dirty" might be considered as the comparative degree of the word "soiled", and the word "filthy" as the superlative degree. The scientific definition need not be applied to the word "decomposed", as used in the act. The sense in which "decomposed" is used in the act means that stage which, if carried somewhat further, would bring a particular substance to a state which would properly be called "rotten." *United States* v. *10 Barrels of Olives*---------- 125

The words "filthy", "decomposed", and "putrid", as used in the act, are to be construed by their ordinary meaning, and not by their scientific meaning or definition. "Filthy" is defined as of the nature of or containing filth; dirty; nasty. "Decomposed" is defined as in a state of decomposition; decayed, rotten. "Putrid" is defined as in a state of putrefaction; tainted; as putrid flesh. *United States* v. *350 Bags of Shell Peanuts*---------- 685

In determining whether an article of food consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, within the meaning of the act, the words "filthy", "decomposed", and "putrid" should be considered as used in their common and ordinary meaning and not in a purely technical and scientific sense; that is to say, the word "filthy" is usually considered to mean nasty or dirty, and "decomposed" is usually considered to mean rotten, and "putrid" has a somewhat similar meaning in every-day life—rotten or emitting a vile odor. *United States* v. *720 Cases of Tomato Catsup*---------- 877

It is not necessary to apply any very fine or close or scientific definition of the words "filthy, putrid, or decomposed," as used in the act, section 7, subdivision 6. In plain English these words mean that the substance is rotten; that it is unfit for food for man. *United States* v. *Gidden*---------- 360

FILTHY, DECOMPOSED, AND PUTRID—Continued. Page

The words "filthy, decomposed, and putrid", as used in an information charging that an article of food contained filthy, decomposed and putrid animal substance, mean what they ordinarily imply—putrid, tainted, decomposed, or decayed. *United States* v. *Gorman & Co* 1171

As used in the provision of the act, section 7, that an article of food shall be deemed to be adulterated if it consists in whole or in part of a filthy, decomposed, or putrid animal substance, the word "filthy" means dirty, nasty, unwholesome; "decomposed" means decayed; and "putrid" means a state of putrefaction, tainted, or such a state of decomposition as to be offensive to the smell. *United States* v. *1,600 Cases of Canned Salmon* 1105

In determining the meaning of Congress in the words "filthy", "decomposed", and "putrid", as used in the provision of the act, section 7, subdivision 6, that food shall be deemed to be adulterated if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, all of them may be considered. The word "decomposed" was used by Congress in its ordinary sense. This may be implied from consideration of the words with which it is associated. The word "filthy" means something more than merely dirty; the word "decomposed" means something more than filthy, and ordinarily is understood to mean rotten. The word "putrid" implies something that is so rotten that it is vile, or stinks. Decomposition, from a technical standpoint, sets in immediately upon the destruction of life and continues to a greater or less extent. The word "decomposed" must be understood relatively and in its ordinarily accepted sense. The word must be construed in its natural and obvious sense, its general, and not its scientific, definition, and that general definition is that it means rotten. *United States* v. *1,246 Cases of Tomato Catsup* 943

The words "filthy, decomposed, and putrid" are applicable to certain conditions resulting from the presence of living organisms, and the conditions of animal substance known as "filthy, decomposed, and putrid" are caused by the presence of such living organisms. A substance containing bacilli liable to cause disease, to such an extent as to make it dangerous for food purposes, is certainly "filthy", under the meaning of that word as generally used, and especially since the result of investigation has shown that filth or dirtiness is dangerous through the germs which it contains, and not solely because of offense to the senses. Oysters, although shipped unopened as taken from the water, may come within the prohibition of the act, where, by reason of the condition of the waters in which they are grown, they contain harmful bacteria, which renders them "filthy, decomposed, or putrid" and therefore adulterated within section 7, subdivision 6 of the act. *United States* v. *Sprague et al* 508

The word "filthy", as used in the act (sec. 7, subdiv. 6), has its ordinary and usual signification. *United States* v. *Wedell* 771

The word "filthy" means nasty, foul, or dirty. *United States* v. *408 Bushels of Oysters* 718

The word "filthy", as used in the act with reference to food, means what it means in ordinary use, that is, unclean, foul, dirty, and unfit for use by reason of its uncleanly condition. The word "decomposed", as so used in the statute, means decayed or rotten in the ordinary acceptation of these words, and not decomposition as understood scientifically. *United States* v. *1,500 Cases of Tomato Pulp* 892

Horse beans *held* to be "filthy" within the meaning of the act if as much as 25 percent of them contained weevils, larvae, or grubs. *United States* v. *Koshland* 777

In a proceeding to condemn oysters as being filthy, *held* that the jury must find that the oysters contained filth in a substantial amount, not necessarily in such quantity as to be observable to the naked eye, but even though it be observable only with the aid of a microscope. *United States* v. *408 Bushels of Oysters* 718

FILTHY, DECOMPOSED, AND PUTRID—Continued. Page

The presence in flour of a large number of worms, insects, and beetles renders the flour filthy in the general acceptation of the term, and even assuming them to be removable, the flour would by reason of its contact with them still contain more or less husks and excreta and would still be filthy within the meaning of the act. *Wm. M. Galt & Co.* v. *United States*---------- 422

The words "filthy" and "decomposed", in the provision of the act declaring an article of food adulterated if it consists in whole or in part of a filthy or decomposed animal or vegetable substance, are not to be used or considered in a purely technical and scientific sense. They are to be used in a practical, common sense way, and are to relate to a substantial presence of filth or decomposition. "Filthy" is defined as of the nature of or containing filth; dirty; nasty. "Decomposed" is defined in some of the dictionaries as decayed, rotton; and that is the definition of the word for the purposes of the statute. *United States* v. *1,000 Cases of Tomato Puree*---------- 704

In determining whether or not an egg product was decomposed in whole or in part, the word "decomposed" must be given its ordinary signification and not any technical meaning. Such product *held* not in whole or in part decomposed in the ordinary sense of the word. *United States* v. *443 Cans of Frozen Egg Product*-- 197

Judgment reversed, *United States* v. *443 Cans of Frozen Egg Product*---------- 345

Judgment C. C. A. reversed, *443 Cans of Frozen Egg Product* v. *United States*---------- 416

The term "decomposed," as used in the act, section 7, subdivision 6, providing that an article shall be deemed adulterated if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, means a state of decomposition, rotten, decayed. *United States* v. *Glaser, Kohn & Co*---------- 601

The word "decomposed", as used in the act, section 7, means more than the beginning of decomposition; it means a state of decomposition. *A. O. Andersen & Co.* v. *United States*---------- 1053

In order to come within the provision of the act that an article of food shall be deemed to be adulterated if it consists in whole or in part of a decomposed animal or vegetable substance, there must be something more than a trace of rottenness in the article; there must be such an amount or such a degree of rottenness as to be definable, measurable, and appreciable. It need not be of any particular degree, but it must be something that can be found substantially in the article. Id.

The word "decomposed" means a state of decomposition, and "decomposition" means the condition of being decayed, putrid, or rotten. The word "putrid" means absolutely rotten and decayed. *United States* v. *1,195 Cases of Canned Salmon*---------- 1099

The word "decomposed", as used in the act (sec. 7, subdiv. 6) means a state of decomposition, and "decomposition" means a condition of being decayed, putrid, or rotten. *Held* that canned salmon, if found to be decomposed within said definition, was adulterated within the meaning of the act, and subject to condemnation. *United States* v. *2,205 Cases of Canned Salmon*---------- 1133

The mere fact that an article of food is decomposed cannot of itself subject it to forfeiture. There are many articles of food which are decomposed, both from a scientific and a lay standpoint, and yet they are commonly eaten, and they are either not known to be harmful or known not to be harmful. If the Food and Drugs Act were to be construed as meaning that any article which was decomposed, irrespective of its effect upon the public health, could be forfeited to the Government, then logically the Government could forfeit many kinds of articles of food, simply because, from the standpoint of a theory, such articles were technically decomposed, whether that word be used scientifically or in the lay language. *United States* v. *350 Bags of Shell Peanuts*---------- 685

FILTHY, DECOMPOSED, AND PUTRID—Continued. Page

The term "decomposed", as it appears in the act, section 7, subdivision 6, is not confined to its technical or scientific definition. Strictly speaking, or scientifically speaking, an article may be said to be decomposed when it is broken down, when it is separated into its constituent elements; but as the term is used in the act that is not the final test. If it were, foods which are produced by the decomposition of some other food substance would be within the ban of the statute. So there must be some other or some additional meaning of the term "decomposed", as it is used in the act; and that meaning is decayed or rotten, as these terms are commonly and ordinarily understood. *United States* v. *1,367 Cases of Pork and Beans* 766

Decomposition begins, in a sense, where life ends, but that is not the sort of decomposition meant by the act, section 7, subdivision 6, declaring food adulterated if it consists in whole or in part of a decomposed animal substance. Decomposition, beginning the moment life ceases, increases by degrees to rottenness, decomposition, and decay. It is necessary, therefore, to give a reasonable construction to the word "decomposed" in order to carry out the intent of the statute. *United States* v. *1,195 Cases of Canned Salmon* 1099

United States v. *2,205 Cases of Canned Salmon* 1133

In a proceeding to condemn canned salmon as adulterated because it consisted in whole or in part of a filthy, decomposed, or putrid animal substance, *held* that the word "decomposed" does not mean the beginning of decomposition, because decomposition sets in whenever life is extinct, and therefore there must be some state after fish is taken out of the water and before it is canned, when it cannot be said that it is decomposed or putrid or filthy or decayed. *United States* v. *1,600 Cases of Salmon* 1105

The word "decomposed", as used in the act, section 7, subdivision 6, does not mean the beginning of decomposition—when life ends—nor does it mean that an article of food shall have reached such an advanced stage of decomposition that it is resolved into its elements; it contemplates a state of decomposition that renders the article unfit for human food. *United States* v. *1,974 Cans of Canned Salmon* 1108

United States v. *2,995 Cases of Canned Salmon* 1136

Decomposition means to break up; to decompose; to resolve into elements. The process of fermentation being a process of decomposition, when fermentation has proceeded far enough an article becomes decomposed. *United States.* v. *One Barrel of Desiccated Egg Product* 99

Taking the word "rotten" as expressing the general idea to which the words "decomposed" and "putrid" may be referred, the word "decomposed" would probably represent a less advanced stage than "putrid." Id.

An article of food which is decomposed to the extent that it is unfit for human food might reasonably be called filthy and deleterious and perhaps in a sense poisonous. *United States* v. *3,000 Pounds of Frozen Eggs* 198

Where a frozen egg product is so near decomposition that exact chemical and thermal precautions are necessary to prevent decomposition, then the product is, as an article of food, so close to the danger line as to excite suspicion and demand the closest judicial scrutiny, before it is allowed to become an article of food consumption. Evidence *held* to require a finding that a frozen egg product was decomposed and therefore adulterated within the act. *United States* v. *443 Cans of Frozen Egg Product* 345

Reversing judgment in *United States* v. *443 Cans of Frozen Egg Product* 197

Judgment reversed, *443 Cans of Frozen Egg Product* v. *United States* 416

FILTHY, DECOMPOSED, AND PUTRID—Continued. Page

Oranges, frozen before shipment, which because of the freezing were undergoing decomposition and would become increasingly unfit for food and less wholesome, *held* to be "decomposed" and adulterated within the meaning of the act, even though they were not harmful if eaten. *United States* v. *462 Boxes of Oranges* 816

The word "decomposed", as used in the act, section 7, declaring food adulterated if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, *held*, not applicable to a change in the condition of oranges, caused by frost bite; though there may be a difference of opinion on the point, since undoubtedly the chemical contents of the fruit is changed as the result of frost bite. *United States* v. *315 Boxes of Oranges* 1208

While the act prohibits the interstate shipment of food which consists in whole or in part of decomposed vegetable matter, the Government, in a libel proceeding against certain tomato catsup shipped in interstate commerce, allegedly decomposed in whole or in part, may not be heard to complain that the catsup was decomposed within the strict requirement of the statute if the degree of decomposition be shown within toleration permitted for such food product in bulletins published by the Department of Agriculture in the course of the administration of the act. *United States* v. *1,246 Cases of Tomato Catsup* 943

Provisions of the act prohibiting sale or shipment of adulterated food, defined in part as food containing a "decomposed substance", *held* not invalid because the act fails to definitely specify the extent to which decomposition must have progressed to bring an article within the prohibition. *A. O. Andersen & Co.* v. *United States* 1053

Where, in a proceeding to condemn canned salmon for adulteration as being in whole or in part decomposed, evidence tended to show that, as to salmon, three well-defined degrees of decomposition exist, after life had ceased, described in order as "stale", "tainted", and "putrid", *held* that if the jury found that the evidence fixed such degrees or states of decomposition, they might consider them in determining whether the salmon was adulterated or not, that is to say, whether or not the salmon was "stale", "tainted", or "putrid", in whole or in part; and that if they found that any of these three degrees of decomposition existed, then the verdict should be for the libelant. *United States* v. *2,205 Cases of Canned Salmon* 1133

Canned cherries containing cherries affected with rot, and wormy cherries, *held* adulterated as decomposed within the meaning of the act, but not "filthy" or "putrid." *United States* v. *897 Cases of Canned Cherries* 1183

Eggs may become putrid or decomposed by the simple process of decay and as the resultant or natural causes, but they will not be come filthy unless something is added thereto which renders them dirty, noisome, or nasty. A "putrid" substance is in such a state of decay as to be fetid or stinking from rottenness. *United States* v. *F. E. Rosebrock & Co* 190

An article of food is adulterated within the meaning of the act, section 7, subdivision 6, if it is in a filthy, decomposed, or putrid condition, caused either from an inherent conditon or an external substance; or if it "consists of" or contains filthy, decomposed, or putrid matter; or if it contains a foreign substance which, though neither filthy, decomposed, or putrid in itself, causes the food from contact with it to decompose or become filthy or putrid. Milk containing bacteria, including *Bacillus coli* and *B. streptococci*, *held* adulterated in that it consisted in whole or in part of a filthy, decomposed, or putrid animal and vegetable substance. *Dade* v. *United States* 465

Flour containing worms, insects, and beetles, *held* adulterated in that it consisted in whole or in part of a filthy, decomposed, and putrid animal and vegetable substance. *United States* v. *350 Sacks of "Princess Flour" and 50 Sacks of "Fancy Melba Flour"* 351

Affirmed, *Wm. M. Galt & Co.* v. *United States* 422

FILTHY, DECOMPOSED, AND PUTRID—Continued. Page

A libel for condemnation of tomato catsup, alleging that it was misbranded in that it was made in part from tomato pulp screened from peelings and cores as the "offal" of tomato canning factories, and not from choice ripe tomatoes, etc., as stated in the labels, did not charge a violation of the act, section 7, subdivision 6, relating to preparations consisting in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance; the words "as the offal of tomato canning factories" being of no exact signification, and the word "offal" not the equivalent of a charge that the tomato pulp was a filthy, decomposed, or putrid vegetable substance. *United States* v. *650 Cases of Tomato Catsup* 31

Canned pork and beans *held* to be adulterated and subject to condemnation if some of the beans in the cans were partly rotten or decayed. *United States* v. *1,367 Cases of Pork and Beans* 766

Canned cherries *held* adulterated in that they consisted in whole or in part of a filthy, decomposed, or putrid vegetable substance because of the presence of wormy cherries and of decomposed cherries. *United States* v. *384 Cases of Canned Cherries* 1176

In a prosecution charging defendant with shipping eggs adulterated in that they consisted in whole or in part of a filthy, decomposed, or putrid animal substance, *held* essential to conviction that it be shown that the eggs were at the time of shipment rotten and decomposed to such an extent that they were unfit for food. *United States* v. *Blazek* 1074

In proceedings for condemnation of canned salmon for adulteration in that it consisted in whole or in part of a filthy, decomposed, or putrid animal substance, *held* that the jury, in order to find for the Government, must find that the article was filthy or decomposed or putrid so as to render it unfit for human food. *United States* v. *1,600 Cases of Canned Salmon* 1105

United States v. *1,974 Cases of Canned Salmon* 1108

United States v. *2,995 Cases of Canned Salmon* 1136

If an article of food consists in whole or in part of a filthy or decomposed vegetable substance, it is unnecessary, in order to come within the prohibition of the act in such respect, that such article be shown to be unfit for food. *United States* v. *720 Cases of Tomato Catsup* 877

Eggs released from the shells and frozen, but which by reason of decay had so far decomposed that they were not fit for human food or consumption as such, *held* to be adulterated within the meaning of the act, section 7, in that they consisted in whole or in part of a filthy and decomposed and putrid animal or vegetable substance. *United States* v. *13 Crates of Frozen Eggs* 531

Affirmed, *United States* v. *13 Crates of Frozen Eggs* 605

The provision of the act, section 7, that an article of food shall be deemed adulterated if it consists in whole or in part of a filthy, decomposed, or putrid vegetable substance, does not apply to citrus fruits unfit for consumption because green or immature. *Sligh* v. *Kirkwood* 634

A libel charging that an article of food is adulterated in that it consists in whole or in part of a filthy, decomposed, or putrid vegetable substance, completely and distinctly states an offense under the act, section 7, and an added allegation that the article was "unfit for food" may be regarded as superfluous language; and on a trial of such libel it was unnecessary for the Government to prove that such article was unfit for food. The test of adulteration in such case is not to be determined by the answer to the question whether the article is or is not fit for food. The article is adulterated if it consists in whole or in part of a filthy, decomposed, or putrid substance. *United States* v. *275 Cases Tomato Catsup* 141

In a proceeding to condemn canned salmon as adulterated under the provision of the act that food shall be deemed to be adulterated if it consists in whole or in part of a filthy, decomposed, or putrid animal substance, *held* that it was unnecessary, in order to justify condemnation, that it be shown that the eating of the salmon would

FILTHY, DECOMPOSED, AND PUTRID—Continued. Page

be injurious to the health of the individual, but that it must be shown to be unwholesome to such an extent that it would not satisfy the ordinary requirements of the commercial world. *United States* v. *1,600 Cases of Canned Salmon*---- 1105

In the provision of the act declaring an article of food adulterated if it consists in whole or in part of a decomposed vegetable substance, Congress has made the rule and fixed the standard of adulteration in this respect; and the right of the Government under the act to condemn and forfeit articles of food so adulterated is not limited or restricted to such as are found to be decomposed to such an extent as to render them unfit for food or deleterious to health. In a proceeding to forfeit canned pork and beans on the ground that the product was adulterated in that it consisted in whole or in part of a decomposed vegetable substance, *held* that the question whether or not the product was unfit for food, or would be deleterious to health, if eaten, was not involved in the case. *United States* v. *1,367 Cases of Pork and Beans*---- 766

Under the act, section 7, subdivision 6, an article of food is adulterated and subject to condemnation and forfeiture, if it is composed in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, and it is not necessary that it be shown to be unfit for food, or deleterious if eaten. *United States* v. *200 Cases, More or Less, of Canned Salmon*---- 1095

The letter of the statute forbids the transportation and sale in interstate commerce of an article of food which consists in whole or in part of a filthy, decomposed, or putrid animal substance. The words used are free and clear from ambiguity, and each has a common, ordinary and well-known meaning. There is nothing in the statute itself which would make the state of edibleness or healthfulness of the article relevant. It is, therefore, improper for the jury, in a proceeding to condemn an article of food as within such prohibition of the statute, to take into consideration any evidence tending to show that the article is fit or unfit for food, or healthful or harmful to health; it makes no difference whether the article is fit for food and healthful or is not. *United States v. 2,205 Cases of Canned Salmon*---- 1133

In a proceeding to forfeit a shipment of peanuts containing moldy or wormy nuts, as adulterated within the meaning of the act, section 7, subdivision 6, where it appeared that not more than 10 percent of the nuts throughout the shipment were moldy or wormy, *held*, that only such of the individual peanuts that were moldy or wormy, or both, as were found to be either filthy or decomposed or putrid, in the ordinary meaning of these words, and, because of such condition, to tend to be injurious to health, were subject to condemnation. *United States* v. *350 Bags of Shell Peanuts*---- 685

In a proceeding for condemnation of a food product as adulterated within the provision of the act, section 7, declaring food adulterated if it consist in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, proof that the product would be injurious to health is not required. *United States* v. *200 Cases of Adulterated Tomato Catsup*---- 583

A. O. Andersen & Co. v. *United States*---- 1053

United States v. *384 Cases of Canned Cherries*---- 1176

In a proceeding to condemn oysters because they contained filth, *held* that the question whether the oysters were healthful or not was not involved under the act. *United States* v. *408 Bushels of Oysters*- 718

The act prohibits the interstate shipment of food products if they are decomposed, and this prohibition applies without reference to the effect of the decomposition on the health of the consumer. Therefore, in a libel proceeding to condemn as decomposed within the meaning of the statute a food product shipped in interstate commerce, the Government is not required to show that the product was, by reason of the decomposition, injurious to health; if the product is decomposed in the common, ordinary acceptation of the term, it comes within the inhibition of the statute, even if it would have no deleterious effect on the health of the consumer. *United States* v. *1,500 Cases of Tomato Pulp*---- 892

FILTHY, DECOMPOSED, AND PUTRID—Continued. Page

The test to determine whether an article of food is adulterated within the act, section 7, providing that an article of food shall be deemed adulterated if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, is not whether the article is unwholesome or injurious to health. *Knapp et al.* v. *Callaway et al*---------- 1,276

Tomato pulp *held* to be subject to condemnation as adulterated because it consisted in whole or in part of a filthy or decomposed vegetable substance, if made partly of decomposed tomatoes, even though its injurious properties were destroyed through sterilization by heat and it would be harmless to health, if eaten, and whether or not it was fit for food. *United States*, v. *5,060 Cans of Tomato Pulp*---------- 780

An article of food which is decomposed is within the prohibition of the act regardless of whether it is harmful or harmless to health, if eaten; it makes no difference whether such article be healthful or unhealthful, or even that it be perfectly healthful. *United States* v. *1,195 Cases of Canned Salmon*---------- 1099

Under the provision of the act, section 7, subdivision 6, that a food product is adulterated if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, no standard being fixed by which it can be determined when the product has reached such a stage of decomposition as to consist wholly or partly of filthy, decomposed, or putrid substance, each case must be determined on its own facts, and a product which is so far decomposed as to be unfit for food is within the meaning of the statute. *United States* v. *200 Cases of Adulterated Tomato Catsup*---------- 583

A. O. Andersen & Co. v. *United States*---------- 1053

The act has not established a precise standard whereby adulteration can be determined under the provision of section 7, subdivision 6, that an article of food shall be deemed to be adulterated if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance; and because of this fact the courts have uniformly permitted each case to be judged upon its own special facts. *United States* v. *384 Cases of Canned Cherries*---- 1176

Evidence that the presence of mold in tomato catsup is so substantial as to warrant a finding that the product is filthy, decomposed, or putrid in the common, ordinary, practical sense is sufficient to warrant a finding that the product is adulterated in such respect within the meaning of the act. *United States* v. *720 Cases of Tomato Catsup*---------- 877

In a prosecution charging shipment of milk adulterated in that it consisted in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, *held* that the jury, in order to convict, must find that the milk was adulterated as alleged, when it was delivered at the railway depot for shipment; and that the jury, in determining whether the milk was old and impure at that time, might use the standard prescribed in a statute of the State where the trial was held providing that "milk containing more than 1,000,000 bacteria per cubic centimeter shall be considered impure milk." *United States* v. *Hopkins*---------- 585

The act, section 7, subdivision 6, provides that food shall be deemed adulterated if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter. Raw fish infested with threadlike worms difficult to identify, but surrounded by thick, greenish-yellow fluid unpleasantly suggestive of pus, which consisted of broken-down fish tissue and to some extent the excreta of the worms, and which was readily observable by anyone eating the fish, but, unless he knew its origin, would probably be unobjectionable, *held* to come within the scope of the act, section 7, subdivision 6, and not ex-

FILTHY, DECOMPOSED, AND PUTRID—Continued. Page

cluded therefrom by the absence of proof that the condition of the fish would impair the health of the consumer or the flavor of the fish. While the statute is primarily concerned with the health of consumers, it might well ban "filthy" or "decomposed" animal matter or the "product of a diseased animal" without direct or scientific proof of danger to health. The aesthetic guide frequently precedes the scientific one, and the Government might wisely ban food which runs counter to it in the categories mentioned. *United States* v. *186 Boxes of Whole Tullibees and 116 Boxes of Dressed Tullibees*---------- 1342

In a prosecution charging a shipment of tomato paste adulterated in that it consisted in whole or in part of a filthy, decomposed, or putrid vegetable substance, *held*, that whether the process of nature in the tomato between the time it was ready for canning and the time it was actually put into the can may have been such as to cause the alleged condition of the product, was immaterial; the question was whether the product was in such condition at the time of shipment. *United States* v. *Gidden*---------- 360

In an action to condemn numerous cases of canned tomato purée as adulterated within the provision of the act that an article of food shall be deemed adulterated if it consist in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, dismissal of the libel ordered as to all of the article except cans examined, upon the ground that it appeared from the evidence that there was a variation in the amount of mold in the contents of the different cans examined, and that it did not sufficiently appear from the testimony offered as to the manufacture of the product and the filling of the cans which had not been examined, that they contained filthy, putrid, or decomposed vegetable substance. *United States* v. *1,000 Cases of Tomato Purée*---------- 704

In a libel proceeding against certain cases of tomato catsup alleged to be in whole or in part decomposed, evidence as to the conditions at the factory where the catsup was manufactured, *held* competent. *United States* v. *1246 Cases of Tomato Catsup*---------- 943

On trial of a libel against certain cases of tomato catsup of which claimant was the manufacturer, for alleged adulteration in that it consisted in whole or in part of a filthy and decomposed vegetable substance, where the Government adduced evidence tending to show that the tomatoes used in the manufacture of the catsup were partly or wholly decomposed or rotten, *held*, on the theory that in the manufacture of tomato catsup the exclusion of all decomposed tomato matter was impossible, that the Government, in order to prevail, must show that in the selection of the tomatoes from which the catsup was manufactured such reasonable care and caution as a person of ordinary care and prudence would use were not exercised to exclude decomposed tomatoes, and that the catsup was decomposed and filthy to an unreasonable extent, or to an extent that a reasonably prudent, cautious, and diligent person engaged in the business of manufacturing such product would not permit if the product were to be consumed by his own family. *United States* v. *1,038 Cases of Tabasco Flavor Catsup*---------- 871

In a proceeding for forfeiture of canned salmon as adulterated in that it consisted in whole or in part of a filthy, decomposed, or putrid animal substance, *held* that the question whether or not salmon tainted, spoiled, or decomposed before it was canned, is, after canning, processing, and subjection to a high degree of heat, harmful to health, was not in issue and was immaterial. *United States* v. *1,195 Cases of Canned Salmon*---------- 1090

A shipment of canned salmon *held* to consist in part of a filthy, decomposed, or putrid animal substance to such a percentage in excess of reasonable and salutary requirements as to constitute the shipment adulterated within the prohibition of the act. *United States* v. *430 Cases of Canned Salmon*---------- 1035

FILTHY, DECOMPOSED, AND PUTRID—Continued. Page

Shipments of numerous cases of canned salmon *held* not subject to forfeiture as adulterated within the meaning of the Act declaring an article of food adulterated if it consists in whole or in part of a filthy, decomposed, or putrid animal substance, on the theory that each individual can of salmon was an "article of food" within the meaning of the act, and that it was not shown that a sufficient number of the cans contained salmon that was filthy, decomposed, or putrid. *United States* v. *1,459 Sases of Canned Salmon*_____ 995

United States v. *1,974 Cases of Canned Salmon*_____ 1037

In proceedings for condemnation of shipments of canned salmon as adulterated in that it consisted in whole or in part of a filthy, decomposed, or putrid animal substance, *held* necessary to a verdict of condemnation that it be shown that the adulteration extended to the entire product sought to be condemned. *United States* v. *1,974 Cases of Canned Salmon*_____ 1108

United States v. *2,995 Cases of Canned Salmon*_____ 1136

In a proceeding to condemn parcels of canned salmon as adulterated under the provision of the act that food shall be deemed to be adulterated if it consists in whole or in part of a filthy, decomposed, or putrid animal substance, *held* that the jury, in order to return a verdict in favor of the Government, must find that a percentage of such adulteration extended throughout the parcel, and was greater than was inevitable in the process of canning when ordinary and proper care is exercised. *United States* v. *243 Cases of Canned Salmon* _____ 1131

In a proceeding to condemn shipments of canned salmon in that it consisted in whole or in part of a decomposed animal substance, *held* that in order to warrant condemnation of such shipment, the jury must find that decomposition to a substantial degree extended throughout the whole shipment, although it was not necessary to find that each and every can of salmon in such shipment was so decomposed. *United States* v. *2,205 Cases of Canned Salmon*_____ 1133

In a libel proceeding against a certain number of cases of tomato catsup allegedly adulterated in that it consisted in whole or in part of a filthy, decomposed, or putrid vegetable substance, *held*, that if the jury should find that the catsup in the total number of cases, or in any part of such number, is in such a condition as to be within the prohibition of the act, then their verdict should be for the Government, and that if they should find the catsup in only a part of the total number of cases to be in such condition, they should indicate the number of such cases. *United States* v. *720 Cases of Tomato Catsup*_____ 877

Where an article of food is alleged to consist in whole or in part of a filthy, decomposed, or putrid animal substance, any one of these adjectives, if applied to the substance and established by proof, would be sufficient to justify condemnation of the article. *United States* v. *One Barrel of Desiccated Egg Product*_____ 99

In a proceeding to forfeit an article of food as being filthy or decomposed, *held*, the Government was not required to prove that the article was both filthy and decomposed; it was sufficient if the article be shown to be either filthy or decomposed. *United States* v. *10 Barrels of Olives*_____ 125

In a libel proceeding against an article of food for alleged adulteration under the provision of the act that an article of food shall be deemed adulterated if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, *held* unnecessary for the Government to prove that the product was filthy and decomposed and putrid; it is sufficient to establish the existence of any one of the conditions enumerated. *United States* v. *720 Cases of Tomato Catsup*_____ 877

In a libel proceeding to condemn shipments of a food product on the ground that it was filthy and decomposed, *held* that the Government would be entitled to a verdict if the jury should find that the product was either filthy or decomposed, or both. *United States* v. *1,500 Cases of Tomato Pulp*_____ 892

FILTHY, DECOMPOSED, AND PUTRID—Continued. Page

in a proceeding for condemnation of canned salmon as adulterated because it consisted in whole or in part of a filthy, decomposed, or putrid animal substance, *held* that the jury should find for the Government if they should find that the article was either filthy or decomposed or putrid. *United States* v. *1,600 Cases of Canned Salmon* 1105

See Adulteration; Article; Consist; Constitutionality of the Food and Drugs Act; Injuries to Health; Knowledge and Intent; Standards; Unfit for Food.

FINES.

See Offenses; Penalties.

FISH.

Raw fish infested with parasitic worms, *held*, come within the scope of the provision of the act, section 8, that food shall be deemed adulterated if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, etc. *United States* v. *186 Boxes of Whole Tullibees and 116 Boxes of Dressed Tullibees* 1342

See Salmon, Canned; Sardines; Tuna Fish.

FLAVOR.

See Compound Ess Grape; Creme de Menthe Flavor Non-alcoholic Cordial; Fruit Wild Cherry Compound; Lemon Extract or Flavor; Orange Extract or Flavoring; Vanilla Extract or Flavor.

FLOUR:

Flour *held* to be filthy and adulterated under the act, section 7, subdivision 6, by reason of the presence of worms, insects, and beetles, and of the condition which they produced in the flour. *United States* v. *350 Sacks of "Princess Flour" and 50 Sacks of "Fancy Melba" Flour* 351

Affirmed, *Wm. M. Galt & Co.* v. *United States* 422

Flour treated by the Alsop process for bleaching *held* to be adulterated because, as a result of such treatment, nitrites or nitrite-reacting material had been mixed and packed with the flour so as to reduce and lower and injuriously affect its quality and strength; the flour was mixed, colored, and stained in a manner whereby damage or inferiority was concealed; and the flour contained added poisonous or other added deleterious ingredients, to wit, nitrites or nitrite-reacting material, which might render the flour injurious to health. Said flour *held* to be misbranded because it was offered for sale under the distinctive name of another article, to wit, "Patent Flour", and, being labeled "Fancy Patent. This flour is made from the first quality hard wheat", was labeled so as to deceive and mislead the purchaser. *United States* v. *625 Sacks of Flour* 129

Reversed, *Lexington Mill & Elevator Co.* v. *United States* 443

Judgment C. C. A. affirmed, *United States* v. *Lexington Mill & Elevator Co* 577

Flour bleached by treatment by the Alsop process *held* to be adulterated because, as a result of such treatment, substances known as nitrites had been mixed and packed with the flour so as to reduce and lower and injuriously affect its quality and strength; the flour was mixed, colored, and stained in a manner whereby damage and inferiority was concealed; and the flour contained added poisonous and added deleterious ingredients, to wit, nitrites, which rendered it injurious to health. Said flour *held* to be misbranded because it was offered for sale under the distinctive name of another article, to wit, "High Patent Flour", when it was not such article, but was flour of a grade inferior to "Patent Flour"; and because it was labeled and branded so as to deceive and mislead the purchaser, being labeled and branded "High Patent Flour", when it was not "Patent Flour", but was flour of a grade inferior to "Patent Flour." *United States* v. *420 Sacks of Flour* 96

FLUID EXTRACT CINCHONA: Page

A drug labeled "Fluid Extract Cinchona" *held* adulterated within the meaning of the act, section 7, in that, being a drug sold under by a name recognized in the United States Pharmacopoeia or National Formulary, it differed from the standard of strength, quality, and purity, as determined by the test laid down in the United States Pharmacopoeia or National Formulary at the time of investigation. *United States* v. *G. F. Harvey Co*---------- 754

FOOD:

Pears and apples are food within the meaning of the act. *United States* v. *3,192 Boxes of Apples and 532 Boxes of Pears*---------- 1199

Eggs released from the shell and frozen or unfrozen are an "article of food", and, if adulterated, their transportation in interstate commerce is prohibited. The fact that decomposed eggs ought not to be used for food or as an ingredient of some food article does not remove them from the category of adulterated food, they being within the statutory definition, nor does the fact that they may be used for tanning purposes. *United States* v. *13 Crates of Frozen Eggs*---------- 531

United States v. *13 Crates of Frozen Eggs*---------- 605

Where a libel for condemnation of frozen eggs described them as articles of food it was not objectionable for failure to negative that the eggs were intended for other than food purposes. *United States* v. *300 Cans of Frozen Eggs*---------- 283

Under the act, section 6, defining "food" to include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound, the term applies to and includes wine. *United States* v. *Sweet Valley Wine Co*---- 468

Cider is a food within the meaning of the act. *United States* v. *Shucart*---------- 693

Vinegar is a food product, as defined in the act, section 6. *United States* v. *95 Barrels, More or Less, Alleged Apple Cider Vinegar*-- 1047

A sirup called "Coca Cola" is an article of food, under the definition of the act. *United States* v. *40 Barrels and 20 Kegs of Coca Cola*---------- 606

Conceivably an article may be both a food and a medicine, and that when used in the same way, i. e., when taken internally. A manufacturer who designates an article made and sold by him as a food ("International Stock Food") is in no position to complain of his article being treated as what he calls it, i. e., a food. *Savage* v. *Scovell*---------- 18

A condiment is a food and not a medicine. Id.

Coloring materials sold and shipped with the knowledge that they were intended to be used as components of food, *held*, were to be regarded as food within the meaning of the act, though they had no food value themselves. *Untied States* v. *W. B. Wood Manufacturing Co*---------- 1002

Oil of birch, used as one of the ingredients entering into the composition of root beer, is an article of food within the meaning of the act. *United States* v. *Bowers*---------- 763

An article composed of shellac, containing arsenic, dissolved in alcohol, and sold for use in glazing candy, is an article of food. *Weeks* v. *United States*---------- 650

The seed of the wild oat is not a food. *United States* v. *154 Sacks of Oats*---------- 1039

A dairy company which shipped from its receiving plant in Illinois to Missouri milk which was adulterated by addition of water and by reason of the presence of decomposed matter, cannot defeat a prosecution under the act on the ground that the milk was to be treated in Missouri and was not an article of food until after treatment. *Union Dairy Co.* v. *United States*---------- 869

See Adulteration; Confectionery; Drug; Election; Knowledge and Intent; Misbranding.

FOOD INSPECTION DECISIONS: Page

Where, under the decisions of the Department of Agriculture, coloring material, containing more than 5 per cent of salt could not be certified, and a coloring material containing a greater percentage carried a label bearing the words, "Warranted. Complies with all requirements", it was misbranded within the act, section 8, as the label would tend to convey the belief that the color was warranted to comply with the decisions of the Department. *W. B. Wood Manufacturing Co.* v. *United States*---------- 1070

See Mandamus.

FOREIGN PRODUCT.

See Confectionery; Gin; Importation; Macaroni; Oil, Olive; Oil; Salad; Rusk.

FOREIGN SHIPMENT.

See Export Articles.

FORMALDEHYDE:

A frozen-egg product containing formaldehyde *held* to be adulterated in that it contained an added poisonous or deleterious ingredient. *United States* v. *F. E. Rosebrock & Co*---------- 190

FRAUDULENT.

See False and Fraudulent.

FROZEN EGG PRODUCT.

See Eggs and Egg Products.

FRUIT:

The act is not applicable to shipment in interstate commerce of fruit unfit for consumption because green or immature. *Sligh* v. *Kirkwood*---------- 634

See Apples; Blackberries; Filthy, Decomposed, and Putrid; Oranges.

FRUIT PUDDINE:

An article of food sold under its own distinctive name, to wit, "Fruit Puddine" or "Puddine", held misbranded because the statement "Fruit Flavored", appearing on the label, was false or misleading. *United States* v. *150 Cases of Fruit Puddine*---------- 557

The words "cream vanilla" and "rose vanilla", used on a product called "Fruit Puddine" or "Puddine", to designate colors of the product, *held* to be distinctive names and not to constitute misbranding because the product was not flavored with a high-grade vanilla extract, but with vanillin or synthetic vanilla extract obtained from oil of cloves. Id.

FRUIT WILD CHERRY COMPOUND:

Allegations in an information that an article labeled "Fruit Wild Cherry Compound" was adulterated in that a substance, to wit, an imitation wild cherry essence, had been mixed and packed with the article purporting to be fruit wild cherry compound so as to reduce, lower, and injuriously affect the quality and strength of the article, and in that an imitation wild cherry essence had been substituted in part for the genuine article, fruit wild cherry, and in that the article had been colored in a manner whereby its inferiority was concealed, *held* insufficient to charge an offense under the act, since the description of the article on the label as "Fruit Wild Cherry Compound" did not indicate that the article consisted wholly of fruit wild cherry, and, assuming that the article did not contain any added poisonous or deleterious ingredient, there was nothing to prevent the combination of fruit wild cherry with an imitation wild cherry essence. Allegation that the article labeled "Fruit Wild Cherry Compound" consisted chiefly of an imitation wild cherry essence artificially colored, *held* to charge a violation of the act as to misbranding, since the name "Fruit Wild Cherry Compound" represented that the dominant element of the compound was genuine fruit wild cherry. *United States* v. *Weeks*---- 519

FRUIT WILD CHERRY COMPOUND—Continued. Page

An article labeled "Fruit Wild Cherry Compound" *held* to be misbranded in that such statement on the label was false and misleading, and in that it was labeled so as to deceive and mislead the purchaser, the label representing that the article was a genuine fruit wild cherry compound, when it consisted chiefly of imitation wild cherry essence artificially colored; and in that it was sold under the distinctive name of another article, to wit, fruit wild cherry, when it was not fruit wild cherry, but was an imitation thereof. Said article *held* to be adulterated in that it was artificially colored with coal-tar dye to simulate a true fruit wild cherry color, and in a manner whereby its inferiority was concealed. Id.

Reversed, *Weeks* v. *United States*---------- 646

An article labeled "Fruit Wild Cherry Compound", but not containing any "Fruit Wild Cherry", nor any added poisonous or deleterious ingredients, is covered by the provision of the act, section 8, that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the case of compounds known as articles of food under their own distinctive names, and not an imitation of or sold under the distinctive name of another article, and in case of articles so labeled as to indicate they are compounds, and the word "compound" is stated on the package; and therefore is not misbranded. *Weeks* v. *United States*---------- 646

An article labeled "Fruit Wild Cherry Compound", but containing a coal-tar color giving to the mixture the genuine color of wild cherry juice, but not containing any added poisonous or deleterious ingredients, is not adulterated under the provisions of the act, section 7, that an article of food shall be deemed adulterated if it is mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed, for the reason that said provision is qualified by the provision of section 8, that an article of food which does not contain any added or poisonous or deleterious ingredients shall not be deemed to be adulterated in enumerated cases. Id.

GENERIC TERM:

"Generic" may be defined as meaning a class, as distinct from "specific", which might mean a particular member or a class, and when it is used in regulation 19, in connection with the word "term", so as to create the phrase "generic term", the word "generic" means a class. "A generic term" means the description of a class of product. *United States* v. *Finlayson et al*---------- 535

The word "Holland", used in connection with the word "gin", is a geographical name which has become generic by long usage, and represents a style, type, or brand, within the meaning of regulation 19 (a). *United States* v. *Five Cases of Hurdle Brand Holland Gin*---------- 549

GEOGRAPHICAL NAME.

See Coffee; Holland Gin; Hollands Geneva Gin; London Dry Gin; Macaroni; Regulations; Rusk.

GIN.

See Holland Gin; Hollands Geneva Gin; London Dry Gin.

GINGEROLE.

A drug called "Gingerole" held not misbranded under the act as amended by act August 23, 1912, on the ground that the evidence did not show that any of the alleged false and fraudulent statements as to the curative or therapeutic effects of the drug, contained on the label, etc., was both false and fraudulent. *United States* v. *Gingerole Co*---------- 977

GLUCOSE.

See Corn Sirup.

GON-NOL: Page

An article of drugs labeled "Gon-Nol" *held* misbranded for the reason that statements on the label falsely and fraudulently represented its curative or therapeutic effects. *United States* v. *Kar-Ru Chemical Co*---- 900
Affirmed, *Kar-Ru Chemical Co.* v *United States*---- 970

GOULD AMENDMENT.

See Constitutionality of the Food and Drugs Act; Weight, Measure, and Numerical Count.

GRAIN ALCOHOL VARNISH:

An article labeled "Grain Alcohol Varnish", for use in glazing candy, *held* to be adulterated in that it contained an added poisonous and deleterious ingredient, arsenic, which might render the article injurious to health. *United States* v. *Weeks*---- 528
Affirmed, *Weeks* v. *United States*---- 650

GRAIN STANDARDS ACT.

See Oats.

GRANT'S HYGIENIC CRACKERS:

An article of food labeled "Grant's Hygienic Crackers" *held* to be within the provision of the act, section 8, subdivision 4, that articles of food which do not contain any added poisonous or deleterious ingredient shall not be deemed misbranded if known under their own distinctive names and not an imitation of or offered for sale under the distinctive name of another article, and not misbranded by reason of alleged false and misleading statements on the label. *United States* v. *Hygienic Health Food Co*---- 259

GRAPE FLAVOR.

See Compound Ess Grape; Smack.

GRAPE, COMPOUND ESS.

See Compound Ess Grape.

GRAPE JUICE:

An article labeled "Grape Juice. Pure, unfermented, thrice sterilized", held misbranded if cane sugar were added thereto and if the article were partially fermented. *United States* v. *Mohn Wine Co*-- 316

GRENADINE SIRUP.

See Sirup, Grenadine.

GUARANTY:

A guaranty made under the provisions of section 9 of the act, if false, can have been made with no other purpose than to defeat the object of the act. *United States* v. *Charles L. Heinle Specialty Co*---- 82

If, for any reason, a guaranty is insufficient to impose liability upon the manufacturer, the liability remains where it primarily rested—upon the dealer. *United States* v. *Mayfield et al*---- 90

The provision of section 9 of the act, regarding guaranty, is available to a dealer only when such guaranty relates to the identical article shipped by him, and affords no defense to him where it relates to a constituent used by him in the manufacture of the article shipped. Id.

Whether a document offered as a guaranty is in fact a guaranty within section 9 of the act is a question of law for determination by the court; and the legal effect of a document delivered by a manufacturer to a jobber, stating that all goods furnished "hereafter will comply with the Food and Drugs Act" until notice of revocation, was, as to a product furnished after the guaranty was given, to guarantee such product against adulteration. *United States* v. *Glaser, Kohn & Co*---- 601
Affirmed, *Glaser, Kohn & Co.* v. *United States*---- 651

Section 9 of the act, regarding guaranty, includes continuing guaranties, as well as those given at the time of sale and in reference to specific goods; and a guaranty of a manufacturer that all goods

GUARANTY—Continued. Page

furnished a wholesale dealer "hereafter will comply with the Food and Drugs Act until notice of revocation" is a continuing guaranty, and a valid and sufficient guaranty under the section, and attaches to every item of sale made by the manufacturer to the wholesaler until the guaranty is revoked, and furnished a basis for an information against the manufacturer for selling an adulterated article of food, since where, by the terms of a written guaranty, it appears that the parties look to a future course of dealing for an indefinite time, or a succession of credits to be given, it should be deemed a continuing guaranty. *Glaser, Kohn & Co.* v. *United States*_____ 651

A letter of guaranty should receive a liberal, fair, and reasonable interpretation, and attain the object designed and the purpose to which it is applied. Id.

A guaranty signed by the manufacturer of a misbranded article, signed more than 18 months after a prosecution was instituted and a few days before the trial, *held* not to satisfy the requirements of a valid guaranty under section 9 of the act and not to constitute a defense in the prosecution of a shipper of such article. *Steinhardt Bros. & Co.* v. *United States*_____ 327

An alleged guaranty given 6 years prior to the prosecution, to the effect that all goods to be sold by the guarantor to a particular dealer thereafter would comply with the Food and Drugs Act and would not be in any manner adulterated or misbranded, *held* to be no guaranty at all under the act. *United States* v. *Scully et al*__ 460

See Constitutionality of the Food and Drugs Act; Knowledge and Intent; Object of the Act; Purpose of the Act.

GUM ARABIC:

Gum arabic *held* to be a "similar" article to gum chadya, or Indian gum. *United States* v. *Weeks*_____ 485

HARPER'S CUFORHEDAKE:

An article labeled "Harper's Cuforhedake Brain Food" and "Harper's Cuforhedake Brane Fude", *held* misbranded. *United States* v. *Harper*_____ 11

HEARING.

See Notice and Opportunity to be Heard.

HOG FEED, ECONOMY SPECIAL.

See Economy Special Hog Feed.

HOLLAND GIN:

An article of domestic manufacture, labeled "Hurdle Brand Holland Gin, Distilled by Baird Daniels Co., Warehouse Point, Conn.", *held* not misbranded as purporting to be a foreign product. *United States* v. *Five Cases of Hurdle Brand Holland Gin*_____ 549

See Hollands Geneva Gin; London Dry Gin.

HOLLANDS GENEVA GIN:

The term "Hollands Geneva Gin" *held* to have come, through long usage, to indicate a style, type, or brand of gin, and not to constitute misbranding when used on a domestic article, if accompanied on the label by the name of the place where the article was manufactured. *United States* v. *Finlayson et al*_____ 535

See Holland Gin; London Dry Gin,

HONEY:

An article labeled "Excelsior Choice Pure Strained Honey", composed of honey and invert sugar, *held* adulterated and misbranded. *United States* v. *Six Cases of Honey*_____ 543

See Corn Sirup.

HORSEBEANS.

See Beans.

HUDSON'S EXTRACT: Page

An imitation of vanilla, labeled "Hudson's Extract", without any indication of what the article was composed, *held* to be misbranded where there was no proof that the words "Hudson's Extract" had a well-known trade meaning. *Hudson Manufacturing Co.* v. *United States*---------- 344

See Vanilla Extract or Flavor.

HYGIENIC CRACKERS.

See Grant's Hygienic Crackers.

ICE CREAM:

Ice cream containing only 7.09 percent of butterfat *held* not adulterated by reason of deficiency in fat, as there is no authorized standard for ice cream, and the evidence was insufficient to warrant the fixing of a standard for butterfat in ice cream. *United States* v. *Rinchini*---------- 318

IMITATION:

The provision of the act that an article of food shall be deemed to be misbranded "if it be an imitation of or offered for sale under the name of another article", deal, first, with imitations; that is, articles patterned after, or a copy of, or made in simulation of, another article, and as such, offered or put out as the genuine; and, second, articles, whatever they may be, whether imitations or not, which are put out under the distinctive name of another article. The statute condemns the use of means which being used arouse the belief that one thing is really another. *United States* v. *24⅞ Gallons of Smack*---------- 1181

See Compound; Distinctive Name.

IMPERIAL SPRING WATER.

Ordinary Croton water drawn from the pipes in New York City, filtered and bottled after the addition of small quantities of mineral salts and carbonic acid gas, is not "spring water", as the term is generally understood, and labeled as "Imperial Spring Water", is misbranded within the meaning of the Act. *United States* v. *Morgan et al*---------- 146

IMPORTATION:

Section 11 of the act provides for the examination of articles sought to be imported, suspected of being adulterated or misbranded, by the Department of Agriculture, and declares that, if they are found to be so, entry shall be forbidden, and they shall be destroyed unless exported within 3 months from the date of notice of refusal of entry, except that, pending examination, the importer shall obtain possession by executing a penal bond conditioned to return the goods to the Secretary of the Treasury when demanded, etc. *Held* that, where proceedings were instituted for the exclusion of certain adulterated or misbranded olives, the importer's execution of a bond for possession under said section did not amount to an official declaration that the olives had been found to comply with the act. *United States* v. *Nine Barrels of Olives*---------- 128

Bill for injunction to restrain the Secretaries of Treasury and Agriculture from permitting importations of crude ergot of rye alleged to be substandard and in violation of the act, *held* properly dismissed in the absence of showing that such action was capricious or arbitrary. *Ambruster* v. *Mellon, Secretary of the Treasury, et al*---------- 1236

See Injunction.

INDICTMENT:

The offense against the act, section 2, is not an "infamous crime", and the institution of proceedings by an information charging such offense, filed by the district attorney, was not a violation of the Fifth Amendment of the Constitution, providing that no person shall be held to answer for an infamous crime unless upon presentment or indictment of a grand jury. *United States* v. *J. Lindsay Wells Co*---------- 169

INDICTMENT—Continued.

Page

An indictment for misbranding an article in violation of the act was not invalid for failure to allege investigation by an officer of the Department of Agriculture, notice to the defendants of their violation of the act, or that defendants were afforded an opportunity to present evidence and be heard. *Schraubstadter et al.* v. *United States* ---------- 398

Where an indictment described defendants as "S. and G., doing business in the city and county of San Francisco under the name and style of A. Fink's Widow, hereinafter called the defendants", *held* that such phrase was merely descriptive of the persons indicted, and that the indictment would be regarded as of the individual members of the firm, and not of the firm under its firm name. Id.

Where an indictment charged defendant in three counts with misbranding and the verdict was "guilty as charged in the indictment", *held* that the verdict was tantamount to a conviction on each of the three counts. Id.

Where an indictment charging defendant with violations of the act contained allegations to the effect that the same defendant had previously, on a plea of nolo contendere to a criminal information, been convicted and fined the sum of $50 and costs for another violation of the same act which provides that for a first offense thereunder the punishment shall on conviction be a certain minimum in the statute set forth, but that on conviction for any subsequent offense thereunder the punishment shall be increased in a certain definite manner in the statute prescribed, *held* that the fact of such former conviction was properly pleaded in the indictment. *United States* v. *St. Louis Dairy Co*---------- 962

See Crime, Infamous; Election; Information; Notice and Opportunity to be Heard; Prior Conviction.

INFAMOUS CRIME.

See Crime, Infamous.

INFERIORITY.

See Colored; Damage or Inferiority; Mixed.

INFORMATION.

The proceeding by information is an ancient method of procedure which has come to us from the common law of England, and it is well settled that this method of procedure is proper here. *Weeks* v. *United States*---------- 613

Procedure by criminal information is common law practice, and being a matter of practice it needs no statute to support it. Originally it was a concurrent remedy with indictments for all misdemeanors except misprison of treason. Informations under the Food and Drugs Act are perfect representatives of this ancient practice. In the United States the function of an information is limited by the constitutional provision that no one shall be held to answer for a "capital or otherwise infamous crime", except on presentment by the grand jury. *United States* v. *J. L. Hopkins & Co*---------- 366

There is no question that offenses against the Food and Drugs Act may be prosecuted upon information and without an indictment. *United States* v. *Wells*---------- 480

The practice followed in prosecuting individuals by information for violating the Food and Drugs Act must be in accord with recognized procedure, and must not be within the inhibitions of the Federal Constitution. *United States* v. *Simon et al*---------- 728

The offense against section 2 of the act *held* not an "infamous offense", and hence the institution of proceedings thereunder by information of the district attorney, charging defendant with shipping adulterated food in interstate commerce was not a violation of the Fifth Amendment of the Constitution, providing that no person shall be held to answer for an infamous crime unless upon presentment or indictment of a grand jury. *United States* v. *J. Lindsay Wells Co*- 169

In the United States the informations used by the prosecuting officers are the informations used by the Attorney General in England, and

INFORMATION—Continued. Page

not those exhibited by masters of the crown, and which were governed by 4 and 5 William and Mary, chapter 18, and as at common law an information could be filed by the Attorney General simply on his oath of office, and without verification, the verification of an information by a prosecuting attorney in this country is unnecessary, unless required by some constitutional or statutory provision. *Weeks* v. *United States*---------- 613

It is proper for the court to examine the information and the affidavits in support thereof, and, if the same shall be found insufficient, to deny motion of the United States attorney for leave to file the information. Motions of the United States attorneys for leave to file informations charging misbranding in violation of the act, denied, where in the opinion of the court the misbranding alleged was doubtful. *In re Wilson*---------- 33

United States v. *Schurman et al*---------- 95

In proceedings against a defendant for violation of the act, instituted by a district attorney, in his official capacity, by a criminal information, *held* that the fact that leave of court to file the information had not actually been had was no abuse of process and not ground to revoke the leave by virtue of which the information purported to have been filed. *United States* v. *Simon et al*---------- 728

Prosecutions by information have long had a recognized place in criminal procedure. In form, they proceed with leave of court. Whether the leave is made formal or actual is a matter of practice, to be regulated by the courts. Actual leave may be exacted, or it may be permitted to be assumed unless and until challenged. The latter is the established practice, and on the whole the better practice, because it leaves the propriety of the proceeding to be determined on its merits. Id.

Under the Constitution, Amendment 4, the court has no jurisdiction to direct the issuance of a warrant on an information filed, made on the information and belief of the United States attorney alone. It must be supported by proof establishing probable cause; that is, by legal evidence that a crime has been committed and that there is probable cause to believe the accused guilty of the commission thereof. *United States* v. *Baumert et al*---------- 113

United States v. *Wells*---------- 480

Before a summons or capias is issued in prosecutions instituted by information filed by the United States attorney, wherein the defendant is charged with a crime upon conviction for which he may be fined and imprisoned, the information should be presented to the judge, supported by the oath of someone having knowledge of the facts showing the existence of probable cause. The evidence may be oral or by affidavits. Upon the hearing of which the court, as it may believe that the evidence does or does not show probable cause, may or may not cause the arrest of the accused, and have him or not have him brought before the court to answer the charge. In other words, before a citizen is arrested, there should be facts sworn to and presented to the court showing the existence of probable cause for such arrest. *United States* v. *Wells*---------- 480

Revised Statutes, section 1022, provides that certain offenses may be prosecuted either by indictment or information filed by the United States attorney, and the Constitution, Amendment 4, declares that no warrant shall be issued but on probable cause supported by oath or affirmation. *Held*, that the constitutional provision does not require that the oaths or affirmations of the supporting witnesses be taken in open court or before the judge issuing the warrant or directing its issuance, but that the information is so supported where it is accompanied by the evidence of witnesses sworn before a United States commissioner on a preliminary examination, properly taken and certified, or when accompanied by the affidavits made on oath of witness sworn before any officer authorized by law to take and subscribe such oaths or affirmations. *United States* v. *Baumert et al*---------- 113

INFORMATION—Continued. Page

An information for violation of the Food and Drugs Act was sworn to on information and belief by the United States district attorney, supported by certain letters purporting, but not proved, to have been written or authorized by accused taking issue with the Agricultural Department's claim of violation; also a statement not in the form of an affidavit, by an analyst of the Department, to which was attached a notary's certificate that it had been subscribed and sworn to, etc. The paper contained no venue, nor was there any certificate attached to it showing that the person certifying it was a notary authorized to take and certify oaths and affirmations, and that it was taken and subscribed as required by the laws of the State, etc. *Held*, that the information was not sufficiently proved to justify the issuance of process. Id.

The provision of the Fourth Amendment to the Constitution that "no warrant shall issue but upon probable cause supported by oath or affirmation", which is a limitation upon the powers of the Federal Government only, does not require an information filed by a district attorney of the United States to be verified or supported by an affidavit based on personal knowledge and showing probable cause, unless such information is made the basis of an application for a warrant of arrest. If the sole purpose of the information is to state the accusation, a defendant may be charged and tried for a misdemeanor on an information not verified nor so supported. *Weeks* v. *United States* 613

An information not upon oath is not violative of the Fourth Amendment of the Constitution, where defendant has voluntarily appeared and filed motion to quash, it being only required that the information shall be supported by oath before warrant may issue thereon. *United States* v. *Newton Tea & Spice Co* 950

An information, bearing the signature of the district attorney and to which were attached four affidavits sworn to before notaries public, is sufficient to support a judgment of conviction, though not verified by the district attorney; no warrant of arrest having been sought, and it being assumed that the district attorney, who signed in his official capacity, acted under his oath as a Government official. *Abbott Bros. Co.* v. *United States* 831

While an information filed by the United States attorney under the sanction of his official oath, and without verification, would be sufficient in certain cases, an information not so filed, but expressly stating upon its face that it was made upon the oath of the several parties whose affidavits were annexed, was not sufficient, unless the affidavits could be considered. *United States* v. *Schallinger Produce Co* 623

Notaries public have no authority under the laws of the United States to administer any oaths in connection with criminal prosecutions, and hence an information expressly stating that it was made upon the oath of parties whose affidavits were annexed, was defective, where three of the affidavits were taken before notaries public, and the fourth, standing alone, was of no avail. Id.

Though a corporation cannot commit certain crimes, and may not be arrested or imprisoned, a proceeding against it for the violation of a criminal statute is a "criminal proceeding", with all the incidents of such a proceeding, and an information therein is defective, if made upon the oath of parties named in annexed affidavits taken before notaries public. Id.

Defects in the acknowledgment of an information are waived, if not raised by suitable objection before trial, and cannot thereafter be raised. *Abbott Bros. Co.* v. *United States* 831

The objection that an information was not made on the oath of the prosecuting officer, but on the oaths of witnesses by affidavit, some of which were taken before notaries public, was purely technical, and was waived by pleading to the information without raising the objection. *Simpson* v. *United States* 832

Unless an information is void, an objection that it was not made on the oath of the prosecuting officer, but solely upon oath of witnesses by affidavits, some of which were taken before notaries

INFORMATION—Continued. Page

public, cannot be raised for the first time on appeal, unless a refusal to consider it would shock the judicial conscience. Id.

Failure to attach to an information the affidavits on which it is based does not justify the setting aside of a conviction. *United States* v. *American Laboratories* 641

An information under the Act will not be dismissed on appeal for the reason that it does not appear that there had been a notice and hearing by the Secretary of Agriculture as provided for by section 4 of the act, where no motion to dismiss for this reason was made below nor was the question raised by any pleading or assignment of error. *Frank et al.* v. *United States* 329

The rule applicable to an information is no less liberal than that prescribed for indictments by Revised Statutes, section 1025, and its averments of fact constituting the offense need be only so certain and specific as fairly to inform defendant of the crime intended to be alleged, and to make the judgment a complete defense to a second prosecution for the same offense. *Simpson* v. *United States* 832

In view of Revised Statutes, section 1025, the allegations of an information need only be so specific as fairly to inform defendant of the crime intended to be alleged, and to make available a plea of former acquittal or conviction, if a second prosecution were instituted for the same offense. An information charging defendant made an interstate shipment of drugs misbranded in violation of section 8 of the act, as amended by act August 23, 1912, which alleged that statements regarding the curative or therapeutic effects of the drugs, made on the label and package and in an accompanying circular, were false and fraudulent and were applied by defendant to the article knowingly and in wanton disregard of their falsity, *held* sufficient as against motion in arrest. *Dr. J. H. McLean Medicine Co.* v. *United States* 907

The certainty required in an information is only such as will fairly inform the defendant of the offense intended to be charged, so as to enable him to prepare his defense, and so as to make the judgment a complete defense to a second prosecution. *Newton Tea & Spice Co.* v. *United States* 1089

It is generally enough to describe a statutory offense in the words of the statute, and if more particularity is desired defendant may move for a bill of particulars. Id.

United States v. *American Maid Flour Mills* 1286

An innuendo may not change, add to, or enlarge the sense of expressions beyond their usual meaning. It may serve as an explanation, but not as a substitute. Hence, an averment in an information that one who branded an article with a label whose accepted and usual signification correctly describes it, intended that the public or purchasers should understand that the label had an opposite and unusual significance, fails to disclose any misbranding. *Nave-McCord Mercantile Co.* v. *United States* 166

An information charging defendant with selling an adulterated or misbranded article of food in interstate commerce in violation of the act, should specifically charge the manner of adulteration as defined in section 7, or of misbranding as defined in section 8. *United States* v. *St. Louis Coffee & Spice Mills* 44

An information charging that defendant sold in interstate commerce a liquid labeled "Flavor of Vanilla", which did not contain any extract of vanilla, does not state a case of adulteration or misbranding of vanilla extract in violation of section 2 of the act, the words "extract" and "flavor" not being synonymous terms. Id.

An information alleging shipment in interstate commerce of an article of food labeled as "Extract Terpeneless Lemon", in which a dilute solution of alcohol and water was substituted in part for said terpeneless lemon extract so that the same contained no more than 0.05 percent of citral derived from the oil of lemon, whereas, as recognized by the trade generally and by the standard of purity established by the Secretary of Agriculture under authority of the act of March 3, 1903, such extract should contain at least 0.2 percent by weight of such citral, *held* stated facts

INFORMATION—Continued.

Page

sufficient to sustain counts of both adulteration and misbranding under the Food and Drugs Act. *United States* v. *Frank et al*_____ 205

An information alleging that an interstate shipment of confectionery, commonly called candy, was adulterated in that it consisted in whole or in part of a filthy, decomposed, or putrid vegetable substance, *held* sufficiently charged violation of the act. *United States* v. *Watson-Durand-Kasper Grocery Co*_____ 837

An information alleging that statements on the label of an article of food were false and misleading in that they represented to the purchaser that the article was a substitute for eggs and could be used in place of eggs for cooking and baking, whereas, in truth, said article was not a substitute for eggs, and could not be used in place of eggs for baking and cooking, was sufficient under the act, as against an objection that it did not set forth why or in what manner the article could not be used as a substitute for eggs. *United States* v. *Newton Tea & Spice Co*_____ 950

Affirmed, *Newton Tea & Spice Co.* v. *United States*_____ 1089

An information under the act for misbranding an article of food, charging that the label bore statements that the article was an excellent substitute for eggs and could be used in place thereof for baking and cooking purposes, which statements were false and misleading, *held* sufficiently definite. *Newton Tea & Spice Co.* v. *United States*_____ 1089

Affirming *United States* v. *Newton Tea & Spice Co*_____ 950

Since "macaroni" is defined as made from a paste from the flour of hard glutinous wheat, and "semolina" is defined as the hard grains retained in the bolting machine after the fine flour has passed through, an information charging an article labeled "macaroni" adulterated and misbranded because made of flour, and not of semolina, is not sufficiently definite, even though macaroni must not contain the fine flour which passes through the bolting machine. *United States* v. *Krumm*_____ 993

The restriction of the application of the act to original unbroken packages applies only to those who receive in interstate commerce and thereafter deliver adulterated or misbranded articles, not to those who ship or deliver for shipment, so that an information charging that defendant shipped an adulterated and misbranded article of food in interstate commerce need not allege that it was shipped in original unbroken packages. Id.

An information charging defendant with shipping an article of food adulterated in that a product containing less than 80 per centum by weight of milk fat had been substituted for "butter", *held*, charged an offense under the Food and Drugs Act, in view of section 7, and in view of the act of March 4, 1923, which defines butter for the purposes of the Food and Drugs Act. *United States* v. *Centralia Dairy Co*_____ 1336

An information charging that an article of food was misbranded in that the statements "butter" and "one pound net", on the packages, were false and misleading in that they represented that the article was butter, namely a product which should contain not less than 80 per centum by weight of milk fat, and represented that each of such packages contained one pound net of the article, whereas in truth the article contained less than 80 per centum by weight of milk fat, and each of the packages contained less than 1 pound net of the article; and in that the article was labeled as stated so as to mislead and deceive the purchaser into the belief that it was butter as defined, and that each of such packages contained 1 pound net of the article; *held*, not demurrable. Id.

An information charging misbranding under the act, section 8, paragraph 3, of certain sacks of flour, meal, etc., alleging that such sacks were branded as containing each 24 pounds, when in fact they contained less, but not alleging promulgation of, or violation by defendant of, regulations fixing tolerances and exemptions or permitting variations; *held*, not open to motion to quash on the ground that the provision of section 8, paragraph 3, for establishing tolerances and exemptions and for permitting variations was invalid. *United States* v. *American Maid Flour Mills*_____ 1286

INFORMATION—Continued. Page

Where an information charging an interstate shipment of drugs misbranded in that the package and an accompanying circular contained false and fraudulent statements regarding the curative or therapeutic effect of the drugs, alleged that the shipment was made by S., the defendant, trading as S's Medical Institute, and that the representations were false and fraudulent in that they were applied to such article knowingly and in reckless and wanton disregard of their truth or falsity; *held*, that the information sufficiently showed that it was defendant's knowledge and reckless and wanton disregard of the truth that was intended to be charged. *Simpson* v. *United States*---------- 832

An information for shipping drugs misbranded in that the label of the package containing the drug and an accompanying circular contained false and fraudulent statements regarding their curative or therapeutic effects, which alleged that the shipment consisted of certain packages, that the packages contained the circular or pamphlet described, and that one of the alleged misrepresentations appeared on the label, and that the other was included in such circular; *held*, that it sufficiently alleged that the misrepresentations charged were intended to accompany the bottles containing the drugs into the hands of the consumers. Id.

In a prosecution for violation of the act by misbranding, the Government cannot be required to elect between counts, one of which describes the article as a drug, and the other as a food or drink, where the question is in controversy. *Steinhardt Bros. & Co.* v. *United States*---------- 327

United States v. *American Chicle Co*---------- 362

See Affidavits; Appeal and Error; Constitutionality of the Food and Drugs Act; Crime, Infamous; Election; Indictment; Notice and Opportunity to be Heard; Prior Conviction.

INJUNCTION:

The Food and Drugs Act being a valid enactment of Congress, injunction will not issue to restrain United States officers from having issued, or serving, process for seizing complainant's flour under a section 10, in view of Revised Statutes, section 723, declaring that suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate, and complete remedy may be had at law. *Shawnee Milling Co.* v. *Temple, United States District Attorney et al*---------- 106

A bill in equity to restrain and enjoin the Secretary of Agriculture and other officials of the Department from prosecuting libels brought and seizures made of plaintiff's remedy in various cities, and from causing to be instituted any further such libels or seizures, until the issues involved could be determined by the court in a test case, dismissed on the ground that the bill failed to state a cause for injunctive relief. *National Remedy Co.* v. *Hyde, Secretary of Agriculture et al*---------- 1230

Reversed, *National Remedy Co.* v. *Hyde, Secretary of Agriculture, et al*---------- 1272

The action of the Department of Agriculture in causing libels to be instituted and prosecuted against plaintiff's remedy in numerous widely scattered places constituted arbitrary exercise of power and deprivation of due process of law, where under averments of plaintiff's bill, the effect thereof would be to deprive plaintiff of its property through destruction of its business before the issues involved could be determined by the court, and the facts did not show that such drastic action was necessary to protect the public prior to determination of the court; and a court of equity, under its jurisdiction to restrain by injunction multiplicity of suits under such circumstances, may so restrain the Secretary and other officials of the Department of Agriculture from such action. *National Remedy Co.* v. *Hyde, Secretary of Agriculture et al*---------- 1272

Reversing *National Remedy Co.* v. *Hyde, Secretary of Agriculture et al*---------- 1230

INJUNCTION—Continued. Page

A bill for injunction in the Supreme Court of the District of Columbia to restrain the Secretary of Agriculture from publishing, pursuant to section 4 of the act, notice of a judgment of the Police Court of the District of Columbia imposing a fine upon plaintiff after conviction of the offense of offering for sale and selling an adulterated article of food, dismissed, plaintiff's contention that the Police Court of the District of Columbia was without jurisdiction of such offense because it was not "a proper court of the United States" within the meaning of the act, section 5, providing for the prosecution for offenses under the act in the proper court of the United States, being adjudged meritless. *Huyler's* v. *Houston*---------- 507

Affirmed, *Huyler's* v. *Houston*---------- 572

Motion for a preliminary injunction to restrain officers of the Department of Agriculture from detaining shipments of dried egg yolk belonging to plaintiffs and from basing the standards of dried egg yolk, for purposes of admissibility into the United States, upon the test adopted by the Department, denied, where, in view of the contents of defendants' affidavits opposing the motion, it could not be said that the action of defendants had been arbitrary or capricious, or that complainants had shown reasonable probability of ultimate success in the suit. *Knapp et al.* v. *Callaway et al*---------- 1276

A suit to enjoin officials of the Department of Agriculture from arbitrarily seizing plaintiff's remedy as adulterated and misbranded, depriving plaintiff of due process of law, *held* not a "suit against the United States." *National Remedy Co.* v. *Hyde, Secretary of Agriculture, et al*---------- 1272

The exercise by the Secretary of the Treasury and the Secretary of Agriculture of authority vested in them by the act to determine whether imported drugs are adulterated or misbranded, requiring findings of facts and exercise of judgment, will not be reviewed by the courts in a suit for injunction, unless such authority has been capriciously or arbitrarily exercised. *Ambruster* v. *Mellon, Secretary of the Treasury, et al*---------- 1236

See Constitutionality of the Food and Drugs Act; Mandamus.

INJURIOUS TO HEALTH:

It is not necessary, in order to constitute misbranding of a food product by reason of a misleading label, that the product should be injurious to health. *United States* v. *Mohn Wine Co*---------- 316

The prohibition of misbranding of food is designed to prevent deceiving or misleading the purchasing public, even though the article sold is not injurious to health. *United States* v. *95 Barrels, More or Less, Alleged Apple Cider Vinegar*---------- 1047

The primary purpose of the act is to prevent injury to the public health, and while the test of misbranding of a food product under the act, section 8, is whether it is true to name, there should not be overstrictness in applying this test in a case where the public health cannot possibly be jeopardized. *Ninety-five Barrels, More or Less, Apple Cider Vinegar* v. *United States*---------- 1079

In the provision of the act, section 7, that no article shall be deemed adulterated "if it contains any added poisonous or other added deleterious ingredient which may render such article injurious to health", the words "injurious to health" must be considered and given their natural meaning, and the addition of an ingredient to an article of food which is poisonous in sufficient quantity does not constitute an adulteration unless the quantity used is such as may render the article injurious to health. *Lexington Mill & Elevator Co.* v. *United States*---------- 443

It is not required that the article of food containing added poisonous or other added deleterious ingredients must affect the public health, and it is not incumbent on the Government in order to make out a case to establish that fact. The act has placed upon the Government the burden of establishing, in order to secure a

INJURIOUS TO HEALTH—Continued. Page

verdict of condemnation under the statute, that the added poisonous or deleterious substance must be such as may render such article injurious to health. The word "may" is here used in its ordinary and usual signification, there being nothing to show the intention of Congress to affix to it any other meaning. In thus describing the offense Congress doubtless took into consideration that foods may be used in many ways. Food may be consumed by the strong and the weak, the old and the young, the well and the sick; and it is intended that if any food, because of any added poisonous or other deleterious ingredient, may possibly injure the health of any of these, it shall come within the ban of the statute. If it cannot by any possibility, when the facts are reasonably considered, injure the health of any consumer, such food may not be condemned under the act. *United States* v. *Lexington Mill & Elevator Co*---------- 577

United States v. *3,192 Boxes of Apples et al*---------- 1199

An article composed of shellac, containing arsenic, dissolved in alcohol, for use in coating candy, *held* adulterated under the act, section 7, declaring an article of food adulterated where it contains any added poisonous or other added deleterious ingredient which may render the article injurious to health, if the amount of arsenic was such that it would reasonably have a tendency to injure the health of a person eating candy coated with the article. *United States* v. *Weeks*---------- 528

An article of food composed of shellac, containing arsenic, dissolved in alcohol, for use in glazing candy is adulterated under the act, section 7, declaring an article of food adulterated if it contains any added poisonous or other added deleterious ingredient which may render such article injurious to health, though the amount of arsenic which could possibly be consumed by a person eating the glazed candy would be minute. The only question is, was there sufficient arsenic in the varnish to make it an article which "may be injurious to health"? *Weeks* v. *United States*---------- 650

Coloring materials for use in foods and drinks, allegedly containing an added poisonous and deleterious ingredient, to wit, arsenic, *held* not adulterated on the ground that the arsenic in the quantities present was not shown to be in fact poisonous, hurtful, or injurious to health. *United States* v. *W. B. Wood Manufacturing Co*---------- 1002

Where it was impossible to eliminate arsenic entirely from coloring material, the presence of such a small quantity that, when diluted as ordinarily used, it would take years to produce a dose of one-thirtieth of a grain, such as is ordinarily prescribed by physicians, *held* not to render the coloring material "injurious to health" within the act, section 7, subdivision 6. *W. B. Wood Manufacturing Co.* v. *United States*---------- 1070

In a prosecution charging adulteration of an article of food in that a substance has been substituted in part for such article, it is unnecessary that the Government prove that such substituted substance is deleterious or poisonous, or injurious to health. It is sufficient to constitute adulteration within the statute if any substance not a component part of the original article has been substituted. *United States* v. *Libby, McNeill & Libby*---------- 442

Under the act, section 7, declaring a food product adulterated if it consist in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, the interstate shipment of such product is prohibited whether or not its use would be injurious to health. *United States* v. *200 Cases of Adulterated Tomato Catsup*---------- 583

A. O. Andersen & Co. v. *United States*---------- 1053

United States v. *384 Cases of Canned Cherries*---------- 1176

United States v. *186 Boxes of Whole Tullibees and 116 Boxes of Dressed Tullibees*---------- 1342

In a proceeding for condemnation of a food product as adulterated within the provision of the act, section 7, declaring food adul-

INJURIOUS TO HEALTH—Continued. Page

terated if it consist in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, proof that the article would be injurious to health is not required. *United States* v. *200 Cases of Adulterated Tomato Catsup*---------- 583
A. O. Andersen & Co. v. *United States*---------- 1053

The test to determine whether food is adulterated under the act, section 7, providing that any article of food shall be deemed to be adulterated if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, is not whether the article is unwholesome or injurious to health. *Knapp et al.* v. *Callaway et al*---------- 1276

Shipment in interstate commerce of decomposed food products is prohibited under the act, without reference to the effect of the decomposition on the health of the consumer. Hence, in a libel proceeding to condemn a food product as decomposed within the meaning of the act, the Government is not required to show that it was, by reason of the decomposition, injurious to health; if the product is decomposed in the common, ordinary acceptation of the term, it comes within the inhibition of the statute, even though it would have no deleterious effect on the health of the consumer. *United States* v. *1,500 Cases of Tomato Pulp*---------- 892

Where canned cherries were adulterated within the meaning of the act in that they consisted in whole or in part of a filthy, decomposed, or putrid vegetable or animal substance by reason of the presence of decomposed and spotted cherries and of worms and larvae, *held* that evidence that the adulteration was such as to render the cherries injurious to health was unnecessary to subject them to condemnation. *United States* v. *384 Cases of Canned Cherries*---------- 1176

Oranges, frozen before shipment, which because of the freezing were undergoing decomposition and were rendered increasingly unfit for food and less wholesome, *held* adulterated and subject to condemnation under the act, though they were not harmful, if eaten. *United States* v. *462 Boxes of Oranges*---------- 816

Raw fish which, by reason of being infested with parasitic worms, come within the scope of the provision of the act, section 7, subdivision 6, that an article of food shall be deemed adulterated "if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, etc.", and are not excluded therefrom by absence of proof that their condition would impair the health of the consumer. *United States* v. *186 Boxes of Whole Tullibees and 116 Boxes of Dressed Tullibees*---------- 1342

In a proceeding to forfeit a shipment of shell peanuts as moldy or wormy, or both, and adulterated under the act, section 7, subdivision 6, declaring an article of food adulterated if it consist in whole or in part of a filthy, decomposed, or putrid vegetable substance, where it appeared that only a portion of the peanuts in the shipment were moldy or wormy, *held* that only such of the moldy or wormy peanuts were subject to forfeiture as were found as a matter of fact filthy, or as matter of fact decomposed, or as a matter of fact putrid, vegetable substance, and, if any of these three, then only if it were found that their consumption as food might tend to be injurious to health. *United States* v. *350 Bags of Shell Peanuts*---------- 685

In a proceeding against oysters as adulterated because they were filthy, the question whether or not the oysters were healthful held not involved under the statute. *United States* v. *408 Bushels of Oysters*---------- 718

Under the provision of the act, section 7, declaring an article of food adulterated if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, Congress has not limited or restricted the Government's right of condemnation and forfeiture to such article as is found to be so adulterated to an extent that renders it deleterious to health. *United States* v. *1,367 Cases of Pork and Beans*---------- 766

INJURIOUS TO HEALTH—Continued. Page

In a proceeding to forfeit canned pork and beans because the product consisted in whole or in part of a decomposed vegetable substance, *held* that whether or not the product was unfit for human food, or would be deleterious to health, if eaten, was immaterial, and the Government was not required to prove the affirmative as to either. *United States* v. *1,367 Cases of Pork and Beans* 766

Tomato catsup, if filthy or decomposed, is adulterated within the meaning of the act, whether or not it is thereby rendered injurious to health in the sense of being poisonous. *United States* v. *720 Cases of Tomato Catsup* 877

In a proceeding for condemnation of canned salmon as adulterated under the provision of the act declaring an article of food adulterated if it consist in whole or in part of a filthy, decomposed, or putrid animal substance, *held* immaterial whether or not the salmon was hurtful or harmful to health. *United States* v. *1,195 Cases of Canned Salmon* 1099

In a proceeding to condemn canned salmon on the ground that it was adulterated in that it consisted in whole or in part of a filthy, decomposed, or putrid animal substance, *held* unnecessary for the Government, in order to obtain a verdict in its favor, to show that the salmon would be injurious to the health of the individual eating it; but that the question was whether the salmon was unwholesome to such an extent that it would not satisfy the ordinary requirements of the commercial world; and if it was, then it should be condemned, but if it was not, then it should not. *United States* v. *1,600 Cases of Canned Salmon* 1105

In a proceeding against shipments of canned salmon charging adulteration under the act, section 7, subdivision 6, in that the salmon was in whole or in part decomposed, *held* that it was improper for the jury to consider any evidence tending to show that the salmon was fit for food and healthful or was unfit for food and harmful, and that it was immaterial whether the salmon was fit for food and healthful or was not; there being nothing in the statute making the state of the healthfulness or the edibleness of the article relevant to the inquiry. *United States* v. *2,205 Cases of Canned Salmon* 1133

In a prosecution charging adulteration of a medicinal drug in that the article was sold under or by a name recognized in the United States Pharmacopoeia and differed from the standard of strength, quality, and purity as determined by the test laid down in said Pharmacopoeia, *held* unnecessary for the Government to show that the adulteration complained of was deleterious and injurious to the health of the user and consumer. *United States* v. *G. F. Harvey Co* 754

A drug containing alcohol and used as an inhalant, *held* not exempt from the provision of the act requiring a declaration on the label of the alcoholic content, though the drug was harmless and not detrimental to health. *United States* v. *11 Cartons of Drug Labeled In Part "Vapex"* 1332

In a libel proceeding against an article of drugs for misbranding in that the label, etc., contained statements regarding the curative or therapeutic effect of the article which were false and fraudulent, *held* that it was unnecessary for the Government in order to prevail, to prove that the article was injurious in any respect, nor would the jury be justified in finding for the claimant on the ground that the article was harmless, such question not being in issue. *United States* v. *539 Boxes and 322 Cartons of Wm. Radan's Microbe Killer* 511

On the issue of misbranding of drugs by false and fraudulent statements regarding the curative or therapeutic effect of the article, the question whether the article would be harmful or harmless is immaterial. *United States* v. *One Gross Packages of "A Texas Wonder"* 910

United States v. *Long* 989

INJURIOUS TO HEALTH—Continued. Page

See Added Poisonous and Added Deleterious Ingredients; Adulteration; Confectionery; Dangerous to Health; Filthy, Decomposed, and Putrid; Misbranding; Object of the Act; Purpose of the Act; Unfit for Food.

INSPECTORS.

See Samples.

INTENT.

See Knowledge and Intent.

INTENT OF THE ACT.

See Object of the Act; Purpose of the Act.

INTERSTATE COMMERCE:

The act, section 2, prohibits the introduction into any State of any article of food or drugs adulterated or misbranded, and provides that any person who shall ship or deliver for shipment from any State to any other State any such adulterated or misbranded article shall be guilty of a misdemeanor. *Held* that, since the statute relates solely to interstate commerce, no jurisdiction to prosecute for violation of the act can be acquired except through the existence of interstate commerce. *United States* v. *J. L. Hopkins & Co* ---------- 401

United States v. *Gandara* ---------- 984

The act, section 10, provides, in the alternative, that any article of food adulterated or misbranded within the meaning of the act, and is being transported from one State, etc., to another for sale, or having been transported, remains unloaded, unsold, or in original unbroken packages, shall be liable to be proceeded against by libel for condemnation. The words "having been transported" contemplate a transportation in interstate commerce, and not from one point in a given State, Territory, District, or insular possession to another point in the same State, Territory, District, or possession. *United States* v. *46 Packages and Bags of Sugar* ---------- 168

Neither a sale nor the place of sale and delivery is alone the test of interstate commerce, nor does transportation, although an adjunct essential to commerce, constitute a transaction of interstate commerce. A sale, the parties to which are from different States, is a transaction of interstate commerce, wherever the contract of sale may be made, when the goods are to be transported from one State to another, whether the sale is made before or after shipment. The indispensable element and test of interstate commerce is importation into one State from another. Every negotiation, contract, initiatory and intervening act, trade, and dealing between citizens of any State, or Territory, or the District of Columbia, with those of another political division of the United States, which causes such importation, is a transaction of interstate commerce. *United States* v. *Tucker* ---------- 248

The act *held* not a police regulation, but a proper act for the regulation of interstate commerce. *Shawnee Milling Co.* v. *Temple, United States District Attorney, et al* ---------- 106

Where a drug preparation was shipped in casks by the manufacturing agent in one State to the owner of the secret formula for its manufacture in another State, to be bottled and labeled by the owner before being offered for sale, *held* that the shipment was not made in interstate commerce within the meaning of the act, and was not subject to seizure under section 10 because the casks containing the preparation were not labeled so as to show the quantity or proportion of alcohol contained therein. *United States* v. *65 Casks of Liquid Extracts* ---------- 47

Affirmed, *United States* v. *Knowlton Danderine Co* ---------- 89

Where defendant shipped adulterated tomato paste from its place of business in one State to itself at its other place of business in another State, for the purpose of having it tested with a view to export, *held* such shipment was in interstate commerce and constituted an offense against the act. *Philadelphia Pickling Co.* v. *United States* ---------- 451

INTERSTATE COMMERCE—Continued. Page

The fact that frozen eggs proceeded against had been shipped from one State to another, consigned by the shipper to itself, did not indicate that they had not been transported in interstate commerce. *United States* v. *300 Cans of Frozen Eggs*---------- 283

A manufacturer who sells and delivers an adulterated article of food to a wholesaler with knowledge that the latter is engaged in interstate commerce, and upon the terms of a guaranty against adulteration, deliberately places the article in interstate commerce channels, and is within the Food and Drugs Act punishing the sale and delivery in interstate commerce of adulterated food. *Glaser, Kohn & Co.* v. *United States*---------- 651

It is settled by decisions of the Supreme Court that the negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce. *Weeks* v. *United States*---------- 867

The sending or shipping of articles of drugs by mail from a point in one State to a point in another State constitutes an interstate shipment within the act, and, where such articles are misbranded, an offense against the act. *United States* v. *Tucker*---------- 248

United States v. *Gandara*---------- 984

Where defendant in Ohio sent a misbranded medicine by mail to a person in the District of Columbia, *held* the transaction was in interstate commerce and constituted an offense against the act, and the fact that the negotiations had been conducted by mail and that the medicine was deposited in the mail in Ohio did not make the transaction an intrastate one. *United States* v. *Tucker*------ 248

The State has power to make regulations for the protection of its people against fraud or imposition by impure food or drugs, but the State may not, under guise of exercising its police power or otherwise, impose burdens upon or discriminate against interstate commerce, nor may enact legislation in conflict with the statutes of Congress passed for the regulation of the subject, and if it does, to the extent that the State law interferes with or frustrates the operation of the acts of Congress, its provisions must yield to the superior Federal power given to Congress by the Constitution. *McDermott et al.* v. *State of Wisconsin*---------- 473

The doctrine of original packages was not intended to limit the right of Congress, when it chose to assert it, as it has done in the Food and Drugs Act, to keep the channels of interstate commerce free from the carriage of injurious or fraudulently branded articles and to choose appropriate means to that end. The legislative means provided in the Federal law for its own enforcement may not be thwarted by State legislation having a direct effect to impair the effectual exercise of such means. Id.

Congress had the power to enact the provisions of the act, section 10, under which adulterated articles of food, transported in interstate commerce, may be confiscated by a proceeding in rem in the Federal courts after they have reached their destination and there remain in the hands of the consignee in the original unbroken packages. *Hipolite Egg Co. v. United States*---------- 223

The Sherley amendment of August 23, 1912, to section 8 of the Food and Drugs Act, under which misbranding includes false and fraudulent statements regarding the curative or therapeutic effects of drugs, is within the power of Congress to regulate interstate and foreign commerce; and such regulation of interstate commerce is within the power of Congress whether the statement be contained in the original package or on the containers of the article. *Seven cases of Eckman's Alterative* v. *United States*---------- 707

A State cannot, under cover of exerting its police power, directly regulate or burden interstate commerce, and no State statute which even affects incidentally interstate commerce is valid if repugnant to the Food and Drugs Act; but a police regulation of a State which has real relation to the proper protection of the people of the State, and is reasonable in its terms, and does not

INTERSTATE COMMERCE—Continued. Page

conflict with any valid act of Congress, is not unconstitutional because it may incidentally affect interstate commerce. *Savage* v. *Jones*---------- 376

See Constitutionality of the Food and Drugs Act; Constitutionality of State Laws; Jurisdiction; Original Unbroken Package; Physicians' Prescriptions; Police Regulation; Sale; Shipment.

INVESTIGATION:

The word "investigation" used in section 7 of the act, providing that a drug shall be deemed to be adulterated if, when sold under a name recognized in the United States Pharmacopoeia, it differs from the standard of strength, quality, or purity as determined by the test laid down in said pharmacopoeia official at the time of *investigation*, is not necessarily identical with the word "examination" used in section 4. Investigation is much the wider word; it includes not only an examination into the nature of the article shipped, but into all the circumstances of the shipment. The examination of the article itself is but a part of the investigation which must necessarily be held, to ascertain the matters necessary to the formulation and proof of an information or indictment. *United States* v. *Lehn & Fink*---------- 229

The function and duty of officials of the Department of Agriculture, under section 4 of the act, are those of investigation. The findings and conclusions with respect to adulteration and misbranding are merely tentative and not binding. They are not a regulation or an order, but merely the assertion of an opinion that the law has been violated and that proceedings in the name of the United States as directed by statute should be instituted. *United States* v. *Morgan*- 335

National Remedy Co. v. *Hyde, Secretary of Agriculture, et al*---- 1272

The investigation by the Department of Agriculture, including notice and opportunity to be heard, provided for in section 4 of the act, is a necessary condition precedent to the institution of condemnation proceedings under section 10, where they are based on a report of the Secretary of Agriculture. *United States* v. *74 Cases of Grape Juice*---------- 144

United States v. *74 Cases (Or 20 Cases) of Grape Juice*---------- 256

United States v. *Certain Cans of Syrup*---------- 328

The investigation provided for in section 4 of the act refers to cases in which there is to be a prosecution under section 5 for the enforcement of penalties prescribed by section 2, and not to cases where forfeiture proceedings are contemplated for condemnation, as authorized by section 10; so that it was no objection to forfeiture proceedings that no prior proceedings had been instituted by the Secretary of Agriculture under section 4. *United States* v. *100 Barrels of Vinegar*---------- 287

An indictment for misbranding an article under the act was not invalid for failure to allege a preliminary investigation by an officer of the Department of Agriculture, notice to defendants of their violation of the act, or that defendants were afforded an opportunity to present evidence and be heard. *Schraubstadter et al* v. *United States*---------- 398

See Analysis; Examination; Notice and Opportunity to be Heard; Pharmacopoeia, United States; Samples.

JUDICIAL NOTICE:

The court may take judicial notice of the fact that food syrup is a saccharine solution of a superior quality, frequently called molasses, and that it may be made of any of the various sugars of commerce, such as cane, beet, or maple sugar. *United States* v. *68 Cases of Syrup*---------- 62

Judicial notice will be taken of the fact that good, sound wheat of the best variety, properly and timely harvested, put through the sweat in the stack, well ground and bolted, makes nutritious, wholesome, and white flour. *Shawnee Milling Co.* v. *Temple et al*-- 106

JUDICIAL NOTICE—Continued. Page

Judicial notice will be taken of the fact that screening or sifting is one of the processes of catsup making. *United States* v. *650 Cases of Tomato Catsup* 31

Judicial notice may be taken of the fact that cider vinegar is far superior to distilled vinegar. *United States* v. *10 Barrels of Vinegar* 254

The court may take judicial notice that standard lexicographers define the words "salad oil" as "olive oil." *Von Bremen et al.* v. *United States* 338

The court may take judicial notice of the nature of the substances declared to be adulterants by section 7 of the act, in case of confectionery. *United States* v. *French Silver Dragée Co* 43

It is a matter of common knowledge that in the fine wheat flour of commerce much of the nutritive property of the grain is absent, which remains in whole wheat flour. *United States* v. *Krumm* 993

It is a matter of common knowledge that water in milk reduces and lowers its strength. *United States* v. *Griebler* 29

Union Dairy Co. v. *United States* 869

The court takes judicial notice of the fact that the raising of citrus fruits is one of the great industries of the State of Florida. *Sligh* v. *Kirkwood* 634

It is common knowledge that generally the wild oat plant is regarded as a weed, in the sense that it is highly undesirable vegetation, and that the seed of the wild oat is not a food. *United States* v. *154 Sacks of Oats* 1039

It is not a matter of common knowledge of which the court may take judicial notice without proof, that a chemical derivative, as acephenetidin, necessarily contains, or is of the same nature as, the substance whence it may be derived, as acetanilid. *United States* v. *Antikamnia Chemical Co* 260

It is a matter of common knowledge that proprietary medicines in bottles are usually sold to the consumer in cartons, and that the latter usually contain circulars or other advertising matter. *Simpson* v. *United States* 832

Where a court is required to take judicial notice of the meaning of a term as a matter of law, it may resort to any authoritative sources of information to enlighten its judgment. *United States* v. *One Carload of Corno Horse and Mule Feed* 274

JURISDICTION:

Under section 2 of the act no jurisdiction to prosecute for violation thereof can be acquired except through the existence of interstate commerce. *United States* v. *J. L. Hopkins & Co* 401

Under section 2 of the act the gist of the offense is shipping or delivering for shipment of adulterated or misbranded food or drugs, to be introduced into another State by interstate commerce, and, hence, jurisdiction exists in the Federal court of the district from which the goods were shipped, though the defendant did not reside in that district. Id.

The provision of section 10 of the act, for the seizure of adulterated or misbranded food or drugs within any district where they may be found, relates only to civil proceedings against the goods, and does not determine the jurisdiction of a criminal prosecution. Id.

The Police Court of the District of Columbia is a "proper court of the United States", within the meaning of the act, section 5, which requires United States attorneys to whom violations of the act are reported "to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States" for the enforcement of the penalties provided by the act; and said court has statutory jurisdiction of first offenses under the act. *Huyler's* v. *Houston* 507

Affirmed, *Huyler's* v. *Houston* 572

The provision of section 10 of the act that proceedings in cases to forfeit adulterated or misbranded food or drugs shall conform as

JURISDICTION—Continued. Page

near as may be to proceedings in admiralty, does not render such proceedings within the admiralty or maritime jurisdiction; the jurisdiction in such cases is conferred by the act itself. *United States* v. *Two Barrels of Desiccated Eggs*---- 232

The act does not confer admiralty jurisdiction upon the district courts in proceedings to condemn property under the act. The provision of section 10 that a libel shall be filed and the proceedings shall conform as near as may be to proceedings in admiralty, relates only to procedure and not to jurisdiction. *Goodwin et al.* v. *United States*---- 1130

Under Revised Statutes, section 563, subdivision 8, giving United States district courts jurisdiction of all civil cases in admiralty or maritime jurisdiction, the court, in seizures under section 10 of the Food and Drugs Act, and on land, proceeds as a court of common law jurisdiction on a trial by jury. *United States* v. *George Spraul & Co*---- 217

Certain cans of adulterated preserved whole eggs, shipped from one State to another but not for sale, and, when seized, stored on the premises of the owner, and in the original unbroken packages in which they were shipped, and not intended for sale but for use by the owner in its bakery business, *held* to be subject to the jurisdiction of the court in a proceeding in rem under section 10 of the act. *United States* v. *50 Cans of Preserved Whole Eggs*---- 74

Affirmed, *Hipolite Egg Co.* v. *United States*---- 223

Under the act adulterated articles are, while in interstate commerce, made culpable as well as their shipper; while in the original unbroken packages, they can be seized and they carry their own identification as contraband of law; they are subject to the power of Congress to regulate interstate commerce, and they are not beyond the jurisdiction of the National Government because within the borders of a State. *Hipolite Egg Co.* v. *United States*---- 223

Under section 10 of the act providing for seizure and forfeiture of adulterated food shipped from one State to another for sale, or, having been so transported, remains unsold, in the original unbroken packages, etc., the jurisdiction of the Federal Government over interstate commerce of adulterated food continues while the food remains in the original unbroken packages at the point of destination. *United States* v. *Two Barrels of Desiccated Eggs*---- 232

Congress having, in the act, made adulterated or misbranded articles of food or drugs contraband of interstate commerce, in section 10 has provided not only for the seizure of such articles while being actually transported in interstate commerce, but also for such seizure after such transportation and while such articles remain "unloaded, unsold, or in original unbroken packages", and the provisions of section 10 are clearly within the power of Congress under its authority to make effectual regulations to keep impure or misbranded articles out of the channels of interstate commerce, and are measures essential to the accomplishment of the purpose of the act. Hence, it is enough to give the Federal Government jurisdiction over adulterated or misbranded articles of food or drugs which have been transported in interstate commerce, if they remain unsold, whether in the original unbroken packages or not. *McDermott et al.* v. *State of Wisconsin*---- 473

In a proceeding in rem under section 10 of the act the court has jurisdiction to enter personal judgment for the costs against the claimant, and stipulation by the owner intervening is unnecessary to give the court such jurisdiction. *United States* v. *50 Cans of Preserved Whole Eggs*---- 74

Affirmed, *Hipolite Egg Co.* v. *United States*---- 223

The provision in section 10 of the act that proceedings for seizure of goods shall be by libel and conform as near as may be to proceedings in admiralty, does not include appellate proceedings; the action of the district court on the libel can be reviewed only as at common law, by writ of error and not by appeal; and the circuit courts of appeals have no jurisdiction upon an appeal in such cases,

JURISDICTION—Continued. Page

and neither the action of the court nor the consent of the parties could give such jurisdiction. *443 Cans of Frozen Egg Product* v. *United States* 416
United States v. *779 Cases of Molasses* 65
United States v. *Hudson Manufacturing Co. et al* 420
Hudson Manufacturing Co. v. *United States* 344
Goode v. *United States* 698

Where the validity of a regulation made by the three Secretaries to whom power to make regulations is delegated by section 3 of the act, is denied, an authority exercised under the United States is drawn in question, and not merely the construction of a statute, and the Supreme Court has jurisdiction to review the judgment of the Court of Appeals of the District of Columbia. *United States* v. *Antikamnia Chemical Co* 552

In proceedings for condemnation and forfeiture under section 10 of the act, seizure of the goods proceeded against is jurisdictional and must precede filing of the libel. *United States* v. *8 Packages and Casks of Drugs* 149

Prior executive seizure of goods proceeded against under section 10 of the act is unnecessary to confer jurisdiction to condemn and forfeit the same. *United States* v. *Two Barrels of Desiccated Eggs* 232
United States v. *George Spraul & Co* 217
United States v. *100 Barrels of Vinegar* 287

See Admiralty Proceedings; Appeal and Error; Certification of Violations; Costs; Examination; Interstate Commerce; Investigation; Libel; Notice and Opportunity to be Heard; Original Unbroken Packages; Police Court, District of Columbia; Seizure.

JURY TRIALS:

The right to trial by jury granted by section 10 of the act, on demand of either party, is absolute, and means a trial by jury according to the established practice in courts of common law. *United States* v. *779 Cases of Molasses* 65

Under the Constitution of the United States, article 3, section 2, which provides that trial of all crimes, except impeachment, shall be by jury, if an offense amounting to a crime should not be tried by jury, the judgment would be a nullity and would require reversal. The trial of a "petty offense" under waiver of jury would amount to an arbitration as to questions of fact involved, and the court's conclusions of fact could not be reviewed. *Frank et al.* v. *United States* 329

See Appeal and Error; Petty Offense.

JUSTICES OF THE PEACE.

See Affidavits.

KAR-KOL:

A medicinal preparation labeled "Kar-Kol" *held* misbranded in that the label bore statements regarding the curative or therapeutic effect of the article which were false and fraudulent. *United States* v. *Kar-Ru Chemical Co* 900
Affirmed, *Kar-Ru Chemical Co.* v. *United States* 970

KAR-NITUM:

A medicinal preparation labeled "Kar-Nitum" *held* misbranded in that the label bore statements regarding the curative or therapeutic effect of the article which were false and fraudulent. *United States* v. *Kar-Ru Chemical Co* 900
Affirmed, *Kar-Ru Chemical Co.* v. *United States* 970

KAR-RU:

A medicinal preparation labeled "Kar-Ru" *held* misbranded in that the label bore statements regarding the curative or therapeutic effect of the article which were false and fraudulent. *United States* v. *Kar-Ru Chemical Co* 900
Affirmed, *Kar-Ru Chemical Co.* v. *United States* 970

KELLETT'S OIL OF EDEN NO. 1:

Page

A medicinal preparation labeled "Dr. J. L. Kellett's Oil of Eden No. 1" *held* misbranded in that the labels, the packages, and circulars in the packages contained statements regarding the curative or therapeutic effect of the article which were false and fraudulent. *United States* v. *Kellett*---------- 711

KELLETT'S SWEET SPIRITS OF EDEN:

A medicinal preparation labeled "Dr. J. L. Kellett's Sweet Spirits of Eden" *held* misbranded in that a statement, on the labels, of the proportion of alcohol in the article, was false and misleading; and in that the labels, the packages, and circulars in the packages, contained statements regarding the curative or therapeutic effect of the article which were false and fraudulent. *United States* v. *Kellett*---------- 711

KNOWLEDGE AND INTENT:

The act nowhere requires proof of intention by the use of the words "knowingly", "willfully", or such like words. It would be destructive of the act, nullify it entirely, to allow the intent of the person violating it to be considered as a defense. *United States* v. *36 Bottles of London Dry Gin*---------- 570
United States v. *Koshland*---------- 777

In a prosecution charging misbranding of an article of food as labeled so as to deceive or mislead the purchaser, *held* that the question of the actual intention of defendant to deceive was immaterial, and that the sole question was whether the label, taken as a whole, was reasonably calculated to deceive or mislead the average purchaser of the article. *United States* v. *Johnson et al*-- 847

In a prosecution charging misbranding of an article of food, *held* that the question of defendant's intent or purpose in misbranding the article, if misbranded, was immaterial; the sole question was whether the article was misbranded as charged. *United States* v. *Scaduto*---------- 947

In determining whether an article of food is misbranded by alleged false or deceptive label, the question of what the seller intended is immaterial; the question is, what would be the effect of the label on the minds of purchasers—would they be deceived and misled into thinking they were getting something they did not get. *United States* v. *37 One-Pound Packages of Colors*---------- 1165

In a prosecution charging defendant with shipping milk adulterated because it contained water, it is unnecessary to prove that defendant actually put the water in the milk himself, or that he knew that there was water in the milk. Under the act, which is for the protection of the consuming public, a person who undertakes to ship food products must be held to know what it is he puts into commerce and must know at his own peril what it contains. *United States* v. *Griebler*---------- 29

On a charge that an article shipped by defendant in interstate commerce as oil of birch was adulterated and misbranded by reason of containing methyl salicylate, *held* that the jury, in order to convict, must find that defendant knew or had reason to know that the article so shipped contained methyl salicylate and was adulterated or misbranded, as alleged. *United States* v. *Bowers*-- 763

In a prosecution charging defendants with shipping milk allegedly adulterated in that water had been mixed therewith and substituted in part therefor, *held* requisite to conviction that it be shown that defendants intentionally added and mixed water with the milk or that it was done with their knowledge or consent. *United States* v. *Tetz et al*---------- 917

In a prosecution charging defendant with shipping an article of food allegedly misbranded because the quantity of the contents of the package was less than that represented on the label, *held* that the jury, in order to convict, must find that defendant intended to misbrand or misstate the true quantity of the contents of the package. *United States* v. *Italian Importing Co*---------- 922

KNOWLEDGE AND INTENT—Continued. Page

In a prosecution of an information charging defendant with shipping an article contained in a barrel bearing the label "Vanilla Extract", and alleging adulteration and misbranding because the article was not vanilla extract as described on the label, but was a substance containing coumarin, commercial glucose, and caramel, *held* that the jury, in order to convict, must find that defendant authorized or countenanced the putting of the label containing the alleged misbrand on the barrel containing the article, knowing that it was to be so misbranded. *United States* v. *Weeks*_ 528

In a prosecution charging defendants with shipping olive oil alleged to be adulterated by reason of mixture therewith of cottonseed oil, *held* esential to a conviction that the jury find that defendants either so adulterated the article themselves or knew or had good reason to believe it was so adulterated at the time of shipment. *United States* v. *Marmarelli et al*_____ 1122

On an information charging defendant with shipping butter allegedly misbranded because the weight of the contents of the package was misstated on the label, *held* that if the jury find that the butter when it left defendant's place of business was full weight, and that the shortage, if any, was due to the physical condition of the butter and beyond defendant's control, they must acquit. *United States* v. *Monotti-Larimer*_____ 1144

In a prosecution under the act for the giving of a false guaranty the criminal intent essential to the commission of the offense existed at the time the defendant gave the certificate specifying that it was under the act of June 30, 1906, and such a certificate could only be given for the purpose of evading the act of Congress or of fraudulently securing its benefit. *United States* v. *Charles L. Heinle Specialty Co*_____ 82

Proof of the absence of knowledge on the dealer's part that an article is obnoxious to some of the provisions of the act is a defense only when the article is purchased from a manufacturer and a guaranty is taken from the manufacturer that it complies with the requirements of the act. *United States* v. *Mayfield et al*_____ 90

In a prosecution against the manufacturer of an allegedly adulterated article of food delivered by defendant under a guaranty to a dealer who shipped it in interstate commerce, *held*, that the question of defendant's intent or knowledge was not involved, and that it was unnecessary that the Government show that defendant intentionally adulterated the article, or that defendant knew at the time it delivered the article to the dealer that the article was adulterated, and that the only question was whether the article was adulterated at the time of such delivery. *United States* v. *Glaser, Kohn & Co*_____ 601

In a libel proceeding to forfeit certain gin, charging misbranding under the provision of the act, section 8, that the term "misbranded" shall apply to any food product which is falsely branded as to the country where it is produced, *held* that the charge would be sufficiently sustained by evidence showing that the label did not tell the truth as to the country where the gin was produced, and that it was immaterial whether the failure to tell the truth was the result of design or was merely unintentional or accidental, since Congress by the act has chosen to punish failure to tell the truth in such respect. *United States* v. *36 Bottles of London Dry Gin*____ 489

In a libel proceeding to forfeit certain gin charging misbranding in that the label was calculated to deceive and mislead the purchaser of the article into believing that it was a foreign product when it was not, *held* that the jury in order to find in favor of the Government on the charge, must find that the maker of the gin in using the label intended to deceive or mislead the purchaser by representing the gin to be a foreign product when it was not. Id.

In a proceeding against certain "London Dry Gin" for misbranding in that the gin was not made in London, the jury having found that such name had reference to a distinct kind of gin, which

KNOWLEDGE AND INTENT—Continued. Page

need not necessarily be made in London, and that in using the label the maker did not intend to deceive or mislead the purchaser by representing that the gin was a foreign product, the Government was not entitled to a judgment of condemnation. Id.

Judgment reversed, *United States* v. *36 Bottles of London Dry Gin*---------- 570

In a proceeding for condemnation of alleged misbranded gin under the act, section 8, providing that an article shall be deemed misbranded if it be labeled or branded so as to deceive or mislead the purchaser or purport to be a foreign product when it is not so, the intent of the maker not to deceive is immaterial, the gist of the offense being whether the label deceives or is calculated to mislead and deceive the purchaser. *United States* v. *36 Bottles of London Dry Gin*---------- 570

Reversing judgment in *United States* v. *36 Bottles of London Dry Gin*---------- 489

The intent follows from the act. The true construction of the Food and Drugs Act is that the dealer or manufacturer sells a commodity at his peril and he is bound to understand the ingredients of the products. *United States* v. *Hobart et al*---------- 171

The act does not expressly provide that shippers or dealers must knowingly or wilfully violate its provisions, but if a false label was placed on an article inadvertently or by a mistake by an employee, the defendant should not be held guilty of misbranding. *United States* v. *S. Gumpert et al*---------- 182

The question whether or not the defendant in a case prosecuted under section 2 of the act, intended to violate the law does not enter into the case. The question is, was the law violated? *United States* v. *Gidden*---------- 360

United States v. *J. L. Hopkins & Co*---------- 366

United States v. *Koshland*---------- 777

United States v. *Taylor*---------- 839

An article of food or drugs which is adulterated or misbranded is an offending thing which threatens the health of the citizen, and is therefore subject to seizure and forfeiture without regard to the acts or knowledge of the owners or claimants. *United States* v. *Five Boxes of Asafoetida*---------- 160

United States v. *Nine Boxes of Asafoetida*---------- 165

In determining whether an article of food is labeled or branded so as to deceive or mislead the purchaser, the question of intent does not enter into the case. *United States* v. *58 Sacks and 70 Sacks Corn Meal*---------- 322

United States v. *Johnson et al*---------- 847

In a prosecution charging defendant sold and shipped wheat as "No. 2 Red wheat" alleged to be adulterated and misbranded because it was a mixture containing hard wheat of inferior quality, *held* that it was no defense that defendant did not know that such wheat was being shipped, and that it had no intention of shipping wheat of any other quality or variety than No. 2 Red wheat. *United States* v. *Hall-Baker Grain Co*---------- 291

Reversed, *Hall-Baker Grain Co.* v. *United States*---------- 391

The H. Co., Kansas City, Mo., contracted to sell to the W. Co., Fort Worth, Tex., a quantity of No. 2 Red wheat, according to Missouri officials State standards, and ordered the operator of a public elevator where it stored its grain to ship to the W. Co. in fulfillment of this contract. The operator shipped wheat which was inspected by an official inspector of the State of Missouri and adjudged and certified to be No. 2 Red wheat. On arrival of the wheat in Texas, a Texas inspector, a Federal inspector, and other witnesses found it to be, and it was, wheat of another and less valuable grade. None of the officers or employees of the H. Co. had any knowledge of this fact, or anything to do with the grading or shipping except to order the operator of the public elevator to ship No. 2 Red wheat. *Held*, the H. Co. was not guilty of misbranding or of adulteration within the meaning of sections 7 and 8 of the act. *Hall-Baker Grain Co.* v. *United States*---------- 391

Reversing *United States* v. *Hall-Baker Grain Co*---------- 291

KNOWLEDGE AND INTENT—Continued. Page

In a prosecution charging misbranding of a drug by a false and misleading statement of the quantity of chloroform contained therein, *held* immaterial whether or not defendant intended the false or misleading statement, since, under the act, one who makes such a statement on the label of his article sent out to the public is bound to know whether it is true or not. *United States* v. *Piso Co*_____ 319

The object of the act is to enable the consumer to know what it is in the way of food or drugs that he is putting into his stomach, and to punish anybody who, whether by willful design or carelessness or inadvertence—it makes no difference which—puts forth for human consumption as food or drug that which is not what it pretends to be. *United States* v. *Lehn & Fink*_____ 411

Since a person is presumed to intend the natural and probable consequences of his acts, one using a deceptive or misleading label on an article of food may be convicted of misbranding, even though he had no actual intent to deceive or to mislead. *United States* v. *McConnon & Co*_____ 496

The purpose of the act, section 8, providing that an article of food shall be deemed misbranded if it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so, is to protect the public from deception, and the intent of one charged with misbranding is immaterial. *United States* v. *267 Boxes of Macaroni*_____ 630

In a prosecution under the act for shipping adulterated or misbranded articles of food or drugs, it is not necessary to conviction to prove the knowledge of the defendant that the article shipped was adulterated or misbranded. *United States* v. *Excelsior Baking Co*____ 501

Where decomposed canned eggs, which had not been denatured and therefore could have been used either for food or tanning purposes, were shipped in interstate commerce from one warehouse of the owner to another, they were "an adulterated article of food" within the definition and meaning of the act, and it was no defense to a proceeding to condemn them that the owner intended that they should be used only for tanning purposes. *United States* v. *13 Crates of Frozen Eggs*_____ 531

Decayed frozen eggs taken from the shell and mixed together are within the prohibition of the act, section 2, which prohibits the transportation from one State to another of any adulterated article of food, and the intent of either the shipper or the consignee is immaterial. The act could not be enforced if the Government is compelled, in the case of articles clearly prohibited from interstate commerce, to establish the wrongful intent of the parties. It is enough that such articles are prohibited. All that was necessary for the Government to show was that an adulterated article of food had been transported in interstate commerce. *United States* v. *13 Crates of Frozen Eggs*_____ 605

Defendant shipped an adulterated article of food from its place of business to itself at its other place of business in another State, for the purpose of having it there examined and tested with a view to its export to England if it conformed to the English standard, which would have been lawful under the proviso of the act, section 2. It failed to meet the test and was destroyed, not being used nor sold. *Held*, that the shipment was in interstate commerce, and constituted an offense under said section of the act. *Philadelphia Pickling Co.* v. *United States*_____ 451

Affirming *United States* v. *Philadelphia Pickling Co*_____ 414

Since intent is not an element of offense against the act, a seller of an article of food so represented by his agent to the buyer as to be misbranded, is liable for misbranding, although he told him not to misdescribe the article. *Weeks* v. *United States*_____ 646

On trial of an information charging defendant with shipping an article of food labeled "Grain Alcohol Varnish" adulterated in that it contained an added poisonous and deleterious ingredient, to wit, arsenic, which might render said article injurious to health, *held* that guilty intent was not part of the offense charged and it

KNOWLEDGE AND INTENT—Continued. Page

was unnecessary to prove that defendant knew the nature of the product shipped. The statute makes the acts that are defined to be penal in themselves criminal. Whether or not defendant intended to ship the adulterated article as alleged is immaterial. The question is: Did he do so? *United States* v. *Weeks*_____ 528

A seller of an article of food labeled "Grain Alcohol Varnish", composed of shellac, containing arsenic, dissolved in alcohol, for use for glazing candy, with knowledge of the use, may be convicted of violating the act, section 7, declaring that an article of food is adulterated if it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health, though all shellac imported into the United States contains the added arsenic, and though the seller supposed that the amount of arsenic consumed with the varnished candy would be too minute to injure anyone. *Weeks* v. *United States*_____ 650

The manufacturer of drug products who compounds them and puts them on the market in interstate commerce is bound at his or its peril to see to it that they are up to the standard fixed by law not only when made and shipped, but are so compounded and put up for sale that they will be of the required standard when shipped in interstate commerce for sale to the consumer or user. *United States* v. *G. F. Harvey Co*_____ 754

On an information charging defendant with shipping in interstate commerce a drug product which was adulterated and misbranded because it fell below the standard required under the act, *held* that no question of intent was involved in the case, nor any question, necessarily of evil mind or purpose; and that the question was not whether or not defendant *intended* to comply with the law, but whether it *did* comply with the law; and that it was no defense to the charge in the information that defendant intended to bring the drug product up to the required standard, and supposed and honestly believed it had done so, when it made the shipment complained of. Id.

In a prosecution charging defendant with shipping apples which were adulterated and misbranded, *held* that the question of the intent of defendant or his motive with respect to the labels or brands placed upon the packages, was immaterial; and that the question was: Were the apples adulterated and were they misbranded within the meaning of the act? *United States* v. *Wedell*_____ 771

In a prosecution for shipping an adulterated or misbranded article of food or drugs it is unnecessary to prove that the defendant had knowledge that the article shipped by him was obnoxious to some provision of the act. He is charged with knowledge of the condition of the article. *United States* v. *Koshland*_____ 777

The purpose of the act being to protect the public in the purchase of articles of food, and to prevent deceit, in a prosecution of a manufacturer for shipping a misbranded article of food, the question of what was the intention or purpose of the defendant is immaterial. Whatever was defendant's intention or purpose, and though he was absolutely innocent of any intention to defraud or deceive, yet, if the article differs in composition from that represented on the label, defendant is guilty. *United States* v. *Joslin-Schmidt Co*_____ 881

The statute denounces the act of shipping in interstate commerce an adulterated or misbranded article of food. It does not make the intent with which the act is done an ingredient of the offense. It places upon the person committing the act the necessity of knowing that he is not violating the statute. It is, therefore, no defense, in a prosecution for shipping an adulterated and misbranded article of food, that defendant did not know the article was adulterated or misbranded. *United States* v. *Alban*_____ 1014

The act does not require a specific criminal intent upon the part of the defendant to be shown in order to convict in a prosecution charging him with shipping an adulterated or misbranded food product. It is sufficient to show that defendant knowingly did

KNOWLEDGE AND INTENT—Continued. Page

or committed the prohibited act. The question, therefore, is, did defendant ship the goods knowing that they were adulterated and misbranded? *United States* v. *Paraskevopolus*---------- 925

In a prosecution charging adulteration and misbranding of certain coloring substances for use in food preparations, *held* that it was not required to show that defendant consciously or wilfully adulterated or misbranded the articles. *United States* v. *W. B. Wood Manufacturing Co*---------- 1002

The act requires that a dealer furnishing food products to the public must know what they contain; he cannot hide behind ignorance; he cannot say that he did not know the product was adulterated.

In a prosecution charging sale by defendant of oysters alleged to be adulterated because they contained an excessive quantity of water, *held* that it was immaterial whether water was added by defendant or whether it was added with defendant's knowledge; and that it was sufficient to constitute an offense against the act if the oysters contained added water and if defendant sold them in that condition. *United States* v. *Golden & Co*---------- 1033

In a prosecution for misbranding a food product it is immaterial whether the false or misleading statement was placed on the label consciously or unconsciously; it is sufficient to constitute misbranding if such statement was there. *United States* v. *Sherer-Gillett Co*---------- 1093

In a prosecution charging defendant with shipping eggs which were alleged to be adulterated because they were decomposed, *held* that it was unnecessary to a conviction to show that defendant knew that the eggs were decomposed; and that under the act he was supposed to know and was held to know whether or not the eggs were adulterated. *United States* v. *Blazek*---------- 1074

Canned salmon held to be subject to forfeiture as adulterated within the meaning of the act if it is decomposed so as to be unfit for human food, regardless of how such adulteration was caused or came about and whether or not care was exercised in packing the salmon to prevent the adulteration. *United States* v. *1,974 Cases of Canned Salmon*---------- 1108

A shipment of canned salmon *held* not to be subject to condemnation as adulterated in that it consisted in whole or in part of decomposed or putrid animal substance unless it be shown that a percentage of adulteration existed throughout the shipment, and that a greater percentage existed than was inevitable in canning when ordinary and proper care is exercised. *United States* v. *243 Cases of Canned Salmon*---------- 1131

On a charge that defendant made shipments of butter which was misbranded because the weight of the contents of the packages was less than that stated on the label, there must be proof of an intent on the part of defendant to violate the law. An intent implies knowledge of the violation, but such intent need not be proved separately and apart from the other facts, necessarily, because intent is a state of mind and the intent of a party may be proved by his acts and conduct under any particular set of facts and circumstances, and everybody is presumed to intend the reasonable and probable consequences that may reasonably be anticipated and follow from his acts. Hence, if it is shown that defendant knew or should have known that the contents of the packages were short in weight, and that such shortage was the rule and not the exception in the shipments, the presumption is justified that he intended the shortage. No amount of care exercised or precautions taken will excuse the defendant, if it is shown that, after making allowances for honest or occasional mistakes and variations and tolerances permitted by the act and the regulations made pursuant thereto, the butter was under weight when shipped. Anyone engaged in the business of shipping butter in interstate commerce is conclusively presumed to know what the law is and must substantially comply with it at his peril. *United States* v. *Trinidad Creamery Co*---------- 1152

KNOWLEDGE AND INTENT—Continued.

Page

Where a food product is sold under a false or misleading label, the intention of the seller is immaterial. The question is, what would be the effect on the mind of persons purchasing the article—would they be deceived or misled into thinking they were getting something that it was not? *United States* v. *37 One-Pound Packages of Colors*---- 1165

It is no defense to a charge of shipping adulterated eggs that defendant made reasonable, proper, and careful inspection of the eggs before shipment to determine whether or not they were adulterated, and that he had no knowledge of their adulteration. Under the act the defendant is responsible regardless of what he may have done to ascertain whether or not the eggs were adulterated. *United States* v. *Smith*---- 1173

Whether or not an adulterated food product should be condemned is not dependent on the degree of care the manufacturer exercised in producing it. Canned cherries shipped in interstate commerce, containing worms and decomposed cherries, are subject to condemnation even though the manufacturer was unable to procure cherries free from worms or decomposition. *United States* v. *384 Cases of Canned Cherries*---- 1176

It is no defense in a prosecution charging adulteration and misbranding of an article of food, that defendant did not intend the article to be adulterated or misbranded. *United States* v. *Germack*- 1178

An article of food, such as apples or pears, which contains an added poison which might injure the health of the consumer, if shipped in interstate commerce, is adulterated and subject to forfeiture under the act, regardless of whether the shipper knew or did not know that the article containing the added poison might injure the health of the consumer. *United States* v. *3,192 Boxes of Apples et al*---- 1199

In prosecutions under the act for adulterating or misbranding of food products shipped in interstate commerce the knowledge or intent of the shipper is not an element of the offense. If a food product was adulterated or misbranded within the meaning of the act, and was shipped in interstate commerce by the defendant, it is immaterial whether defendant had knowledge that the article was adulterated or misbranded. *United States* v. *Morehouse*---- 1210

Defendant shipping canned salmon from its cannery in Alaska to Seattle, Wash., with the purpose of there labeling and finally shipping or delivering it in trade, would, if the product contained filthy, decomposed, or putrid animal substance as alleged, be guilty of violating the act, regardless of intent with relation to such condition of the product; but if, in fact, as contended by defendant, it so shipped such canned salmon for testing and approval by agents of the Department of Agriculture as to its fitness for human food before being further shipped or delivered to the trade for that purpose, and both advised such Department agents of such intent before the shipment and of the arrival of the shipment at Seattle for such testing, then defendant should not be deemed guilty of violating the act. *United States* v. *Gorman & Co*---- 1171

In a suit on a bond given by defendants for delivery of adulterated sardines forfeited in a proceeding under section 10 of the act, and conditioned that the sardines should not be sold before they had been inspected and the good segregated from the bad, it was no defense that such condition had been violated through misunderstanding on the part of defendants and in the belief that the sardines when delivered to them had been inspected. Whether defendants acted mistakenly or intentionally is immaterial; the fact that they took the sardines and sold them in their adulterated state is sufficient. *United States* v. *Seacoast Canning Co*---- 1209

A dairy company which shipped from its receiving plant in Illinois to Missouri milk which was adulterated by addition of water and which contained decomposed animal matter, cannot defeat a prosecution on the ground that the milk was to be treated in Missouri and was not an article of food until after treatment. *Union Dairy Co.* v. *United States*---- 869

KNOWLEDGE AND INTENT—Continued. Page

In a proceeding to condemn a shipment of apples allegedly adulterated by the addition thereto of arsenate of lead, a poison, as the result of spraying the trees with a solution of arsenate of lead, where claimant contended that the apples as shipped were not ready for sale or use as food, but that they were being shipped by him to his own warehouse there to have all possible arsenate of lead removed therefrom before being put on the market as food; *held* that the apples were not subject to condemnation, though when shipped there was sufficient poisonous material thereon that they might be deleterious to health when eaten, if claimant in good faith intended that they were not ready for marketing and that they should not go on the market in such condition. *United States* v. *630 Baskets of Apples* 1205

By the act of August 23, 1912, amending the Food and Drugs Act, section 8, Congress recognized that there was a wide field in which assertions as to the curative effect of drugs are in no sense honest expressions of opinion but constitute absolute falsehoods and in the nature of the case can be deemed to have been made only with fraudulent purpose. *Seven Cases of Eckman's Alterative* v. *United States* 707

That false and fraudulent representations may be made with respect to the curative effect of drugs is obvious. It is said that the owner has the right to give his views regarding the effect of his products. But state of mind is itself a fact, and may be a very material fact, and false and fraudulent representations may be made about it. *Seven Cases of Eckman's Alterative* v. *United States* 707
United States v. *Athlophoros Co* 732
United States v. *Dr. J. H. McLean Medicine Co* 850
United States v. *A. Skarzynski & Co* 860
United States v. *141 Bottles of Drug Products* 931
Chichester Chemical Co. et al. v. *United States* 1258
United States v. *17 Bottles, Etc., of An Article of Drugs Labeled in Part "B. & M."* 1287

By section 8 of the act, as amended by the act of August 23, 1912, Congress deliberately excluded the field where there are honest differences of opinion between schools of medicine and practitioners. It was plainly to leave no doubt upon this point that the words false and fraudulent were used. *Seven Cases of Eckman's Alterative* v. *United States* 707
United States v. *Pulmonol Chemical Co* 806

On trial of an information charging misbranding of shipments of drugs in that the labels contained false and fraudulent statements regarding their curative or therapeutic effects with respect to certain ailments, instructions that it was not proper to try rival well-established schools of medicine, and that, if defendant had only used homeopathic remedies, the verdict should be not guilty, *held* proper. *Kar-Ru Chemical Co.* v. *United States* 970

In a prosecution charging misbranding of a medicinal preparation in that statements regarding its curative or therapeutic effect with respect to certain diseases, appearing on the labels, etc., were false and fraudulent, *held* that if the jury find that there is a contrariety of views among medical practitioners and conflict between schools of medicine regarding the curative or therapeutic effect of the ingredients of defendant's preparation with reference to the diseases named, and that defendant in making the statements complained of based them upon an honest opinion arising out of such contrariety and conflict of medical views, then the jury should take such evidence into consideration as bearing upon defendant's good faith and honest belief and upon the question of fraudulent intent. *United*
United States v. *Athlophoros Co* 732
United States v. *17 Bottles, Etc., of An Article of Drugs Labeled in Part "B. & M."* 1287

That the weight of scientific medical opinion is against a claim of curative or therapeutic value, or that the claim is groundless in fact and unsupported by respectable professional opinion, will not

KNOWLEDGE AND INTENT—Continued. Page

suffice, in itself, to sustain a conviction under a charge of false and fraudulent branding of drugs as to their curative or therapeutic effect. *United States* v. *American Laboratories*---------- 641

One may not be convicted under the act as amended by act August 23, 1912, merely because he advocates a theory of medicine which at the time has not received the sanction of the medical profession; but one guilty of fraud may not escape conviction merely because someone may honestly believe in the theory which he fraudulently sets forth, and the essential difference is one of fact for the jury. *United States* v. *American Laboratories*---------- 641
United States v. *141 Bottles of Drug Products*---------- 931
United States v. *17 Bottles, Etc., of An Article of Drugs Labeled in Part "B. & M."*---------- 1287

In a prosecution for alleged misbranding of a medicine, under the act, section 8, paragraph 3, where it appeared that the defendant in making the curative or therapeutic statements on the label acted on the advice of licensed physicians and in good faith and in the belief that the statements were true, such statements were not fraudulent, even though false. *United States* v. *Tuberclecide Co*-- 729

In a prosecution for alleged misbranding of a certain medicine, under the act, section 8, as amended by act August 23, 1912, *held* that if defendant honestly believed from reports of doctors and patients who had taken the medicine, and had good reason to believe that the representations as to curative or therapeutic effects of the medicine were reasonably accurate and true, then such representations would not be fraudulent. *United States* v. *Bell & Co*-------- 828

In a prosecution charging a medicine misbranded by false and fraudulent statements regarding its curative or therapeutic effect with respect to diseases specified, where the Government introduced testimony of physicians that in their opinion the ingredients of the medicine would not be efficacious for the disorders for which it was stated on the label to be efficacious, and that in their opinion there was no single combination of drugs which would be effective as a remedy for all of the diseases enumerated, and where witnesses for defendant testified they had used the medicine and that it had proved effective in their cases as a remedy for the disorders with which they stated that they were afflicted, *held* that the question involved was peculiarly one of professional learning, and the jury, in arriving at a verdict, should consider the fact that not a single doctor had been called to testify on behalf of defendant. *United States* v. *Simpson*---------- 700

Under the act, section 8, as amended by act August 23, 1912, providing that drugs shall be deemed misbranded if the package or label shall bear or contain any statement, etc., regarding the curative or therapeutic effect of such article which is false and fraudulent, the statement, although found or determined to be false, may not properly be found or determined to be fraudulent—

(a) If there was reasonable ground for belief that the article had the curative or therapeutic value claimed in the statements.
United States v. *Matusow*---------- 664
United States v. *C. M. C. Stewart Sulphur Co*---------- 669
United States v. *Kellett*---------- 711
United States v. *A. Skarzynski & Co*---------- 860
United States v. *Kar-Ru Chemical Co*---------- 900
United States v. *One Gross Packages of "A Texas Wonder"*---- 910
United States v. *275 Cases of Mineral Water*---------- 920
United States v. *Gingerole Co*---------- 977
United States v. *Gandara*---------- 984
United States v. *60 Bottles of Dr. Hermance's Asthma and Hay Fever Medicine*---------- 1324

(b) If they were made by one who had an honest intention to make only such statements as he honestly believed to be true.
United States v. *Matusow*---------- 664
United States v. *Eleven Gross Packages of Dr. Williams' Pink Pills*---------- 680

KNOWLEDGE AND INTENT—Continued. Page
United States v. *Tuberclecide Co* 729
United States v. *Athlophoros Co* 732
United States v. *A. Skarzynski & Co* 860
United States v. *Kar-Ru Chemical Co* 900
United States v. *One Gross Packages of "A Texas Wonder"* 910
United States v. *275 Cases of Mineral Water* 920
Kar-Ru Chemical Co. v. *United States* 970
United States v. *Gingerole Co* 977
United States v. *Gandara* 984
United States v. *36 Bottles of Crab Orchard Mineral Water* 1011
United States v. *22 Bottles of Crab Concentrated Mineral Water* 1055
United States v. *Eleven Packages of B. & M. External Remedy* 1059
United States v. *17 Bottles, Etc., of An Article of Drugs Labeled in Part "B. & M."* 1287
United States v. *60 Bottles of Dr. Hermance's Asthma and Hay Fever Medicine* 1324

(c) If they reflected an honestly and sincerely entertained opinion as to the curative or therapeutic value of the article.
United States v. *Matusow* 664
United States v. *Eleven Packages of B. & M. External Remedy* 1059
United States v. *17 Bottles, Etc., of An Article of Drugs Labeled in Part "B. & M."* 1287
United States v. *60 Bottles of Dr. Hermance's Asthma and Hay Fever Medicine* 1324

In a libel proceeding to condemn drugs allegedly misbranded by false and fraudulent statements regarding their curative or therapeutic effect, papers relating to a previous similar proceeding against such drugs and on similar charges, in which there was judgment for the claimant, *held* admissible as bearing on claimant's state of mind with regard to the question of good or bad faith. *United States* v. *17 Bottles, Etc., of An Article of Drugs Labeled in Part "B. & M."* 1287

In a prosecution charging misbranding of defendant corporation's medicine by false and fraudulent statements regarding curative or therapeutic effect of the medicine with respect to certain diseases, *held* that the jury should take into consideration the fact that the president of defendant corporation, who originated the formula and supervised the corporation's business, was neither a physician nor a chemist, as bearing on the question of good faith on the part of defendant corporation. *United States* v. *Abbott Bros. Co* 722

In a prosecution for shipping drugs misbranded in that the label and package contained false and fraudulent statements regarding their curative or therapeutic effect, where the defendant was a graduate physician, *held* that the jury were justified, under all the evidence in the case, in presuming that he knew of the falsity of the claims made for his compound. *Simpson* v. *United States* 832

In a proceeding to forfeit a proprietary medicine for alleged misbranding by false and fraudulent statements regarding its curative effects with respect to diseases specified, *held* that the jury should consider the intelligence and training of the claimant, the proprietor, as bearing upon the question whether or not the statements were false and were put out with actual intent to deceive the public. *United States* v. *Eleven Packages of B. & M. External Remedy* 1059

In libel proceedings under section 10 of the act, charging misbranding of drugs under section 8, as amended by act August 23, 1912, in that the package and label contained statements regarding the curative or therapeutic effect which were false and fraudulent, *held* that if the question whether the statement or representation is true or not is a matter of opinion, so that reasonable men might differ upon the question, then such statement or representation cannot be said to be false or fraudulent within the meaning of the act; a verdict for the Government cannot lawfully be based upon any matter of mere opinion, but must rest upon the proposition that

KNOWLEDGE AND INTENT—Continued.

Page

such statement or representation is absolutely and demonstrably false. *United States* v. *539 Boxes and 322 Cartons of Wm. Radam's Microbe Killer* ---- 511
United States v. *Eleven Packages of B. & M. External Remedy* -- 1059
United States v. *17 Bottles, Etc., of An Article of Drugs Labeled in Part "B. & M."* ---- 1287

In a prosecution charging misbranding of defendant's medicine by false and fraudulent statements regarding its curative effect, testimony of the president of defendant corporation as to statements made to him by various persons that they had taken its medicine and had experienced its curative effects, *held* competent as bearing upon the question whether defendant honestly believed that its medicine would be efficacious for the purposes claimed. *United States* v. *Abbott Bros. Co* ---- 722

In a libel proceeding under section 10 of the act, charging claimant's drug preparation misbranded in that the package and label contained statements regarding the curative or therapeutic effect of the article with respect to diseases specified which were false and fraudulent, where claimant's evidence was limited to testimony of witnesses that they had been benefited in their cases by the use of the preparation, and the nature of the diseases with which they were then afflicted did not appear any further than could be gathered from their testimony with regard to their symptoms, *held* that the jury might consider the circumstance that no physician had been presented who claimed to know what the diseases were from which the witnesses were then suffering. *United States* v. *539 Boxes and 322 Cartons of Wm. Radam's Microbe Killer* ---- 511

In concluding whether or not the maker or seller of a proprietary medicine alleged to be falsely and fraudulently misbranded as to its curative or therapeutic effect has done all that a reasonably prudent person, desiring to act in good faith, would have done to acquaint himself with the effect of the medicine, his education, training, and experience may properly be considered. *United States* v. *60 Bottles of Dr. Hermance's Asthma and Hay Fever Medicine* ---- 1324

Statements as to the curative and therapeutic effect of a drug, even though literally true, are false, if they convey a false impression or engender false inferences. *United States* v. *60 Bottles of Dr. Hermance's Asthma and Hay Fever Medicine* ---- 1324

In a proceeding to forfeit pills on the ground that the labels stating their curative properties were false and fraudulent, charges that the jury should determine whether the pills were sold with an honest belief that they were efficacious for the purposes stated on the labels, and that if the labels were written with intent to create an impression that the pills were efficacious for diseases which the sellers knew or must have known they were not, then the labels were false and fraudulent, were proper. *Eleven Gross Packages, More or Less, of Dr. Williams' Pink Pills* v. *United States* ---- 752

In proceedings charging drugs misbranded because the labels, etc., stating their therapeutic properties, were false and fraudulent, if the jury believe that the statement complained of was partly true, but was so artfully worded as to convey a meaning as to the therapeutic effect of the article which was wholly false, and that the label, etc., were so worded for the purpose of deceiving the public, then they should find such statement to be false and fraudulent. *United States* v. *Eleven Gross Packages of Dr. Williams' Pink Pills* ---- 680
United States v. *Pulmonol Chemical Co* ---- 806
United States v. *Eleven Packages of B. & M. External Remedy* 1059
United States v. *John Dobry Manufacturing Co* ---- 1085
United States v. *60 Bottles of Dr. Hermance's Asthma and Hay Fever Medicine* ---- 1324

KNOWLEDGE AND INTENT—Continued. Page

For the purpose of determining whether the labels on the bottles and the cartons, and the accompanying circulars contain statements that the use of the medicine would arrest or retard all of the diseases specified therein, the jury should take into consideration all of the language used therein, interpreting it as an ordinary intelligent man would, and determine whether it was the intention of defendant to lead persons who read them to believe that the medicine would do so, although the language does not in direct terms say so. *United States* v. *Dr. J. H. McLean Medicine Co*___ 850

Where packages of an article were so wrapped that the description of the article as "Bowman's Abortion Remedy", and directions for its use, would appear only after removal of the wrapper, *held* that such concealing of the labeling by the wrapping was a subterfuge, and clearly and patently an effort to circumvent the law, and was evidence relevant to a charge that the labeling was fraudulent. *United States* v. *100 Boxes of Bowman's Abortion Remedy*__ 1187

State of mind as reflected in advertising matter accompanying a drug could not have been influenced by events subsequent to publication of such matter. *United States* v. *Eleven Packages of B. & M. External Remedy*_____ 1059

Proof of a change from the word "cure" to the word "for" in a label is an evidentiary fact for consideration in concluding whether the change was designed for the purpose of leaving the label at best equivocal and to imply that the article was curative. *United States* v. *Bethesda Mineral Spring Co*_____ 841

On a libel to condemn drugs as misbranded by statements regarding the curative or therapeutic effect thereof, contained in a booklet inclosed in the package, which were alleged to be false and fraudulent, the exclusion of letters from the owner of the formula to his attorney, written long before the libel was instituted, tending to show libelee's good faith, was error. A manufacturer of patent drugs should, on the issue of his good faith, be permitted to show that he sought the advice of counsel, who had consulted proper Government officers in an effort to bring his advertising matter within the terms of the act. *Chichester Chemical Co. et al.* v. *United States*_____ 1258

On the issue whether drugs are misbranded by false and fraudulent statements regarding the curative or therapeutic effect of the article, testimony of witnesses that they have been cured of disease by use of the article is competent as bearing upon the question whether it was honestly believed that the statements were true. *United States* v. *Matusow*_____ 664
United States v. *C. M. C. Stewart Sulphur Co*_____ 669
United States v. *Simpson*_____ 700
United States v. *Kellett*_____ 711
United States v. *Abbott Bros. Co*_____ 722
United States v. *60 Dozen Bottles of "A Texas Wonder"*_____ 888
United States v. *One Gross Packages of "A Texas Wonder"*_____ 910
United States v. *22 Bottles of Crab Orchard Concentrated Mineral Water*_____ 1055
United States v. *Eleven Packages of B. & M. External Remedy*_ 1059
United States v. *17 Bottles, Etc., of An Article of Drugs Labeled in Part "B. & M."*_____ 1287

In a prosecution charging misbranding of a medicinal preparation in that the labels, etc., contained false and fraudulent statements regarding its curative or therapeutic effects, testimonials as to the efficacy of the preparation *held* not competent as evidence of the truth of the representations therein, but merely as bearing upon the question of whether labeling was used in good faith or with fraudulent intent. *United States* v. *Athlophoros Co*_____ 732
United States v. *141 Bottles of Drug Products*_____ 931
United States v. *Eleven Packages of B. & M. External Remedy*__ 1059
United States v. *9 Packages of Crisp's Tung-Tone et al*_____ 1268

KNOWLEDGE AND INTENT—Continued. Page

In a proceeding to condemn a medicinal preparation on the ground that the labels, etc., contained false and fraudulent statements of its curative or therapeutic effects with respect to certain diseases, where testimonials from persons tending to show the curative effect of the preparation on them as sufferers from such diseases, and where the authors of some of the testimonials appeared as witnesses and testified to such effect, *held* that the testimonials themselves were competent only as bearing upon the state of mind and belief of claimant in making the statements on the labels, etc., and upon the question of whether or not he intended thereby to defraud; and that only the testimony of the witnesses themselves, and not the language of the testimonials, was competent as bearing upon the truth of the statements on the labels, etc., as to the curative or therapeutic effect of the preparation. *United States* v. *Eleven Packages of B. & M. External Remedy* 1059

In a prosecution under the act, section 8, for misbranding drugs, by false and fraudulent statements regarding their curative or therapeutic effects, testimonials, etc., are admissible on the question of defendant's good faith, without proof of their execution, etc., where the officer in charge of defendant's business testified he relied thereon, but not where no such reliance is asserted. *Dr. J. H. McLean Medicine Co.* v. *United States* 907

In determining whether there was fraudulent intent in the making of false curative or therapeutic statements, all evidence relating to the placing of the drug on the market from the inception of the marketing of it up to the time of the filing of the information or libel, and all dealing or trading with it, and all conduct of the defendant with regard to it, in the interim, may be properly considered as bearing on the question whether the defendant acted as an honest, fair-minded, average man would act under like circumstances, and whether he had reason to believe, acting as a reasonably prudent man would act under such circumstances, that the drug was curative or therapeutic in the respects attributed to it in the statements. *United States* v. *C. M. C. Stewart Sulphur Co.* 669

United States v. *Eleven Gross Packages of Dr. Williams' Pink Pills* 680

United States v. *Athlophoros Co* 732

In prosecutions charging drugs misbranded under the act, section 8, as amended, declaring drugs misbranded if the package or label shall bear or contain any statement, etc., regarding the curative or therapeutic effect of such article which is false and fraudulent, evidence of good reputation is competent as bearing on the question of intent. *United States* v. *Haltiwanger-Taylor Drug Co* 822

United States v. *Dr. J. H. McLean Medicine Co* 850

Dr. J. H. McLean Medicine Co. v. *United States* 907

See Adulteration; Agents; Corporations; Curative and Therapeutic Effect of Drugs; Defenses; Drug; Evidence; False and Fraudulent; Food; Label; Misbranding; Object of the Act; Purpose of the Act; Sale; Shipment.

KOCA NOLA SYRUP:

An article of food labeled "Koca Nola Syrup" *held* adulterated because it contained cocaine, an added poisonous or deleterious ingredient; and misbranded because the presence, quantity, or proportion of cocaine was not stated on the label. *United States* v. *Koca Nola Co* 59

LABEL:

The label referred to in sections 7 and 8 of the act is the label on the package which the ultimate consumer buys, and not alone the label on the package in which the retail package was shipped to the retailer. *United States* v. *Dr. J. L. Stephens Co* 305

Affirmed, *Dr. J. L. Stephens Co.* v. *United States* 471

McDermott et al. v. *Wisconsin* 473

LABEL—Continued. Page

The term "label", as used in the act, applies to any printed, pictorial, or other matter upon or attached to any package of a food product, or any container thereof, subject to the provisions of the act. *United States* v. *90 Boxes of Macaroni* ---------- 561

A label of a food product shipped in interstate commerce, if false or misleading, constitutes misbranding whether such false or misleading label appears on the boxes in which the product was shipped, or on the bottles of the product, or on the cartons inclosing the same, contained in the boxes. *United States* v. *300 Cases of Mapleine* ---------- 39

Where wheat was shipped by bulk by carload and bore no label, *held*, that the designation of the quality of the wheat in an invoice sheet, and by a certificate of inspection issued to the consignor by a State grain inspector, sent by the seller and consignor to the purchaser and consignee, constituted a label and brand within the meaning of the act. *United States* v. *Hall-Baker Grain Co* ---------- 291

Judgment Reversed, *Hall-Baker Grain Co.* v. *United States* ---------- 391

Section 8 of the act relating to misbranding embraces any statement, design, or device which appears on the outside of the package in which the article is offered for sale, whether such statement is printed upon or otherwise affixed to the package or impressed on a separate label affixed to the package, but does not include an advertising circular inclosed within an article inside the carton in which it is offered for sale. *United States* v. *American Druggists' Syndicate* ---------- 250

Misbranding within the definition of the act, including cases where the package or label "bears" false or misleading statement, *held* inapplicable to such statements in a booklet enclosed within a carton containing drugs. *United States* v. *17 Bottles, Etc., of An Article of Drugs Labeled in part "B. & M."* ---------- 1287

Where statements regarding the curative or therapeutic effect of a drug shipped in interstate commerce were contained on the labels on the bottles of the drug, on cartons inclosing the bottles, and in a circular and booklet inclosed in the carton with the bottle, *held* that such statements, if false and fraudulent, were equally within the meaning of the act as amended August 23, 1912, declaring drugs misbranded if the package or label contains any false or fraudulent statement regarding its curative or therapeutic effect, and it was immaterial whethery they appeared on the labels on the bottles, on the cartons, or in the circular or booklet, since they accompanied the shipment and were intended for perusal by prospective purchasers of the drug. *United States* v. *Eleven Packages of B. & M. External Remedy* ---------- 1059

Boxes or cartons containing a so-called remedy for contagious abortion in cattle consisted of two individual packages each wrapped in paper pasted to three sides thereof. Under the fourth and unpasted side, which would of necessity be torn open by the consumer, appeared directions for the use of the so-called abortion remedy, and under the flap at the top appeared the printed statement "Bowman's Abortion Remedy. This package contains one 9½ pounds treatment of Bowman's Abortion Remedy. Read the directions carefully before administering." A copy of a pamphlet designated "Bowman's Bulletin", sent to the dealer by the claimant who manufactured and shipped the article, contained the statement that directions for use of the so-called remedy would be found inside the package. *Held*, that the printing and labeling were a branding within the meaning of the act, section 8, paragraph 3, "if the package or label shall bear or contain any statement, etc." *United States* v. *100 Boxes of Bowman's Abortion Remedy* ---------- 1187

The act does not require any label on packages of foods or drugs shipped in interstate commerce, except by inference; but where a drug shipped in interstate commerce bears a label, such label should show the information required by section 8 of the act. *United States* v. *8 Packages and Casks of Drug Products* ---------- 149

LABEL—Continued.

Page

The act not only requires that drugs shipped in interstate commerce and labeled shall not be misbranded, but also requires that they shall be labeled with labels conforming to its requirements. *United States* v. *65 Casks of Liquid Extracts*_____ 47

The word "label" as used in the act, which requires packages of drugs shipped in interstate commerce to bear a statement on the label of the quantity or proportion of alcohol, etc., means a descriptive paper affixed to the packages, which must include the statement of how much alcohol, etc., is contained in the package. Id.

A label on a food product is to be given its ordinary and customary meaning as understood by the general public or the ordinary purchaser. *United States* v. *300 Cases of Mapleine*_____ 39

In determining the meaning of words used on the label, etc., of a drug, in a prosecution on a charge of misbranding, they are to be given their ordinary and customary meaning as understood by the general public, and not a technical or scientific meaning. *United States* v. *Harper*_____ 11

The act was passed to apply to the general public; and where, in a prosecution for alleged adulteration and misbranding of an article of food, the jury are called upon to determine the meaning of the label, the meaning referred to, the meaning which must be determinative, is that which is commonly accepted by the public generally. *United States* v. *F. B. Washburn & Co*_____ 434

In determining whether an article of food is misbranded, the words on the label are to be given their ordinary and customary meaning, as understood by the general public, and not their technical meaning. Id.

United States v. *McConnon & Co*_____ 496

Pure-food laws are intended for the protection of the general public as the ultimate purchasers, and where words in everyday use are found on the label of a food product, they are to be given their ordinary and popular meaning, rather than the commercial meaning which they have acquired among manufacturers and dealers. *Libby, McNeill & Libby* v. *United States*_____ 540

In a proceeding for the misbranding of a food product in violation of the act, the words of the offending label are to be construed in their ordinary or customary meaning so far as they have one. *United States* v. *150 Cases of Fruit Puddine*_____ 557

In judging the truth or falsity of statements on the label of an article of food, the language should be taken in the ordinary meaning and significance of the words used, that is, as they would be understood by a person of ordinary intelligence and familiar with the English language, purchasing the article. *United States* v. *Newton Tea & Spice Co*_____ 950

It is difficult to perceive how justice could be done in any case, or what practical efficiency the act would have or what protection it would afford, if the public were required to have scientific and technical knowledge as to the derivation and nomenclature of the various food and drug products. The ordinary purchaser, unless he could rely upon the common and generally understood signification of a label, could never be certain of what he is buying. Whether an article shipped under the label "Pure Pepper" was misbranded under the act, *held* to depend on the customary meaning of the words, and not on the technical meaning thereof. *United States* v. *75 Boxes of Alleged Pepper*_____ 340

Where sirup put up in bottles was labeled "Western Reserve Ohio Blended Maple Syrup", the word "Ohio" and "Maple Syrup" being in red, and between them the word "Blended", and then below that, in smaller type, the statement, "This syrup is made from the sugar maple tree and cane sugar", *held* that purchasers would ordinarily understand that the article contained in part maple sirup made from the boiled-down sap drawn from live maple trees. *United States* v. *Scanlon*_____ 28

LABEL—Continued. Page

Where certain cases containing bottles of maple sirup were branded and labeled "Western Reserve Ohio Blended Maple Syrup, guaranteed absolutely pure, shipped by Western Reserve Syrup Company, Cleveland, Ohio", and the bottles were labeled and branded "Western Reserve Ohio Blended Syrup, Western Syrup Company, Cleveland, Ohio, Blenders of Fancy Maple Syrup and Maple Sugar", *held* that, construing all the words of the bottle labels together, the same meaning was intended as in the labels on the cases, namely, that the bottles and the boxes contained blended maple sirup. *United States* v. *68 Cases of Syrup*---------- 62

The Act was designed to prevent the ordinary purchaser from being deceived and misled as to what he is buying, and therefore the test of misbranding is the effect of the label or statement upon the ordinary purchaser. *United States* v. *95 Barrels, More or Less, Alleged Apple Cider Vinegar*---------- 1047

In construing the language in labels, etc., of drugs, the meaning to be given to it is that which would ordinarily be conveyed by it to purchasers of the article. *United States* v. *17 Bottles, Etc., of An Article of Drugs Labeled in Part "B. & M."*---------- 1287

In determining whether an article of food is misbranded, it is a cursory examination of the label—the only examination made by the ordinary purchaser of the article—which is controlling. *United States* v. *Scanlon*---------- 28

If, as a matter of first impression, the label of a food product tends to convey a false or misleading impression, the article is misbranded even though a deliberate reading of the label might correct such impression. *United States* v. *10 Barrels of Vinegar*---------- 254

A statement in large and plain type on a label of a food product, which conveys a false and misleading impression, constitutes misbranding, even though the false and misleading impression created by such statement is corrected by another statement but in small and inconspicuous type. *Frank et al.* v. *United States*---------- 329

If an article of food is the identical thing indicated by the brand, it is not misbranded under the act, and the method of manufacture is immaterial. *95 Barrels, More or Less, Apple Cider Vinegar* v. *United States*---------- 1079

Judgment reversed, *United States* v. *95 Barrels, More or Less, Alleged Apple Cider Vinegar*---------- 1118

The statute is plain and direct. Its comprehensive terms condemn every statement, design, and device which may mislead or deceive. Deception may result from the use of statements not technically false or which may be literally true. The aim of the statute is to prevent that resulting from indirection and ambiguity, as well as from statements which are false. It is not difficult to choose statements, designs, and devices which will not deceive. Those which are ambiguous and liable to mislead should be read favorably to the accomplishment of the purpose of the act—to enable purchasers to buy food for what it really is. *United States* v. *95 Barrels, More or Less, Alleged Apple Cider Vinegar*---------- 1118

United States v. *McIlvaine Bros*---------- 1127

The general rule is that the act should be so read as to further its purposes, and that not only branding which is misleading or liable to mislead, but also any which is ambiguous, should be visited with the condemnation of the act. A branding which is misleading because of its ambiguity is as much within the inhibition of the statute as if it was misleading in statement. *United States* v. *McIlvaine Bros*---------- 1127

The statement on the label of a package of food, "Substitute for eggs in baking and cooking", was not one of opinion only, but one of fact, and, where false, constituted a violation of the act; it being otherwise expressed upon the label that the article could be otherwise used in place of eggs "in baking and cooking." *United States* v. *Newton Tea & Spice Co*---------- 950

LABEL—Continued.

Page

A statement on a label of an article of food that it is an excellent substitute for eggs, and is to be used for baking and cooking purposes, 1 teaspoonful in place of each egg called for in a recipe, is not a statement of opinion, but of fact, and is a representation to ordinary purchasers that 1 teaspoonful of the article is substantially equivalent to one egg for all purposes, including nutrition, involved in the use of eggs for baking and cooking. *Newton Tea & Spice Co.* v. *United States*---------- 1089

Where claimant shipped mineral water under a label representing that it possessed curative or alleviative qualities, he could not deny that it was a drug within the meaning of the act, section 8, as to misbranding of drugs. *Bradley* v. *United States*---------- 964

A label on mineral water stating that it was recommended in the treatment of certain diseases, and containing directions for its use, was susceptible of the construction that it meant that the use of the water in the treatment of such diseases would effect a cure or alleviation. Id.

Where a libel to condemn pills as misbranded was based on a booklet accompanying the pills, and which, among other things, recited that the pills were "a standard and reliable remedy for amenorrhea (suppression of the menses due to colds, ill health, and other morbid causes)", the language, "other morbid causes", may fairly be construed to mean "other *like* causes", that is to say, other irregularities of the menstrual function of the same general nature as those particularly specified. *Chichester Chemical Co. et al.* v. *United States*---------- 1258

In determining whether a drug product is misbranded within the act, section 8, as amended by act August 23, 1912, the language used on the label or package is to be given the meaning ordinarily conveyed by it to those to whom it is addressed. *Hall* v. *United States*---------- 978

On trial of an information charging misbranding of a drug in that the package and label contained false and fraudulent statements regarding the curative or therapeutic effects of the article with respect to specified diseases and ailments, *held*, that the test of the misbranding was what the statements charged meant to the ordinary person, that is to say, what the ordinary person reading the label, etc., would understand as to the curative or therapeutic effects claimed therein; and that the diseases and ailments named were to be understood to be such as the general public understand such terms, that is, such terms were to be given the meaning generally accepted by the public, and not to be restricted to their technical, medical, or scientific definitions. *United States* v. *C. M. C. Stewart Sulphur Co*---------- 669
United States v. *Athlophoros Co*---------- 732

In determining whether drugs are misbranded in that the label or package contains false and fraudulent statements regarding their curative or therapeutic effects, the words contained in the challenged statements should be given the meaning conveyed by such words in their common usage to the average person, as distinguished from that conveyed to the average physician or scientist. *United States* v. *Bell & Co*---------- 828

In a prosecution charging misbranding of bottled water in that the label falsely and fraudulently represented its curative or therapeutic effect as to certain diseases, *held*, that the jury should test the meaning of the label by giving to the language used the meaning of the words, singly and together, that would be conveyed to ordinary persons and not those who are skilled in medical, chemical, or pharmaceutical science and capable of making nice distinctions and discriminations, and examine the language in the light of the disposition of ordinary human kind to believe in the potency of remedial agents to relieve them from ills from which they are actually or conceivably suffering. *United States* v. *Bethesda Mineral Spring Co*---------- 841

LABEL—Continued. Page

In a prosecution charging misbranding of a drug product in that the labels falsely and fraudulently represented its curative or therapeutic effects, *held*, that the jury should determine the meaning of the representations complained of, taking the words in their ordinary sense and as understood by the general public or people in the ordinary walks of life, to whom the labels were addressed, and not by doctors, druggists, or chemists. *United States* v. *A. Skarzynski & Co*---------- 860

In a proceeding by libel for condemnation of drugs for misbranding under the act, section 8, as amended, *held* that the jury, in determining the meaning and import of the representations made on the label, etc., of the article, should regard such representations as made to the public, and read and interpret the language used in its ordinary and common acceptation. *United States* v. *17 Bottles, Etc., of An Article of Drugs Labeled in Part "B. & M."*---------- 1287

In a libel proceeding to condemn packages of pills on the ground that the label, etc., stating their curative or therapeutic effects with respect to various specified diseases and ailments were false and fraudulent, *held* that the jury, in determining whether the statements made on the label, etc., and set out in the libel, were false and fraudulent, should give to the language used in the statements its ordinary and common meaning and consider it to have the meaning and effect it would convey to an ordinarily intelligent person purchasing the pills; and should determine whether or not it was the intention of the language, so interpreted, to convey the impression that the pills would cure or act as a remedy for the diseases and ailments named even though it did not directly say so. *United States* v. *11 Gross Packages of Dr. Williams' Pink Pills*---------- 680

Affirmed, *Eleven Gross Packages of Dr. Williams' Pink Pills* v. *United States*---------- 752

On trial of an information charging misbranding of a medicinal preparation in that the packages and labels falsely and fraudulently stated the curative or therapeutic effects of the article with respect to various diseases *held*, that the jury should consider all of the language used in the labels, etc., interpreting it as would an ordinarily and reasonably intelligent person, and from it determine whether it was the intention of the defendant to lead such persons who read it to believe that the use of the preparation in the manner and doses prescribed would be efficacious in the treatment of the diseases named, although such language did not in direct terms so state. *United States* v. *Dr. J. H. McLean Medicine Co*---------- 850

In a proceeding to condemn concentrated mineral water for misbranding in that the labels describing it as "The world's greatest remedy for the following ailments in their most chronic forms", followed by a list of ailments and diseases, were false and fraudulent, *held*, that the jury, in construing the language used, should interpret it as would a person of ordinary intelligence purchasing the article, and give to the words the meaning they would convey to such person. *United States* v. *36 Bottles of Crab Orchard Mineral Water*---------- 1011

In a proceeding to condemn so-called concentrated mineral water for misbranding in that statements regarding its curative or therapeutic effect, appearing on the label, were false and fraudulent, *held*, that the jury, in determining the question of misbranding, should take the words of the statements on the label in their ordinary sense, as an ordinary purchaser of reasonable intelligence purchasing the article would take them. *United States* v. *22 Bottles of Crab Orchard Concentrated Mineral Water*---------- 1055

In a proceeding to condemn a drug for misbranding in that the package and label contained false and fraudulent statements regarding its curative or therapeutic effect with respect to various diseases and ailments, *held*, that the jury, in determining whether the article was misbranded, should give to the language of the statements complained of the meaning ordinarily conveyed by it

LABEL—Continued. Page

to those to whom it is addressed, i. e., to the general public and prospective purchasers of the article; that the question for the jury with reference to each such statement is, what would an ordinarily intelligent person suffering from any of such diseases or ailments named understand from such statement as to the curative or alleviating effects of the article on such disease; and that the jury should understand such diseases in accordance with the generally accepted meaning and as understood by the layman, and not apply the technical, medical definitions of the terms given to them by those learned in medicine. *United States* v. *11 Packages of B. and M. External Remedy* 1059

On trial of an information charging misbranding of a drug in that the label contained false and fraudulent statements regarding its curative or therapeutic effects, *held*, that the jury in determining whether the article is misbranded should give to the words on the label and set out in the information such meaning and purpose as they generally signify and the thoughts which they are generally intended to convey. *United States* v. *John Dobry Manufacturing Co* 1085

The mere fact that a label has been used on an article of food for a number of years and before the passage of the Food and Drugs Act does not legalize the use of such label if it is misleading. *United States* v. *F. B. Washburn & Co* 434

The fact that a label of a food product has been adopted and copyrighted and is entitled to full protection as such, is no defense in a proceeding under the act to condemn the product for misbranding, if the label is within the meaning and in violation of the act. *United States* v. *90 Boxes of Macaroni* 561

In case of a clear violation of the statute, there is no occasion for granting a respondent an opportunity to correct his label, but in a case where the violation is doubtful and where the respondent has acted in good faith in being willing to change his label to comply with the law, such an opportunity should be granted. *United States* v. *Schurman et al* 95

See Circulars, Pamphlets, Booklets, Etc.; Designs and Devices; Misbranding; Packages.

LA NOBLENZA:

A drug labeled "La Noblenza" *held* misbranded in that the label contained false and fraudulent statements regarding its curative and therapeutic effects. *United States* v. *Gandara* 984

LEE'S SAVE THE BABY:

A drug preparation labeled "Lee's Save The Baby", *held* not misbranded within the meaning of the act, section 8, as amended by the act of August 23, 1912, declaring drugs misbranded if the package or label shall bear or contain any statement regarding curative or therapeutic effect which is false or fraudulent. *United States* v. *23½ Dozen Bottles, Etc., of An Article of Drugs Labeled in Part "Lee's Save The Baby"* 1240

LEGISLATIVE HISTORY OF THE ACT:

The legislative history of the act considered by the court in ascertaining the intent of Congress in the statute. *United States* v. *Johnson* 85

United States v. *Lexington Mill & Elevator Co* 577

Seven Cases of Eckman's Alterative v. *United States* 707

United States v. *Coca Cola Co* 741

United States v. *100 Cases of Fruit Puddine* 557

French Silver Dragee Co. v. *United States* 121

United States v. *Buffalo Cold Storage Co* 103

United States v. *Dr. J. L. Stephens Co.* 305

United States v. *17 Bottles, Etc., of An Article of Drugs Labeled in Part "B. & M."* 1287

See Congress, Journals of; Congressional Committee Reports; Construction and Interpretation; Debates in Congress.

LEMON EXTRACT OR FLAVOR: Page

An article labeled "Extract of Lemon Peel" *held* misbranded because it was not a true extract of lemon peel, but a dilute extract containing no oil of lemon peel. *United States* v. *S. Gumpert et al*___ 182

Articles labeled "Pure Lemon Flavor" and "Flavor of Lemon" *held* adulterated and misbranded because not of the standard of strength recognized for lemon extract. The terms "flavor" and "extract" *held* to be synonymous. *United States* v. *Edward Westen Tea & Spice Co*_____ 69

Averment in an information that defendant intended that the label "Flavor of Lemon and Citral—A Pure Flavor" should be understood by the public and purchasers to mean a pure flavor or extract of lemon is futile, because the accepted and usual signification of the label is that the article is not pure flavor or extract of lemon but that it is a flavor of lemon and citral. *Nave-McCord Mercantile Co.* v. *United States*_____ 166

An article labeled "Extract Terpeneless Lemon" *held* to be adulterated and misbranded because it contained only 0.05 percent of citral derived from the oil of lemon, whereas, as recognized by the trade generally and by the standard of purity established by the Secretary of Agriculture under authority of act March 3, 1903, such extract should contain at least 0.2 percent by weight of such citral. *United States* v. *Frank et al*_____ 205

An article labeled "Special Lemon. Lemon, Terpene and Citral", *held* misbranded in that the label was false and misleading, and in that the article was labeled so as to deceive and mislead, and in that the article was an imitation of lemon oil and was offered for sale under the distinctive name of another article, because the statement on the label, "Special Lemon", would indicate that the article was a product derived from lemon, whereas, in fact, it was a product containing alcohol and citral derived from lemon grass, and was an imitation of lemon oil. *United States* v. *Weeks*_ 519

Reversed, *Weeks* v. *United States*_____ 646

Judgment C. C. A. affirmed, *Weeks* v. *United States*_____ 867

An article labeled "Special Lemon. Lemon, Terpene and Citral", but not derived from lemon, but a mixture containing alcohol and citral derived from lemon grass, and an imitation of lemon oil, was not misbranded. *Weeks* v. *United States*_____ 646

Reversing *United States* v. *Weeks*_____ 519

Affirmed, *Weeks* v. *United States*_____ 867

An article composed of alcohol and citral derived from lemon grass, and an imitation of lemon oil, and labeled "Special Lemon", and represented by the seller's agent to the buyer as pure lemon oil, was misbranded as offered for sale under the distinctive name of another article, though no label describing it as such other article is affixed to it. *Weeks* v. *United States*_____ 646

Affirmed, *Weeks* v. *United States*_____ 867

See Orange Extract or Flavoring; Vanilla Extract or Flavor.

LEMON PIE FILLING.

See Pie Filling.

LIBEL:

Section 10 of the act, providing that proceedings in cases to forfeit adulterated food shall conform as near as may be to proceedings in admiralty, does not render such proceedings within the admiralty or maritime jurisdiction of Federal courts, the jurisdiction in such proceedings being conferred by the act itself. *United States* v. *Two Barrels of Desiccated Eggs*_____ 232

Under R. S., sec. 563, subdivision 8, giving United States district courts jurisdiction of all causes of admiralty and maritime jurisdiction, and of all seizures on land and on water not within the admiralty and maritime jurisdiction, the court, in seizures under section 10 of the Food and Drugs Act, and on land, proceeds, not as a court of admiralty, but as a court of common law jurisdiction on a trial by jury. *United States* v. *George Spraul & Co*_____ 217

LIBEL—Continued.

Page

The provision of the act, section 10, that proceedings thereunder for seizure of goods for confiscation shall be by libel and shall conform, as near as may be, to proceedings in admiralty, relates only to procedure and not to jurisdiction, and does not include appellate proceedings; the action of the district court on the libel can be reviewed only as at common law, that is, by writ of error and not by appeal. *443 Cans of Frozen Egg Product* v. *United States*_____ 416
United States v. *Hudson Manufacturing Co. et al*_____ 420
Goode v. *United States*_____ 698
Goodwin et al. v. *United States*_____ 1130

By the provision of the act, section 10, that proceedings in libel cases thereunder shall conform, as near as may be, to proceedings in admiralty, the libels in such proceedings under said section are subject to General Admiralty Rule No. 23 providing that "The libel shall also propound and articulate in distinct articles the various allegations of fact upon which the libelant relies in support of his suit, so that the defendant may be enabled to answer directly and separately the several matters contained in each article." *United States* v. *154 Cases of Tomatoes*_____ 967

Section 10 of the act, providing that seizure proceedings shall conform as near as may be to the proceedings in admiralty, does not adopt admiralty rule 22, that libels on seizures for breach of the revenue, navigation, or other laws of the United States shall state the place of seizure and the district within which the property is brought and where it then is, rather than rule 23, providing that the libel, if in rem, shall state that the property is within the district. Id.

A proceeding under section 10 of the act is a civil action as distinguished from a criminal action and is called a suit in rem; that is to say, it is a suit against property, and it does not become a suit against any person at any stage of the case. *United States* v. *300 Cases of Mapleine*_____ 39
United States v. *4½ Cases of Creme de Menthe*_____ 1191

Libels filed, under section 10 of the act, for seizure, condemnation, and forfeiture of adulterated or misbranded articles of food or drugs are not governed by the strict rules of the common law in regard to indictments and criminal informations. *United States* v. *Two Barrels of Desiccated Eggs*_____ 232

It is not essential to the condemnation and forfeiture of adulterated or misbranded drugs, under section 10 of the act, that the owner shall have been guilty of shipping or selling them in violation of section 2. *United States* v. *Five Boxes of Asafoetida*_____ 160
United States v. *Nine Boxes of Asafoetida*_____ 165

The purpose of the act is to conserve the public health by preventing interstate commerce in poisonous or deleterious food and drugs, and, in order that this may be effected, it is not only made a misdemeanor under the act, but the article of food or drug adulterated or misbranded is declared to be forfeited as an offending thing which threatens the health of the citizens, and therefore subject to seizure without regard to the acts or knowledge of the owners or claimants. Id.

Notice and opportunity to be heard, provided for by section 4 of the act, *held* necessary conditions precedent to the institution of proceedings in rem for forfeiture of goods, under section 10, where such proceedings are instituted at the instance of the Secretary of Agriculture. *United States* v. *74 Cases of Grape Juice*_____ 144
Affirmed, *United States* v. *74 Cases (or 20) of Grape Juice*_____ 256
United States v. *Certain Cans of Syrup*_____ 328

A preliminary examination and notice or opportunity to be heard, by the Department of Agriculture as to the adulteration or misbranding of a food or drug product, as provided for by section 4 of the act, are not necessary conditions precedent to the filing of a libel in rem for the condemnation of such product under section 10. *United States* v. *50 Barrels of Whisky*_____ 22
United States v. *65 Casks of Liquid Extracts*_____ 47
United States v. *Nine Barrels of Olives*_____ 128

LIBEL—Continued. Page

It was no defense to a proceeding for condemnation of an alleged adulterated and misbranded article of food, under section 10 of the act, that the Secretary of Agriculture had failed to give claimant the notice and to afford it an opportunity to be heard before the Department prior to the commencement of such proceeding, as provided in section 4. The notice that is required to be given of the seizure of adulterated or misbranded food and of the proceedings for its condemnation, affords ample opportunity to the owner to appear and defend; and if upon a final hearing the food is condemned and declared forfeited, he is not deprived of any property without due process of law. *United States* v. *75 Barrels of Vinegar* ---------- 332

The investigation provided for in section 4 of the act has reference to cases in which there is to be a prosecution under section 5 for the enforcement of penalties prescribed by section 2, and not to cases where forfeiture proceedings are contemplated for condemnation under section 10, so that it was no objection to a forfeiture proceeding that no prior proceedings had been instituted by the Secretary of Agriculture. *United States* v. *100 Barrels of Vinegar*_ 287

Seizure of drugs misbranded in violation of the act, is jurisdictional, and must precede filing of the libel for forfeiture under section 10, and be alleged in the libel, in view of sections 3, 4, and 5, and of the Judiciary Act. *United States* v. *8 Packages and Casks of Drugs*---------- 149

Section 4 of the act authorizes the Secretary of Agriculture to make investigations and to certify violations of the act to the United States district attorney. Section 5 requires such officers on being informed that the act has been violated to cause appropriate proceedings to be commenced in the proper court. Section 10 provides that proceedings to forfeit adulterated or misbranded food shall conform as near as may be to the proceedings in admiralty. *Held*, that neither the marshal nor any other person was authorized to seize food claimed to be subject to forfeiture prior to the commencement of proceedings for a forfeiture in court, and that proceedings for such forfeiture did not depend for jurisdiction on prior seizure. *United States* v. *Two Barrels of Desiccated Eggs*_ 232

The act, section 10, providing for proceedings against adulterated and misbranded food transported in interstate commerce for sale or in original unbroken packages, etc., does not declare the goods ipso facto forfeited by an infraction of the act, nor expressly authorize an executive seizure before proceedings for forfeiture are instituted, but on the contrary requires the district attorney on receiving a certificate of the facts from the Secretary of Agriculture to cause appropriate proceedings to be commenced and prosecuted without delay, for the enforcement of the penalties of the act; hence prior executive seizure was not required to sustain forfeiture proceedings by the provision that the proceedings shall conform as near as may be to the proceedings in admiralty. *United States* v. *George Spraul & Co*---------- 217

Section 10 of the act, providing that an article if adulterated or misbranded shall be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation, indicates that the proceeding shall be commenced in the district court before the property is seized. Id.

It is not ground for dismissal of a libel to forfeit adulterated food under section 10 of the act that the property was not seized before the libel was filed. *United States* v. *100 Barrels of Vinegar*__ 287

It was no objection to a libel in a proceeding under section 10 of the act that it appeared therein that at the time of the filing thereof no seizure of the property therein described had been made by libellant, and that therefore the court had no jurisdiction over the property. *United States* v. *Two Barrels of Desiccated Eggs*__ 232

LIBEL—Continued.

Page

Where sugar alleged to have been adulterated and misbranded was not seized while in transportation, it was not subject to forfeiture under the clause of section 10 of the act, declaring that any article of food adulterated or misbranded, which is being transported from one State, etc., to another, for sale, shall be liable to seizure, condemnation, etc. *United States* v. *46 Packages and Bags of Sugar* 168

A drug is not adulterated or misbranded so as to be subject to condemnation under section 10 of the act unless adulterated or misbranded at the time of seizure, and hence, where asafoetida below the prescribed test and misbranded was received by claimants in interstate commerce and tested and correctly branded before seizure, it was not subject to forfeiture. *United States* v. *Five Boxes of Asafoetida* 160

United States v. *Nine Boxes of Asafoetida* 165

Shipments of a drug preparation in bulk to the owner from its manufacturing agent in another State *held* not subject to seizure and forfeiture under section 10 of the act, where before being offered for sale by the owner and consignee the preparation was bottled and properly labeled. *United States* v. *65 Casks Liquid Extracts* 47

Affirmed, *United States* v. *Knowlton Danderine Co* 89

The remedy in rem provided by section 10 of the act may be invoked where adulterated eggs have been shipped into a State, not for sale as eggs, but intended solely for use by the consignee in the bakery business. *United States* v. *50 Cans of Preserved Whole Eggs* 74

Affirmed, *Hipolite Egg Co.* v. *United States* 223

Section 10 of the act, authorizing proceedings to forfeit adulterated food transported from one State to another, is applicable to eggs shipped from one State to another, not for sale as eggs, but to be used solely as raw material in the manufacture of some other product. *United States* v. *Two Barrels of Desiccated Eggs* 232

Where adulterated vinegar was proceeded against under section 10 of the act, and it appeared that it had been the subject of interstate commerce and was seized while stored in the original unbroken packages, it was not material that the evidence did not show that the vinegar had been shipped in interstate commerce for sale in such original unbroken packages. *United States* v. *100 Barrels of Vinegar* 287

Under the Fourth Amendment of the Constitution, libels for forfeiture of goods for adulteration or misbranding under section 10 of the act, should be supported by affidavit made by someone cognizant of the facts showing probable cause. *United States* v. *8 Packages and Casks of Drugs* 149

Want of sufficient verification of a libel to forfeit food under section 10 of the act is not ground for exception or demurrer to the substance of the libel. Admiralty rule 1 provides that libels shall be verified except those filed on behalf of the United States. *United States* v. *Two Barrels of Desiccated Eggs* 232

In forfeiture proceedings under section 10 of the act, providing that the proceeding in such cases "shall conform as near as may be to the proceedings in admiralty", the court may order the issue of monitions and attachments on informations which are wholly unsupported by oath or affirmation, in view of admiralty rule 22 and sections 1–3 of the act, since the Fourth Amendment to the Constitution does not apply. *United States* v. *18 Cases of Tuna Fish* 1162

Where a libel for seizure and condemnation of certain cases of canned tomatoes upon the ground of adulteration and misbranding, was signed and filed by the district attorney, and the only affidavit attached thereto stated that the affiant "is an inspector of the Department of Agriculture, and that he has read the foregoing libel, and that the averments contained therein as to his own knowledge are true, except as to those matters and things stated to be of his information and belief, and as to those matters and

LIBEL—Continued. Page

things he verily believes them to be true"; *held* that there was such a lack of correlation between the affidavit and the libel that the court could not tell what averments in the latter were made upon affiant's knowledge and what upon his information and belief, and that there was therefore a lack of that certainty of allegation required in a libel for seizure of private property. *United States* v. *154 Cases of Tomatoes*_____ 967

A libel charging adulteration of a food product simply in the words of the act, that it "consists of a filthy, decomposed, or putrid animal and vegetable substance", *held* sufficient in this respect in law. It is often difficult to differentiate an ultimate fact from a conclusion of law. An offense consists in the commission of an act and ordinarily would not be sufficiently pleaded in the words of the statute defining the offense without the addition of a statement of the act which is charged to constitute the offense. Here, however, the act is the adulteration which is charged, and the words of the statute are as descriptive of what the adulteration consists of as any added description could be. If there be no information in the libel of the specific act of adulteration meant to be charged, this can be supplied, if need be, through a bill of particulars. *United States* v. *94 Dozen, More or Less, Half-Gallon Bottles of Capon Springs Water*_____ 1216

Averments in a libel charging misbranding of drugs under section 8 of the act, as amended by act August 23, 1912, should receive a sensible construction. They must definitely charge the statutory offense of misbranding, but if there is enough to apprise those interested in the goods of the charge that the drugs were misbranded because statements as to curative power accompanying the articles in interstate commerce were false and fraudulent as stating they would cure diseases which they could not cure, and were made with intent to deceive, they are sufficient to sustain the libel. *Seven Cases of Eckman's Alterative* v. *United States*_____ 707

A libel in a proceeding to condemn bottled water, based on the amendment of 1912 to section 8 of the act, which, after quoting from the label a long list of ailments for which the water was said to be beneficial, with "healing powers" and a "reliable remedy", denied that the water could produce the therapeutic effects so claimed, stated a case under the statute, and was not subject to demurrer or motion to quash. *Goodwin et al.* v. *United States*_____ 1130

A libel seeking to condemn cases of "Buffalo Lithia Water" as misbranded, which states in effect that the water is misbranded, labeled, and sold as lithia water, when in fact it is not lithia water, and by reason of such misbranding the public is deceived and misled, is sufficiently explicit without characterizing the water as a spring or mineral water. *Goode* v. *United States*_____ 698

A libel for forfeiture of frozen eggs was not defective for failure to negative that the eggs might have been intended for other than food uses, where it described the eggs as articles of food. *United States* v. *300 Cans of Frozen Eggs*_____ 283

It was not ground for the dismissal of a libel to forfeit adulterated and misbranded vinegar which had been the subject of interstate commerce and was seized while stored in the original unbroken packages, that it did not appear that the vinegar was shipped for sale in the original unbroken packages. *United States* v. *100 Barrels of Vinegar*_____ 287

The allegation in a libel that an article of food is adulterated in violation of the act for the reason that it consists in whole or in part of a filthy, decomposed, or putrid vegetable substance, states a complete and distinct offense under section 7 of the act, and the further allegation that such article was "unfit for food" may be regarded as surplusage. Even in an indictment such surplus language is not fatal. *United States* v. *275 Cases Tomato Catsup*__ 141

A libel for forfeiture of alleged adulterated and misbranded sugar under the provision of section 10 of the act providing that any article of food that is adulterated or misbranded, having been

LIBEL—Continued. Page

transported from one State to another and remaining unloaded, unsold, or in the original unbroken packages, shall be liable to be proceeded against by libel for condemnation, *held* fatally defective for failure to charge that the sugar seized had been transported for sale. *United States* v. *46 Packages and Bags of Sugar*-- 168

A libel for forfeiture of packages of drugs as misbranded under the act, on the ground that the drugs, having been transported from one State to another, remain unloaded, unsold, or in the original unbroken packages, *held* insufficient for failure to show the drugs subject to the act. *United States* v. *8 Packages and Casks of Drugs*---------- 149

It was not ground for dismissal of a libel against certain cans of adulterated eggs that they had been shipped into a State, not for sale as eggs, but intended for use of the consignee in the bakery business. *United States* v. *50 Cans of Preserved Whole Eggs*---------- 74

Affirmed, *Hipolite Egg Co.* v. *United States*---------- 223

It was not ground for the dismissal of a libel to forfeit a shipment of dessicated eggs for violation of the act that the libel did not allege that the eggs had been transported for sale. *United States* v. *Two Barrels of Dessicated Eggs*---------- 232

Where a libel alleges that certain frozen eggs had been transported in interstate commerce and were, at the time of the service of the libel, in whole or in part filthy, putrid, or decomposed, and remained in original unbroken packages in a warehouse in New York City, the libel was not fatally defective for failure to charge that the eggs had been transported for sale. *United States* v. *300 Cans of Frozen Eggs*---------- 283

A libel to forfeit a shipment of dessicated eggs for violation of the act was not fatally defective for failure to allege the date when they were shipped, on the theory that the shipment might have been made before the act took effect or because the property was not sufficiently identified; such objections being available by answer. *United States* v. *Two Barrels of Dessicated Eggs*---------- 232

A representation in a libel for seizure and condemnation of canned tomatoes that the article as analyzed by the Department of Agriculture is shown to be adulterated in violation of the act in that tomato pulp has been mixed and packed with and substituted in part for the article, does not constitute an averment of the fact of adulteration; and a representation in such libel that the article as so analyzed is shown to be misbranded in violation of the act in that the labels, containing the word "Tomatoes" and the picture of a ripe tomato, are false and misleading and deceive and mislead the purchaser, does not sufficiently charge misbranding. Such libel *held* insufficient in that it does not contain allegations of substantive facts clearly showing the right of the Government to seize and condemn the goods. *United States* v. *154 Cases of Tomatoes*---------- 967

Where a libel under the act, to condemn certain sirup as misbranded, stated that the boxes and bottles did not contain a blend of maple sirup, as stated on the labels, but alleged that the contents consisted of a mixture or compound of refined cane sugar flavored with an extract of maple wood, the negation of a blend of maple sirup was a conclusion of the pleader, which was not admitted by a demurrer to the libel. *United States* v. *68 Cases of Sirup*---------- 62

It is essential that a libel to condemn food for misbranding should set forth the branding and facts inconsistent therewith, and, if there is indefiniteness in statement, it must be removed by proof. Where a libel charging misbranding of catsup alleged that the label stated the catsup was made from choice ripe tomatoes, etc., when in fact it was made in part from tomato pulp screened from peelings and cores as the offal of tomato-canning factories, and not from choice ripe tomatoes, etc., it would not be assumed, from the fact that the peelings and cores were not used in a tomato-canning factory, that they were not suitable for making tomato catsup. *United States* v. *650 Cases of Tomato Catsup*---------- 31

LIBEL—Continued. Page

A proceeding by libel under section 10 of the act, to condemn food as adulterated is not a criminal prosecution, but an action in the nature of a civil action, and the Government, in order to obtain a verdict in its favor, is only required to sustain the allegations of the libel by a fair preponderance of the evidence, and it is not incumbent on it to show that they are true beyond a reasonable doubt. *United States* v. *625 Sacks of Flour*---------- 129

A proceeding under the act to condemn a shipment of food alleged to be adulterated, is not a criminal prosecution, and the Government is not required to establish its cause of action by evidence beyond a reasonable doubt; the burden is on the Government to establish each and every essential element of its case by a fair preponderance of the evidence, and by evidence which is clear and convincing. *United States* v. *1,367 Cases of Pork and Beans*------ 766

A proceeding to condemn a food product under section 10 of the act is a civil action, and, as such, is within the rule that the Government's case is established by the preponderance of the evidence, as distinguished from the rule in criminal cases where the doctrine of presumption of innocence and the doctrine of reasonable doubt control. *United States* v. *5,060 Cans of Tomato Pulp*---------- 780

A libel proceeding under section 10 of the act, to condemn food as adulterated, is not a criminal prosecution, and the Government is not required to make out its case by proof beyond a reasonable doubt; it is only required to make out its case by a fair preponderance of the evidence. *United States* v. *720 Cases of Tomato Catsup*---------- 877

A proceeding under section 10 of the act, to condemn bottled water as misbranded is not a criminal prosecution, and the Government is not required to make out its case beyond a reasonable doubt; it is sufficient to warrant a verdict for the Government if the evidence establishes its contentions to the satisfaction of the jury. *United States* v. *275 Cases of Mineral Water*---------- 920

A libel proceeding under section 10 of the act, to condemn a food product as adulterated and misbranded, is a civil suit and not a criminal action, and to be tried as a civil suit. The burden is on the Government to prove its contentions to the satisfaction of the jury by a preponderance or greater weight of the evidence, and not beyond a reasonable doubt as in criminal cases. *United States* v. *4½ Cases of Creme de Menthe*---------- 1191

In libel proceedings under section 10 of the act to forfeit alleged adulterated or misbranded food or drugs, the burden of proof is upon the Government to establish its case by a preponderance of the evidence. *United States* v. *175 Boxes of Macaroni*---------- 426

United States v. *539 Boxes and 322 Cartons of Wm. Radam's Microbe Killer*---------- 511

United States v. *1,000 Cases of Canned Tomato Puree*---------- 704

United States v. *11 Gross Packages of Dr. Williams Pink Pills*-- 680

United States v. *408 Bushels of Oysters*---------- 718

United States v. *350 Bags of Shell Peanuts*---------- 685

United States v. *60 Dozen Bottles of "A Texas Wonder"*-------- 888

United States v. *1,038 Cases of Tabasco Flavor Catsup*---------- 871

United States v. *One Gross of Packages of "A Texas Wonder"*--- 910

United States v. *9 Cases of Sparkling White Seal*---------- 1023

United States v. *1,600 Cases of Canned Salmon*---------- 1105

United States v. *1,000 Cases of Sardines*---------- 1113

United States v. *2,205 Cases of Canned Salmon*---------- 1133

United States v. *3,192 Boxes of Apples and 532 Boxes of Pears*---- 1199

United States v. *3,998 Cases of Canned Tomatoes*---------- 1213

On trial of a libel under section 10 of the act, to condemn a food product as misbranded, *held* that the burden of proof upon all issues of the case was upon the Government to satisfy the jury by a preponderance, or fair preponderance, of the evidence. *United States* v. *175 Boxes of Macaroni*---------- 426

A proceeding to condemn a food product under section 10 of the act is a civil case, and the Government, in order to obtain a verdict,

LIBEL—Continued.

Page

must establish its case by a preponderance of the evidence to the reasonable satisfaction of the jury, and not beyond a reasonable doubt. *United States* v. *1,500 Cases of Tomato Pulp*---------- 892

In a libel proceeding under section 10 of the act, against an alleged misbranded food product, *held* that the measure of persuasion is, as in civil cases, a fair preponderance of the evidence, and that the burden is on the Government to prove by a fair preponderance of the evidence the material allegations set up in the libel which are denied in claimant's answer, and the burden is on the claimant to prove by a fair preponderance of the evidence the material allegations set out and alleged affirmatively in his answer and denied by the Government. *United States* v. *90 Boxes of Macaroni*------ 561

In a proceeding under section 10 of the act, to condemn wine alleged to be adulterated and misbranded, *held* incumbent on the Government, in order to sustain a verdict in its favor, to establish the facts constituting the adulteration and misbranding by a fair preponderance of the evidence, to the satisfaction of the court. *United States* v. *60 Barrels of Wine*---------- 658

In a proceeding to condemn confectionery as adulterated because it contained talc, *held* that the burden was on the Government to establish by a fair preponderance of the evidence not only that the article contained talc, but that it contained an appreciable quantity thereof. *United States* v. *307 Cases of Confectionery*---- 353

A forfeiture proceeding under section 10 of the act is not a criminal prosecution, but is a suit to enfore a penalty, and while the degree of proof required of the Government in order to prevail is not that required in criminal cases—proof beyond a reasonable doubt—a higher degree of proof is required of the Government than a mere preponderance, a mere balance, of the evidence in its favor. The burden is on the Government to establish, by clear and satisfactory evidence, that its case has been made out. *United States* v. *One Barrel of Desiccated Egg Product*---------- 99

In a libel proceeding under section 10 of the act, to forfeit a food product alleged to be adulterated, *held* that the burden of proof rests upon the Government to establish the allegations of the libel by the weight of the evidence, and, as such proceeding involves the possible forfeiture of property, the evidence must be of a clear and convincing character. *United States* v. *443 Cans of Frozen Egg Product*---------- 197

In proceedings under section 10 of the act, for seizure and condemnation of bottled waters, as misbranded, *held* that the burden of proof is upon the Government to establish the misbranding charged by a preponderance of the evidence which is clear and convincing. *United States* v. *36 Bottles of Crab Orchard Mineral Water*---------- 1011

United States v. *22 Bottles of Crab Orchard Concentrated Mineral Water*---------- 1055

The proceeding for forfeiture of goods under section 10 of the act is a penalty, and, while it is not a criminal proceeding, it is not far removed in its nature from a criminal proceeding; therefore, a higher degree of proof is required of the Government in such a proceeding than would be required of it in an ordinary suit on an obligation to the United States. It is not only required that there should be a fair weight of evidence in favor of the Government, but also that the Government should make out its case by evidence that is of a higher quality—evidence that is clear, convincing, and satisfactory. *United States* v. *10 Barrels of Olives*---------- 125

United States v. *36 Bottles of London Dry Gin*---------- 489

A proceeding under section 10 of the act, to forfeit a food as adulterated and misbranded is in no sense a criminal prosecution, and the Government is not required, as in criminal cases, to prove the essential elements of its case beyond a reasonable doubt; but the rule is that in such cases, involving the possible forfeiture of property, the Government must establish its cause of action by a clear and satisfactory preponderance of the evidence. *United States* v. *1,246 Cases of Tomato Catsup*---------- 943

LIBEL—Continued. Page

A libel for condemnation of bottled water, for false and fraudulent statements, made on the label, regarding its curative or therapeutic effects, is sustained by sufficiently showing the false and fraudulent character of any one of such claims. *Goodwin et al.* v. *United States*---- 1130

The act provides that proceedings for condemnation shall conform as near as may be to proceedings in admiralty. Admiralty rule 29 declares that, upon the taking of a libel pro confesso, the court shall proceed to hear the cause ex parte and adjudge therein as to law and justice shall pertain. *Held*, that where a libel for condemnation of tomato catsup charged misbranding in that the label stated the catsup was made from choice ripe tomatoes, when in fact it was made in part from tomato pulp screened from peelings and cores as the offal of tomato canning factories, the claimant having neither answered nor contested the allegations of the libel, so that it was taken pro confesso, it was incumbent on the Government to prove that the label contained a statement which was substantially false and misleading. *United States* v. *650 Case of Tomato Catsup*---- 31

Where it was charged in a libel that flour was misbranded in that it was labeled as made of the first quality of hard wheat, whereas, in truth it was made in whole or in part of soft wheat, and the evidence adduced in support of the charge was that the flour was milled from No. 2 Turkey red wheat and was not of the first quality, but that no soft wheat entered into its composition, *held*, the trial court erred in submitting the charge of misbranding to the jury, since the charge tendered the issue of soft wheat as distinguished from hard wheat, and if it was permissible to specify a particular and, failing to support the specification, to prove falsity in another particular, then the specification served but to draw the attention of the libelee from the actual point of controversy and to mislead. *Lexington Mill & Elevator Co.* v. *United States*---- 443

On trial of a libel brought by the Government, under section 10 of the act, against alleged misbranded drugs shipped in interstate commerce, *held* that the Government was required to show that the goods described in the libel were the goods actually seized by the Government under the libel. *United States* v. *539 Boxes and 322 Cartons of Wm. Radam's Microbe Killer*---- 511

The Government is precluded from complaining of words omitted from a libel filed for condemnation of a drug preparation as misbranded under the act, section 8, as amended by act August 23, 1912. *United States* v. *23 7/12 Dozen Bottles, Etc., of An Article of Drugs Labeled "Lee's Save The Baby"*---- 1240

On a libel seeking condemnation of drugs for misbranding under the act, section 8, paragraph 3, a motion by the claimant for leave to withdraw its intervening petition and to permit a default decree to be entered, overruled on representation of the United States attorney that the Government was ready for trial and had procured a number of witnesses from different parts of the country at considerable expense, and that the Department of Agriculture was specially desirous of having the case heard on its merits. *United States* v. *100 Boxes of Bowman's Abortion Remedy*---- 1187

In a proceeding to forfeit sugar under section 10 of the act, where the court permitted the G. Co. to interplead and file a brief, and thereafter permitted the withdrawal of the answer and filing of exceptions, to which the district attorney assented, an objection by the district attorney to the G. Co.'s right to interplead and file a brief in the case unless further evidence was offered that it was a party in interest or the bona fide owner of the sugar seized, *held* too late. *United States* v. *46 Packages and Bags of Sugar*---- 168

In a proceeding to condemn lithia water as misbranded the finding of the court, on jury trial being waived, must be accepted as the verdict of the jury. *Goode* v. *United States*---- 698

LIBEL—Continued.

Page

A libel to condemn bottled water, charging misbranding in general terms, and there having been no motion for a bill of particulars, a general verdict for the Government must be sustained, there being substantial evidence that any one of the statements on the label was false and fraudulent. *Goodwin et al.* v. *United States*__ 1130

It was no objection to a proceeding under section 10 of the act, for condemnation of a large number of cases of canned salmon as adulterated, that the whole number of cases should not be destroyed because only one quarter of the same were found adulterated, since destruction does not follow condemnation as a matter of course under the act, and under the provision for delivery of condemned goods to the owner on payment of costs and giving sufficient bond to the effect that the articles shall not be sold or otherwise disposed of contrary to law, the claimant may be permitted to separate the good from the bad, but the burden of so doing should rest upon it and not on the Government or the ultimate consumer, and if it cannot do this it is its own misfortune and it must suffer the consequences. *A. O. Andersen & Co.* v. *Unted States*_____ 1053

In an action under section 10 of the act for condemnation and destruction of butter which was filthy and decomposed, the court, under the power conferred by the act, allowed redelivery of the butter to the claimant under bond to attempt to cleanse it by renovating, but not by ladling. *United States* v. *Nine Barrels of Butter*_____ 826

Motion of claimant of food products seized on libel to condemn as misbranded, for release of the products under bond pursuant to section 10 of the act, would, under the permissive language of the section, be denied, where, although the articles seized were not deleterious, they had a much lower market value than the articles which the false labels described, the misbranding was fraudulent and injurious to competitors in the trade, and claimant had been convicted of a similar offense before, and had numerous other proceedings pending against him. *United States* v. *Two Cans of Oil of Sweet Birch and Three Cans of Oil of Gaultheria*_____ 963

The provision of section 10 of the act that the court may by order direct that articles of food or drugs condemned as adulterated or misbranded in libel proceedings under said section, be delivered to the owner thereof upon payment of the costs of such proceedings and the giving of a bond as prescribed, is not mandatory, but confers a discretionary power upon the court. Id.

In admiralty practice costs are within the discretion of the court, from which no appeal lies unless perhaps in case of gross abuse of discretion. In no case can costs be assessed against the United States. *Charles* v. *United States*_____ 189

In a proceeding in rem under section 10 of the act the court has jurisdiction to render personal judgment for costs against the claimant, even upon the supposition that the principles of the admiralty law are made applicable to such proceedings by the provision of said section that they shall conform as near as may be to the proceedings in admiralty. *Hipolite Egg Co.* v. *United States*_____ 223

Under the act, on a libel proceeding against tomato pulp, intervening claimants who did not stipulate to pay costs and expenses, expense of custody having exceeded all money value involved, so that they acquiesced in the Government's securing decree of destruction, were not subject to decree in personam for costs, despite rule 26 of the Supreme Court. *United States* v. *1,590 Cases of Tomato Pulp*_____ 914

See Admiralty Proceedings; Admiralty Rules; Adulteration; Affidavits; Appeal and Error; Article; Bond; Burden of Proof; Civil Cases; Construction and Interpretation; Costs; Depositions and Interrogatories; Importation; Indictment; Information; Injunction; Interstate Commerce; Jurisdiction; Jury Trials; Misbranding; Notice and Opportunity to be Heard; Original Package; Package; Penalties; Release; Sale; Search Warrant; Seizure.

LIMITATIONS, STATUTE OF: Page

The general 3-year statute of limitations applicable to crimes was not repealed by the Food and Drugs Act containing no specific limitation on prosecutions thereunder, so as to require immediate prosecution on the theory that in case of delay the right to prosecute would be barred by laches. *United States* v. *J. L. Hopkins & Co*---- 401

LITHIA WATER:

The term "lithia water", as ordinarily understood, means a water containing a sufficient amount of lithium to give a therapeutic effect when drunk in reasonable quantities. *United States* v. *Seven Cases of Buffalo Lithia Water*---- 573

See Buffalo Lithia Water; Mineral Water; Water.

LONDON DRY GIN:

There is a distinct kind of gin known as "London Dry Gin", which need not necessarily be made in London, and the use of the name "London Dry Gin" on this particular kind of gin of domestic production did not constitute misbranding. *United States* v. *36 Bottles of London Dry Gin*---- 489

Judgment reversed *United States* v. *36 Bottles of London Dry Gin*---- 570

See Holland Gin; Hollands Geneva Gin.

LONG'S WORLD'S GREATEST KIDNEY AND BLADDER REMEDY:

An article labeled "World's Greatest Kidney and Bladder Remedy" *held* misbranded in that the label falsely and fraudulently represented the curative or therapeutic effect of the article. *United States* v. *Long*---- 989

MACARONI:

Macaroni to which a coal-tar dye known as "martius yellow" had been added solely as a coloring matter, *held* adulterated within the meaning of the act, section 7, in that it contained an added poisonous ingredient which might render it injurious to health. *United States* v. *1,950 Boxes of Macaroni et al*---- 112

Macaroni containing an unsubstantial amount of coloring matter the presence of which was inconspicuously declared on the label, and having on the label pictures alleged to represent scenes in Italy, held not misbranded. *United States* v. *175 Boxes of Macaroni*---- 426

Macaroni manufactured in the United States and contained in boxes bearing labels containing the words "Macaroni, Gragnano Style—Savoy Brand", the word "Gragnano" being in flaring type and the words "Savoy Brand" in large type, and containing a pictorial representation of an Italian scene, and the boxes being in style and dress similar to boxes used for macaroni made in the Gragnano district in Italy, and also having stamped thereon the words "artificially colored" by means of a rubber stamp in so indistinct a manner as to be almost imperceptible, although the macaroni was so artificially colored as to resemble in color macaroni produced in the Gragnano district in Italy; *held* misbranded. *United States* v. *90 Boxes of Macaroni*---- 561

Macaroni manufactured in the United States and bearing a label containing Italian words including the name of a town in Italy where macaroni is extensively manufactured, so that the general purchaser looking at the label would conclude that it represented an Italian product, *held* misbranded, though the letters "Mfg. U. S. A." appeared in small type within less than an inch of space on a very narrow white margin on the lower edge of the label. *United States* v. *267 Boxes of Macaroni*---- 630

Macaroni labeled "Macaroni Savoia Brand, Gragnano Style", *held* adulterated in that it was an inferior macaroni prepared in whole or in part from a flour other than semolina prepared from durum wheat, the material from which the best grade of macaroni is made, and was colored with a certain dye, to wit, naphthol yellow

MACARONI—Continued. Page

S., to simulate the natural appearance of macaroni made wholly from semolina prepared from durum wheat, and in a manner whereby the inferiority of said article was concealed. *United States* v. *Atlantic Macaroni Co*---------- 793

Since "macaroni" is defined as made from a paste from the flour of hard glutinous wheat, and "semolina" is defined as the hard grains retained in the bolting machine after the fine flour has passed through, an information charging an article labeled "macaroni" was adulterated and misbranded because made of flour, not of semolina, is not sufficinetly definite, even though macaroni must not contain the fine flour which passes through the bolting machine. *United States* v. *Krumm*---------- 993

MACAROONS:

Macaroons *held* adulterated in that glucose had been mixed and packed therewith so as to reduce, lower, or injuriously affect their quality and strength. *United States* v. *F. B. Washburn & Co*---- 434

Reversed, *F. B. Washburn & Co.* v. *United States*---------- 654

An article labeled "Macaroons" *held* misbranded where there was evidence that a macaroon, as commonly understood, was made of ground almonds, sugar, and white of eggs, and that the so-called macaroons were made of cocoanut, sugar, and white of eggs, and contained glucose in addition. *United States* v. *F. B. Washburn & Co*---------- 434

Affirmed, *F. B. Washburn & Co.* v. *United States*---------- 654

McLEAN'S LIVER AND KIDNEY BALM:

An article labeled "Dr. J. H. McLean's Liver and Kidney Balm" *held* misbranded in that the label on the bottle, the carton in which the bottle was contained, and circulars inclosed with the bottle, bore statements regarding the curative or therapeutic effect of the article which were false and fraudulent. *United States* v. *Dr. J. H. McLean Medicine Co*---------- 850

Judgment reversed, *Dr. J. H. McLean Medicine Co.* v. *United States*---------- 907

MAIL, SHIPMENT BY.

See Interstate Commerce; Search Warrant; Shipment.

MANDAMUS:

Where the Secretary of Agriculture has published a decision to the effect that flour bleached by a certain process was obnoxious to the provisions of the Food and Drugs Act, and announced his intention to recommend prosecution of those engaged in its manufacture and sale, a company manufacturing and selling machinery for bleaching flour under a patent process could not maintain a petition for mandamus to compel the Secretary to revoke his decision and not to circulate copies of it. *Alsop Process Co.* v. *Wilson, Secretary of Agriculture*---------- 37

Affirmed, *Alsop Process Co. v. Wilson, Secretary of Agriculture*_ 54

Where the Secretary of Agriculture, after investigation, rendered and promulgated a decision to the effect that flour bleached by a certain process is an adulterated product under the Food and Drugs Act, and announced his intention to recommend the prosecution of those engaged in its sale and manufacture, a company manufacturing machinery for bleaching flour under a patented process has no such interest in the subject matter of the Secretary's action as will entitle it to maintain a petition for mandamus to compel him to revoke his decision and not to circulate copies of it, although the indirect effect of such decision and its promulgation has been and will be to cause millers throughout the country to cease purchasing the relator's machinery. *Alsop Process Co.* v. *Wilson, Secretary of Agriculture*---------- 54

Affirming *Alsop Process Co.* v. *Wilson, Secretary of Agriculture*_ 37

See Injunction.

MAPLE FLAVO: Page

An article labeled "Maple Flavo", composed chiefly of cane sugar and glucose and artificially colored and flavored, *held* misbranded because the name represented the article to be a true maple product when it was not. The term "Maple Flavo" *held* not to be a distinctive name within the meaning of the act. *United States* v. *S. Gumpert et al*---------- 182

MAPLEINE:

The term "Mapleine" *held* not to be a distinctive name within the meaning of the act, and its use on the label of an article containing no maple product *held* to constitute misbranding of the article so labeled. *United States* v. *300 Cases of Mapleine*---------- 39

MAPLE SUGAR:

An article of food sold as maple sugar *held* adulterated in that cane sugar had been mixed and packed therewith so as to reduce and lower its quality and strength. *United States* v. *Huyler's*---------- 455

MAPLE SIRUP:

Maple sirup is popularly recognized as the sirup made by boiling down the sap that flows in the spring of the year from the live maple tree. *United States* v. *Scanlon*---------- 28

See Sirup.

MARASCHINO CHERRIES:

Maraschino is a liqueur or cordial, high in alcohol, produced from the fruit, leaves, and bark of the marasque cherry tree which grows indigenous in Dalmatia. Cherries packed in a weak sirup or sweet liquid containing no alcohol, artificially colored red and highly flavored with essence of bitter almonds, and not produced from the marasque cherry tree, and labeled "Maraschino Cherries", *held* misbranded. *United States* v. *Bettman-Johnson Co*---- 299

MEASURE.

See Weight, Measure, and Numerical Count.

MILK:

Milk *held* adulterated in that water had been mixed and packed therewith so as to reduce, lower, and injuriously affect its quality and strength. *United States* v. *Griebler*---------- 29

Milk *held* adulterated by the addition of water and because of the presence of filthy matter. *United States* v. *Taylor*---------- 839

Milk containing bacteria, including *Bacillus coli* and *B. streptococci* types, *held* adulterated in that it consisted in whole or in part of a filthy, decomposed, and putrid animal and vegetable substance. *Dade* v. *United States*---------- 465

A dairy company shipping from its receiving plant in Illinois to Missouri milk which was adulterated by addition of water and which contained decomposed animal matter, cannot defeat a prosecution on the ground that the milk was to be treated in Missouri, and was not an article of food until after treatment. *Union Dairy Co.* v. *United States*---------- 869

In view of section 7 of the act, declaring that an article shall be deemed to be adulterated if any substance has been mixed or packed with it so as to reduce or lower or injuriously affect its quality or strength, it is unnecessary, in a prosecution for the interstate shipment of milk adulterated with water, for the court to receive evidence that the addition of water injuriously affected the quality or strength of the milk. Id.

In a prosecution charging shipment of milk alleged to be adulterated in that water had been mixed and packed with it so as to reduce, lower, or injuriously affect its quality or strength, and in that water had been substituted in part for milk, *held* that, in order to convict, it must be shown that defendants intentionally added and mixed water with the milk, or that it was done with their knowledge or consent, and that the effect of adding the water to and mixing it with the milk was to reduce or lower or injuriously

MILK—Continued. Page

affect its quality or strength; or that by such substitution of water for milk they intended to deceive the purchaser of the product into buying an inferior for a superior product. *United States* v. *Tetz et al*---------- 917

See Milk, Condensed Skimmed.

MILK, CONDENSED SKIMMED:

An article labeled "Condensed Skimmed Milk" and containing about 42 per cent of cane sugar, the presence of which was not disclosed on the label, *held* adulterated and misbranded. *United States* v. *Libby, McNeill & Libby*---------- 442

Affirmed, *Libby, McNeil & Libby* v. *United States*---------- 540

MILK CHOCOLATE.

See Confectionery.

MINERAL SUBSTANCES.

See Confectionery; Ejusdem Generis.

MINERAL WATER:

Mineral water under a label representing that it possessed curative or alleviative properties, *held* to be a drug within the meaning of the act, and such representations being false and fraudulent, it therefore falls within the condemnation of section 8, subdivision 3, as to misbranding of drugs. *Bradley* v. *United States*---------- 964

Mineral water, not being in its original state, and processes of separation of constituent drug elements being carried to the extent that the water can no longer be used as a beverage, but only in small quantities as a drug, is to be classified as a "drug", and not a "food", within the meaning of the act as amended. *Goodwin et al.* v. *United States*---------- 1130

See Bethesda Natural Mineral Spring Water; Buffalo Lithia Water; Capon Springs Water; Crab Orchard Concentrated Mineral Water; Crab Orchard Mineral Water; Imperial Spring Water; Robinson Spring Water.

MISBRANDING:

The act not only requires that drugs shipped in interstate commerce and labeled shall not be misbranded, but also requires that they shall be labeled with labels conforming to its requirements. *United States* v. *65 Casks of Liquid Extracts*---------- 47

The purpose of the act was to protect consumers against impure and adulterated foods and drugs, and also against the use of food and drugs which do not show what they contain by the brands on the package. *United States* v. *Mayfield et al*---------- 90

The purpose of the act, section 8, providing that an article of food shall be deemed misbranded if labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so, is to protect the public from deception, and the intent of one charged with misbranding is immaterial. *United States* v. *267 Boxes of Macaroni*---------- 630

It is not necessary, in order to establish a charge that an article of food is misbranded by false or misleading statement on the label, that it be found that any person was actually deceived or misled by the statement on the label; it is sufficient if it be found that the statement was calculated to deceive or mislead in any particular. *United States* v. *300 Cases of Mapleine*---------- 39

United States v. *J. L. Hopkins & Co*---------- 366

The act, as against misbranding, was intended to make it possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was and not upon misrepresentations as to character and quality. *United States* v. *Lexington Mill & Elevator Co*---------- 577

United States v. *Coca Cola Co*---------- 741

United States v. *Schider*---------- 875

United States v. *95 Barrels, More or Less, Alleged Apple Cider Vinegar*---------- 1118

United States v. *Ten Cases, More or Less, Bred Spred, Etc., et al*---------- 1262

MISBRANDING—Continued. Page

It is a misbranding of a food product to put a label upon the package which in any way misleads or will mislead the purchaser. The test is, would the ordinary layman, the purchaser, be misled by the label upon the package from a casual observation of the same; if he would, there is a misbranding; if he would not, there is not a misbranding. The act was passed for the protection of the consumers and purchasers. *United States* v. *Mohn Wine Co*_____ 316

The act, section 8, specifies and defines at least two kinds of "misbranding"—one where the article bears a false and misleading label, and the other where it is offered for sale under the distinctive name of another article. In either case, it is not the misbranding that is made unlawful, but the shipment or delivery for shipment from one State to another, of the misbranded article. *Weeks* v. *United States*_____ 867

It is not necessary, in order to constitute misbranding of a food product by reason of a misleading label, that the product should be injurious to health in any way; it is sufficient if the label describing the product is misleading as to something contained in the product. *United States* v. *Mohn Wine Co*_____ 316

It is not necessary that an article of food, in order to be unlawfully misbranded within the act, be dangereous to the health of the public. *United States* v. *Krumm*_____ 993

The prohibition of misbranding in the act is designed to prevent deceiving or misleading the purchasing public, even though the article sold is in itself equally good or not injurious to health. *United States* v. *95 Barrels, More or Less, Alleged Apple Cider Vinegar*__ 1047

The primary purpose of the act is to prevent injury to the public health, and while the test of misbranding of a food product, under the act, section 8, is whether it is true to name, there should not be over-strictness in applying this test in a case where the public health cannot possibly be jeopardized. *Ninety-five Barrels, More or Less, Apple Cider Vinegar* v. *United States*_____ 1079

In a proceeding under the act, section 10, for forfeiture of a food product for misbranding, the burden is on the Government to establish by the evidence not merely a technical, but a substantial violation of the act, which may render the article injurious to health, or mislead the public to its prejudice or harm, or induce the purchase of an article different from the article desired. Id

If an article of food is the identical thing indicated by the brand, it is not "misbranded", within the meaning of the act, section 8, and the method of manufacture is immaterial. Id.

The purpose of the act in forbidding misbranding is to prevent the use of misleading statements as well as those which are false. *United States* v. *95 Barrels, More or Less, Alleged Apple Cider Vinegar*_____ 1118

The statute as to misbranding, is plain and direct. Its comprehensive terms condemn every statement, design, and device which may mislead or deceive. Deception may result from the use of statements not technically false or which may be literally true. The aim of the statute is to prevent that resulting from indirection and ambiguity as well as from statements which are false. It is not difficult to choose statements, designs, and devices which will not deceive. Those which are ambiguous and liable to mislead should be read favorably to the accomplishment of the purpose of the act. Id.

United States v. *John J. Fulton Co*_____ 1229

The test of misbranding under the act, section 8, declaring that the term "misbranded" shall apply to all drugs, or articles of food, the package or label of which shall bear any statement, etc., which is false or misleading in any particular, is whether the statement on the package or label tended to deceive or mislead the ordinary person purchasing the article, giving the words used their ordinary and customary meaning as understood by the general public. *United States* v. *Harper*_____ 11

United States v. *300 Cases of Mapleine*_____ 39

MISBRANDING—Continued.

Page

Whether an article labeled "Pure Pepper" was misbranded under the act depended on the ordinary and customary meaning given to such words, and not on the technical meaning thereof. *United States* v. *75 Boxes of Alleged Pepper* ---- 340

In determining whether an article of food is misbranded as labeled or branded so as to deceive or mislead the purchaser, the terms used on the label must be given the meaning which is commonly accepted and understood by the general public. *United States* v. *F. B. Washburn & Co* ---- 434

In a proceeding for the misbranding of food in violation of the act the words of the offending label are to be construed in their ordinary or customary meaning so far as they have one. *United States* v. *150 Cases of Fruit Puddine* ---- 557

The act as to misbranding was designed to prevent the ordinary purchaser from being deceived and misled as to what he is buying, and therefore the test of misbranding is the effect of the label or statement upon the ordinary purchaser. *United States* v. *95 Barrels, More or Less, Alleged Apple Cider Vinegar* ---- 1047

In determining whether a drug product is misbranded within the act, section 8, as amended by act August 23, 1912, the language used on the label or package is to be given the meaning ordinarily conveyed by it to those to whom it is addressed. *Hall* v. *United States* ---- 978

In a libel proceeding for condemnation of drugs for misbranding under the act, section 8, as amended by act August 23, 1912, *held* that the jury should give to the language of the statements in the labels, etc., and set forth in the libel, its ordinary and common meaning and consider what the statements would mean to an ordinarily intelligent person purchasing the drugs. *United States* v. *Eleven Gross Packages of Dr. Williams' Pink Pills* ---- 680

The test of misbranding under the act, section 8, as amended by act August 23, 1912, declaring drugs misbranded if the package or label bears or contains any statement regarding the curative or therapeutic effect of the drug which is false and fraudulent, is what the statements appearing on the label or in a circular or pamphlet inclosed in the package, mean to the ordinary person, that is, what the ordinary person reading the statements would understand as to the curative or therapeutic effect of the article. *United States* v. *Athlophoros Co* ---- 732

In a prosecution charging misbranding of drugs by reason of the label, etc., containing allegedly false and fraudulent statements regarding the curative or therapeutic effect of the article, *held* that the jury, in determining whether the challenged statements were false and fraudulent, had the right to consider the ideas conveyed by the words in their common usage to the average person as distinguished from the ideas conveyed to the average physician or scientist. *United States* v. *Bell & Co* ---- 828

In a prosecution charging misbranding of bottled water in that the label falsely and fraudulently stated its curative or therapeutic effect, *held* that the jury, in determining whether the label constituted misbranding, should determine what the label meant, and, in doing so, should give to the words and language thereof the meaning they would convey to ordinary men, and not to men who are skilled in medical, chemical, or pharmaceutical science capable of making nice distinctions and discriminations. *United States* v. *Bethesda Mineral Spring Co* ---- 841

Upon a charge of misbranding by offering for sale an article of food under the distinctive name of another article, *held* that the trial court properly received evidence that the shipment was made to fill an order obtained by the defendant's agent by so misrepresenting the article, and properly declined to confine the jury's attention to the label borne by the article when it was shipped. *Weeks* v. *United States* ---- 867

MISBRANDING—Continued. Page

False representations regarding an article of food, in a circular enclosed within the package, cannot be considered as violations of the act as to misbranding. *United States* v. *Newton Tea & Spice Co*---- 950

The act, section 8, declaring that the term "misbranded" shall apply to drugs, the package or label of which shall bear any statement, design, or device regarding the article which shall be false or misleading in any particular, merely embraces any statement, etc., which appears on the outside of the package in which the article is offered for sale, whether such statement is printed on or otherwise affixed to the package, and does not include an advertising circular inclosed with an article inside the carton in which it is offered for sale. *United States* v. *American Druggists' Syndicate*---- 250

The provision of the act that drugs are misbranded if the package or label bears or contains any false and fraudulent statement regarding the curative or therapeutic effect of the article, embraces statements which are contained in the packages as well as those appearing on the label. *United States* v. *Abbott Bros. Co*---- 722

Statements regarding the curative or therapeutic effect of a drug preparation, if false and fraudulent, constitute misbranding under the act, whether such statements appear on the labels of the packages or are contained in a pamphlet or circular contained in the package. *United States* v. *Matusow*---- 664

United States v. *Eleven Gross Packages of Dr. Williams' Pink Pills*---- 680

Section 8 of the act as amended by act August 23, 1912, providing that drugs shall be deemed to be misbranded if the package or label shall bear or contain any statement regarding the curative or therapeutic effect of the article which is false and fraudulent, not only applies to statements which appear on the package or label but embraces as well statements in circulars or printed matter contained inside the package. *Seven Cases of Eckman's Alterative* v. *United States*---- 707

Simpson v. *United States*---- 832

Under the provision of the act that drugs shall be deemed to be misbranded if the package or label bears or contains any false and fraudulent statement regarding its curative or therapeutic effect, a statement as to the curative or therapeutic effect of drug preparations, if false and fraudulent, is misbranding thereof whether it is made on the labels of the bottles, on cartons inclosing the bottles, or in circulars or pamphlets contained in the cartons. *United States* v. *Kellett*---- 711

"Misbranding" within the definition of the act, section 8, as including cases where the package or label shall bear any statement regarding the article or the ingredients or substances contained therein which is false or misleading in any particular, is inapplicable to such statements in a booklet inclosed within a carton containing drugs. *United States* v. *17 Bottles, Etc., of An Article of Drugs Labeled in Part "B. & M."*---- 1287

The purpose of the act was to protect the public health against adulterated, poisonous, and deleterious food and drugs, and in view of such purpose, under section 8 which provides that the term "misbranded" shall apply to all drugs, or articles of food, the package or label of which shall bear any statement, etc., regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, a medicinal preparation cannot be said to be misbranded merely because of a representative on the label as to its curative effect. *United States* v. *Johnson*---- 85

Affirmed, *United States* v. *Johnson*---- 267

The term "misbranded" and the phrase defining what amounts to misbranding in section 8 of the act are aimed at false statements as to identity of the article, possibly including strength, quality, and purity, dealt with in section 7, and not at statements as to curative effect; and so *held* that a statement on the labels of

MISBRANDING—Continued.

Page

bottles of medicine as to the curative effect of the contents, even if misleading, is not covered by the act. *United States* v. *Johnson*__ 267

An information charging misbranding of an article of food should specifically charge the manner of misbranding as defined in section 8 of the act. *United States* v. *St. Louis Coffee & Spice Mills*____ 44

An information charging that defendant shipped in interstate commerce a liquid labeled "Flavor of Vanilla", which did not contain any extract of vanilla, *held*, did not state a case of misbranding of vanilla extract in violation of the act, section 2, the words "extract" and "flavor" not being synonymous terms. Id.

Where a libel to condemn food alleges misbranding under the act, section 8, it is essential that the libel should set forth the branding and facts inconsistent therewith, and, if there is indefiniteness in the statement, it must be removed by proof. *United States* v. *650 Cases of Tomato Catsup*_____ 31

Averments that a fluid was labeled "Flavor of Lemon and Citral—A Pure Flavor," and that it did not contain an appreciable quantity of lemon oil which was an essential ingredient of pure lemon flavor, do not state facts sufficient to show a misbranding under the act, because they fail to show that the fluid was labeled a pure flavor of lemon, or that lemon oil was an essential element of a pure flavor of lemon and citral. *Nave-McCord Mercantile Co.* v. *United States*_____ 166

An averment that one who branded an article with a label whose accepted and usual signification correctly describes it intended that the public or purchasers should understand that the label had an opposite and unusual signification fails to disclose any misbranding. An averment that the defendant intended that the label "Flavor of Lemon and Citral—A Pure Flavor" should be understood by the public and purchasers to mean a pure flavor or extract of lemon is futile, because the accepted and usual signification of the label is that the article is not a pure flavor or extract of lemon, but that it is a flavor of lemon and citral. Id.

Averments in a libel charging misbranding under the act, section 8, as amended by act August 23, 1912, should receive a sensible construction. They must definitely charge the statutory offense of misbranding, but if there is enough to apprise those interested in the goods that they were charged with misbranding because statements as to curative power accompanying the articles in interstate commerce were false and fraudulent, as stating they would cure diseases which they could not cure, and were made with intent to deceive, they are sufficient to sustain the libel. *Seven Cases of Eckman's Alterative* v. *United States*_____ 707

An information alleging that statements on the label of an article of food were false and misleading in that they represented to the purchaser that the article was a substitute for eggs and could be used in place of eggs for cooking and baking, whereas, in truth said article was not a substitute for eggs, and could not be used in place of eggs for baking and cooking, *held*, sufficiently charged facts constituting misbranding, as against an objection that it did not set forth why or in what manner the article could not be used as a substitute for eggs. *United States* v. *Newton Tea & Spice Co*_ 950

Newton Tea & Spice Co. v. *United States*_____ 1089

A libel for condemnation of certain canned tomatoes, representing that said article of food, labeled "Castle Haven Brand Tomatoes. Our first quality carefully selected," as analyzed by the Department of Agriculture is shown to be misbranded in violation of the Food and Drugs Act in that the labels contain the statement "Tomatoes" and the cut of a ripe tomato, which are false and misleading and deceive and mislead the purchaser, *held* insufficient, there being no allegation in the libel that the contents of the cans were not derived from tomatoes, whether ripe or unripe, or that they were not of the first quality available to the packer or that they had not been carefully selected; and the representation of

MISBRANDING—Continued. Page

the ripe tomato on the label merely indicated the source of the contents of the cans and did not tend to deceive. *United States* v. *154 Cases of Tomatoes* 967

An information alleging that packages of an article were misbranded in that the statements "butter" and "one pound net" were false and misleading in that they represented that the article was "butter," namely, a product which should contain not less than 80 per centum by weight of milk fat, and represented that each of such packages contained one pound net of the article, whereas in truth the article contained less than 80 per centum by weight of milk fat and the packages contained a less amount than one pound net of the article; and that the article was further misbranded in that it was labeled as stated so as to mislead and deceive the purchaser into the belief that it was butter as defined, and that each of such packages contained one pound net of the article, *held* sufficiently charged misbranding in view of section 8 of the act, and in view of act March 4, 1923, defining "butter" for the purpose of the Food and Drugs Act. *United States* v. *Centralia Dairy Co* 1336

The labeling of canned apples and canned blackberries to indicate that the fruit was grown in Michigan, when it was grown in Arkansas, there being evidence that Michigan apples and blackberries were better than those grown in Arkansas, *held*, constituted misbranding. *United States* v. *100 Cases of Tepee Apples et al* 20

A sirup, composed of 10 percent of maple sugar and 90 percent of white sugar, labeled "Gold Leaf Syrup", with a trade mark consisting of a gold leaf in the form of a maple leaf, and stalks projecting on each side apparently representing sugar cane, and bearing the words "Composed of Maple and White Sugar" distinctly, cannot be said to be misbranded within the meaning of the act because the proportion of white sugar in the sirup exceeded that of maple sugar. *In re Wilson* 33

"Salad Oil" prima facie means olive oil, and, in the absence of evidence that the term has recently acquired a more general meaning to include other oils, its use without further explanation on packages of cotton seed oil constitutes misbranding. *Brina* v. *United States* 104

Ordinary Croton water drawn from the pipes in New York City, filtered and bottled after the addition of a small quantity of mineral salts and carbonic acid gas, is not "spring water", as the term is generally understood, and the labeling of the bottle as "Imperial Spring Water" was misleading and constituted misbranding within the meaning of the act, section 8. *United States* v. *Morgan et al* 146

An article labeled "Orange Flavoring" is not misbranded merely because it is shown to contain no more than about 20 percent of orange extract. It must be shown that the words orange "flavoring" and orange "extract" have a trade meaning to the effect that such substances are identical in strength. *United States* v. *Union Pacific Tea Co* 196

An information alleging that an article of food labeled as "Extract Terpeneless Lemon" was misbranded in that the article did not contain 0.2 percent of citral derived from lemon, but contained only 0.05 percent of such citral, and that the article therefore was not terpeneless lemon extract as recognized by the trade generally and by the standard of purity established by the Secretary of Agriculture by authority of act March 3, 1903, *held*, stated facts which sustained a count for misbranding under the Food and Drugs Act. *United States* v. *Frank et al* 205

A bottle containing wine produced in California and labeled "Extra Dry Champagne", without any other qualifying or descriptive words, tends to mislead and deceive and is misbranded under the provisions of the act. *United States* v. *Schraubstadter et al* 237

A bottled wine produced in California and labeled "Champagne" without any other qualifying or descriptive words, is misbranded

MISBRANDING—Continued. Page

under the act. Such a wine having substantially the same qualities as the champagne manufactured in France and produced substantially in the same way, although originating in California, is not misbranded if it is labeled "California Champagne", or if by some other device conspicuously displayed in connection with the word champagne, purchasers are clearly advised that the bottles do not contain a product of France. Id.

A bottled domestic wine, artificially carbonated, and labeled "Extra Dry Champagne" and with a design and with words in French calculated to induce a purchaser to believe he was buying a foreign and not a domestic product, *held* misbranded. *Schraubstadter et al.* v. *United States* ---------- 398

An article described on the label as "Peroxide Cream", and containing some peroxide, *held* not misbranded though the quantity of peroxide contained in the article was so small as to be insignificant. *United States* v. *American Druggists' Syndicate* ---------- 250

Alleged pure cider vinegar *held* misbranded where samples showed only from 0.11 to 0.16 percent glycerin. *United States* v. *100 Barrels of Vinegar* ---------- 287

Where grape juice contained added cane sugar the label describing the same as "Pure unfermented grape juice" was misleading and constituted misbranding. *United States* v. *Mohn Wine Co* ---------- 316

Where there was no proof that the words "Hudson's Extract" had a well-known trade meaning, an imitation of vanilla marked "Hudson's Extract", without giving any indication of what the article was composed, constituted misbranding under the act. *Hudson Manufacturing Co.* v. *United States* ---------- 344

In view of undisputed testimony that the term "patent flour" does not connote flour containing any fixed or maximum percentage of the wheat berry, and that it may differ with different kinds of wheat, a misbranding within the meaning of the act, section 8, cannot be predicated alone on the percentage in a flour so branded. *Lexington Mill & Elevator Co.* v. *United States* ---------- 443

Judgment affirmed, *United States* v. *Lexington Mill & Elevator Co.* ---------- 577

A charge in a libel that flour was misbranded in that it was labeled as made of the first quality of hard wheat, whereas, in truth it was made in whole or in part of soft wheat, was not sustained by evidence that the flour was milled from No. 2 Turkey red wheat and was not of the first quality, and that no soft wheat entered into its composition. Id.

Wine consisting in whole or in part of a pomace wine *held* misbranded as "Ohio Claret Wine." *United States* v. *60 Barrels of Wine* ---------- 658

Where macaroni manufactured in the United States bore a label containing Italian words, including the name of a town in Italy where macaroni is extensively manufactured, and the general purchaser, looking at the label, would conclude that it represented an Italian product, the macaroni was misbranded within the meaning of the act, section 8, though the letters "Mfg. U. S. A." appeared in small type within less than an inch of space on a very narrow white margin on the lower edge of the label. *United States* v. *267 Boxes of Macaroni* ---------- 630

In a prosecution for misbranding so-called macaroons, under the act, section 8, providing that an article of food is misbranded if it be an imitation of or offered for sale under the name of another article, or if the package containing it, or its label, shall bear any statement regarding the article or the ingredients or substances contained therein which shall be false or misleading in any particular, if the jury found that a macaroon, as commonly understood, consists of ground cocoanut, sugar, and the white of eggs, then defendant's product containing glucose in addition, and branded "Macaroons", was misbranded within the meaning of the act. *F. B. Washburn & Co.* v. *United States* ---------- 654

MISBRANDING—Continued. Page

An article labeled "Special Lemon. Lemon Terpene and Citral", which was not derived from lemon, but was a mixture containing alcohol and citral derived from lemon grass, and an imitation of lemon oil, *held* not misbranded. *Weeks* v. *United States*_____ 646

An article composed of alcohol and citral derived from lemon grass and an imitation of lemon oil, and labeled "Special Lemon", and represented by the seller's agent to the buyer as pure lemon oil, was misbranded within the act, section 8, defining misbranding as offering an article for sale under the distinctive name of another article, though no label describing it as such other article was affixed to it. Id.

Affirmed, *Weeks* v. *United States*_____ 867

An information alleging misbranding of defendant's food product in that its designation on the label, "Cordial Non-Alcoholic Rock & Rey", was false and misleading in representing the article to be (a) a compound of rock candy and rye whisky, (b) a cordial, and (c) a cordial containing rock candy and rye whisky, when it was syrup containing sugar, commercial glucose, and artificial coloring matter, *held*, failed to charge misbranding, on the ground that such designation was an arbitrary and fanciful one, calculated to put the purchaser of the article upon inquiry as to its ingredients, and that the word "non-alcoholic" indicated that the product did not contain whisky and that it was not a cordial (the essential ingredient of which is alcohol). *United States* v. *Goodman*_____ 484

On a finding that there is a distinct kind of gin known as "London Dry Gin" which need not necessarily be made in London, *held* that the use of such name on the label of such particular kind of gin not made in London did not constitute misbranding. *United States* v. *36 Bottles of London Dry Gin*_____ 489

Judgment reversed, *United States* v. *36 Bottles of London Dry Gin*_____ 570

An article of domestic manufacture designated on the label as "Holland" gin, with the statement "Distilled by Baird Daniels Co., Warehouse Point, Conn.", *held* not misbranded as purporting to be a foreign product, since the term "Holland" in connection with the word gin is a geographical name which has become generic by usage, and represents a style, type, or brand of gin, and the label stated the State where the article was manufactured. *United States* v. *Five Cases of Hurdle Brand Holland Gin*_____ 549

Natural spring water taken from Buffalo Lithia Springs in Mecklenburg County, Va., and sold in bottles under the label "Buffalo Lithia Water—Springs No. 2, Buffalo Lithia Springs Water—Nature's Materia Medica, Buffalo Lithia Water Company, Buffalo Lithia Springs, Va.", *held* misbranded within the meaning of the act, section 8, first general paragraph, in that the water was not a lithia water and did not contain a sufficient amount of lithium to entitle it to be called lithia water. *United States* v. *Seven Cases of Buffalo Lithia Water*_____ 573

Affirmed, *Goode* v. *United States*_____ 698

Flour *held* misbranded in that it was offered for sale under the distinctive name of another article, to wit, "High Patent Flour", when it was a flour inferior to "Patent Flour" and was a mixed flour consisting of "Straight Flour" mixed with "Clear Flour"; and misbranded in that it was labeled and branded so as to deceive and mislead the purchaser, that is to say, it was described on the labels as "High Patent", when it was not "Patent Flour", but was a mixture of straight flour made from a mixture of hard and soft new winter wheat, and clear old wheat flour. *United States* v. *420 Sacks of Flour*_____ 96

Flour *held* misbranded in that it was labeled as "Patent" flour, when in fact it was not patent flour but was flour inferior to patent flour, and was sold under the distinctive name of another article and labeled so as to deceive and mislead the purchaser; and further misbranded in that the labels contained the statement,

MISBRANDING—Continued. Page

"This flour is made of first quality hard wheat", when in fact it was not made from first quality hard wheat, but was made in whole or in part from wheat inferior to first grade winter wheat, and was sold under the distincitve name of another article. *United States* v. *625 Sacks of Flour*---- 129
Reversed, *Lexington Mill and Elevator Co.* v. *United States*--- 443
Judgment C. C. A. affirmed, *United States* v. *Lexington Mill and Elevator Co*---- 577

Under a regulation adopted under the act, that "The use of a geographical name in connection with a food or drug product will not be deemed misbranding, when by reason of long usage it has come to represent a generic term, and is used to indicate a style, type, or brand, but in such cases the state or territory where any such article is manufactured or produced shall be stated upon the principal label", coffee shipped from the port of Aden, Arabia, whether produced in Arabia or Abyssinia, may properly be labeled "Mocha", but the label must state in which of the two countries it was produced. *United States* v. *Thomson & Taylor Spice Co*--- 390

The H. Co., at Kansas City, Mo., contracted to sell to the W. Co., at Fort Worth, Tex., a quantity of No. 2 red wheat, according to Missouri official state grades, and ordered the operator of a public elevator where it stored its grain to ship to the W. Co. in fulfillment of this contract No. 2 red wheat. The operator loaded and sent to the W. Co. a car of wheat. After the wheat was loaded, an official inspector of the State of Missouri at Kansas City inspected, adjudged, and certified this wheat to be No. 2 red wheat. An invoice of it was forwarded to the W. Co., showing that it was shipped under the contract and subject to Kansas City weights and grades. The wheat arrived in Texas without change. There, on inspection by a Texas inspector, a Federal inspector, and other witnesses, it was found to be wheat of another and less valuable grade. None of the officers or employees of the H. Co. had any knowledge of this fact, or anything to do with the grading or shipping, except to order the operator of the elevator to ship No. 2 red wheat. *Held*, the H. Co. was not guilty of misbranding within the meaning of section 8 of the act. *Hall-Baker Grain Co.* v. *United States*---- 391
Reversing *United States* v. *Hall-Baker Grain Co*---- 291

A food product labeled "Grenadine Syrup", composed of sugar, citric and tartaric acid, and juices of certain fruits, and in the manufacture of which no pomegranates were used, *held* not misbranded as labeled or branded so as to deceive or mislead the purchaser, since the word "grenadine" in its common acceptance does not mean a sirup made from pomegranates, but the term "grenadine syrup" is used in commerce to designate, not a sirup so made, but a sirup possessing a certain characteristic flavor and color, and a purchaser of sirup so labeled was not entitled to expect to receive a sirup actually made from pomegranates. *United States* v. *30 Cases Purporting to be Grenadine Syrup*---- 394

Cakes labeled "Macaroons" *held* misbranded in that they were labeled so as to deceive or mislead the purchaser, because they were not made of cocoanut, but of almonds, and because they contained glucose, when macaroons mean cakes made not of cocoanut, but of almonds, and containing sugar and not any glucose. *United States* v. *F. B. Washburn & Co.*---- 434
Affirmed, *F. B. Washburn & Co.* v. *United States*---- 654

A liquid made by distilling wood, for curing meats, *held* not misbranded by the label "Wright's Condensed Smoke. A Liquid Smoke", such name being a fanciful or descriptive one referring to the article and not tending to deceive or mislead the public into the belief that the article was actually smoke in condensed, liquid form. *United States* v. *Wright et al*---- 482

Hog feed was misbranded under the act where the labels upon the bags contained false and misleading statements as to the percentages of its ingredients. *United States* v. *426 Bags of Economy Special Hog Feed*---- 1001

MISBRANDING—Continued. Page

A coal-tar color labeled "Warranted. Complies with all requirements", containing salt in a percentage greater than the maximum prescribed for such coloring materials by the Department of Agriculture, *held* misbranded, where it appeared that it was known or understood in the trade that the "requirements" referred to the requirements of the department, and that the particular article was being purchased according to such requirements. *United States* v. *One Pound Can Coal-Tar Color*---------- 1019

Carbonated apple juice with capsicum added, contained in bottles labeled "Sparkling White Seal" and resembling in form and dress a distinctive bottle used for champagne sold and well-known under the same name, *held* misbranded within the meaning of the act, section 8, declaring an article of food misbranded if the package or its label bear any false or misleading statement, design, or device regarding the article. *United States* v. *9 Cases of Sparkling White Seal*---------- 1023

Affirmed, *Duffy-Mott Co.* v. *United States*---------- 1078

Where an artificial or intentional mixture of oats contained 23 percent of foreign material, a percentage of which was wild oats, which had been intentionally added, branding the mixture "Sample grade star oats" was a misbranding, subjecting it to forfeiture under the Food and Drugs Act, even assuming that the wild oat seed is a food, and that such brand was not deceptive, and not, withstanding that, under the regulations authorized by the Grain Standards Act, a natural mixture containing as high as 25 percent of foreign material could have been branded "Sample grade oats", and that the oats were graded by an authorized inspector as sample oats. *United States* v. *154 Sacks of Oats*---------- 1039

Claimant manufactured vinegar from sound, mature apples from which 80 percent of the water had been evaporated and an equal amount of pure water added before pressing. The liquid obtained by the pressing was similar in chemical test to apple cider made from fresh apples, and the product resulting after fermentation was similar in taste, appearance, and composition to vinegar made from unevaporated apples. Vinegar so made had been extensively sold in the market for many years. *Held* that such vinegar labeled and sold as "Apple Cider Vinegar Made from Selected Apples", was misbranded in that the label was false and misleading, and in that the vinegar was offered for sale under the distinctive name of another article. *United States* v. *95 Barrels, More or Less, Alleged Apple Cider Vinegar*---------- 1047

Reversed, Ninety-Five Barrels, More or Less, Apple Cider Vinegar v. *United States*---------- 1079

Judgment C. C. A. reversed, *United States* v. *95 Barrels, More or Less, Alleged Apple Cider Vinegar*---------- 1118

Claimant manufactured vinegar from sound and mature apples from which, for the purpose of preservation, 80 percent of the water had been evaporated and an equal amount of pure water added before pressing. The liquid obtained by the pressing was identical in taste, substance, and chemical test with cider pressed from unevaporated apples. If any constituent element of the apples was removed by the evaporating process, it was so small that its absence was not shown by chemical tests. Such vinegar was labeled and sold as "Apple Cider Vinegar." *Held*, that such name was not a misbranding. *Ninety-Five Barrels, More or Less, Apple Cider Vinegar* v. *United States*---------- 1079

Reversing *United States* v. *95 Barrels, More or Less, Alleged Apple Cider Vinegar*---------- 1047

Judgment C. C. A. reversed, *United States* v. *95 Barrels, More or Less, Alleged Apple Cider Vinegar*---------- 1118

Vinegar made from dried apples by adding water equivalent to that removed in the drying, and fermenting the resulting solution, even though it be similar to vinegar produced directly from fresh apple cider and equally wholesome, is not the same thing; and a label describing it as "Apple Cider Vinegar Made from Selected Apples"

MISBRANDING—Continued. Page

is misleading to the public, and a misbranding within the act. *United States* v. *95 Barrels, More or Less, Alleged Apple Cider Vinegar*---- 1118

Reversing *Ninety-Five Barrels, More or Less, Apple Cider Vinegar*---- 1079

Where, under the decisions of the Department of Agriculture, coloring material containing more than 5 percent of salt could not be certified, and a coloring material containing a greater percentage carried a label bearing the words "Warranted. Complies with all requirements", the article was misbranded within the act, section 8, as the label would tend to convey the belief that the color was warranted to comply with the decisions of the department. *W. B. Wood Manufacturing Co.* v. *United States*---- 1070

False representations on the labels of an article of food as to the results which may be obtained by the use of the article may constitute misbranding under the act, section 8, providing that the term misbranded shall apply to all articles of food the package or label of which shall bear any statement, etc., regarding such article which shall be false or misleading. Statement on the label of an article of food "Substitute for eggs in baking and cooking", was not one of opinion only, but one of fact, and, where false, constituted misbranding within the act; it being otherwise expressed upon the label that the article could be otherwise used in place of eggs "in baking and cooking." *United States* v. *Newton Tea & Spice Co*---- 950

Affirmed, *Newton Tea & Spice Co.* v. *United States*---- 1089

Canned salmon, labeled "Select Pink Salmon. Fresh Fish", when the pack was of inferior quality and not fresh, as the term is used in the trade, *held* misbranded. *United States* v. *200 Cases, More or Less, of Canned Salmon*---- 1095

A drug containing alcohol, used as an inhalant for the treatment of head colds, *held* subject to the provision of the act, section 8, par. 2, as to misbranding for failure of the package to bear a statement on the label of the quantity or proportion of alcohol, though the drug is harmless and not detrimental to health. *United States* v. *11 Cartons of Drug Labeled in Part "Vapex"*---- 1332

The act, section 8, subdivision 4, provides that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the case of mixtures or compounds known as articles of food under their own distinctive names and not an imitation of or offered for sale under the distinctive name of another article, etc. *Held*, that an article of food manufactured and sold under the distinctive name of "C. A. P.", and consisting of calcium acid phosphate and corn starch, and not containing any poisonous or deleterious ingredient, was not misbranded within the meaning of the act by reason of the presence of corn starch. *United States* v. *100 Barrels of Calcium Acid Phosphate*---- 58

The provision of the act, section 8, that a mixture or compound known as an article of food under its own distinctive name and not an imitation of or sold under the distinctive name of another article, if the name is accompanied by a statement of the place of manufacture, shall not be deemed adulterated or misbranded unless it contains some added poisonous or deleterious ingredient, protects such article from the charge of misbranding only insofar as any statement or suggestion contained in the name itself is concerned, and does not prevent its condemnation as misbranded, if, in addition to such distictive name, the label contains other misleading statements, designs, or devices. *United States* v. *40 Barrels and 20 Kegs of Coca-Cola*---- 239

Judgment affirmed, *United States* v. *40 Barrels and 20 Kegs of Coca Cola*---- 606

Under the provision of the act, section 8, that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be misbranded in the case of

MISBRANDING—Continued. Page

mixtures or compounds known as articles of food under their own distinctive names, and not an imitation of or sold under the distinctive name of another article, if the name is accompanied by a statement of the place of manufacture, *held*, that a compound, being a syrup used in the preparation of beverages and long known and sold under its trade name of "Coca-Cola", and no other article of food or beverage has been manufactured or sold under such name, cannot be deemed misbranded within the meaning of the statute because it does not contain any material element derived from the leaves of the cola plant. *United States* v. *40 Barrels and 20 Kegs of Coca Cola*_____ 239

Under the provision of the act, section 8, that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be misbranded in specified cases, a compound sold under the name of Coca Cola, which is the distinctive name of the product of the manufacturer thereof and of nothing else, is not misbranded, "Coca" being indicative of one article, "Cola" being indicative of another distinct article, and the combination not being descriptive of any substance or combination known until adopted by the manufacturer, and still unknown as an appellation for any other substance on the market. *United States* v. *40 Barrels and 20 Kegs of Coca Cola*_____ 606

Judgment reversed, *United States* v. *Coca Cola Co*_____ 741

Section 8 of the act provides that an article of food shall be deemed to be misbranded if the package containing it or its label shall bear any statement, etc., regarding the ingredients or substances contained therein which shall be false or misleading in any particular, provided that an article not containing any added poisonous or deleterious ingredients shall not be deemed to be misbranded in the case of mixtures or compounds known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, etc. *Held* that while a distinctive name may be purely arbitrary, and may satisfy the statute, it must be one that distinguishes the article; and where more than one name, each descriptive of an article, are united, it does not constitute a "distinctive name" within the protection of the proviso, and amounts to misbranding, if the article sold does not contain any of the articles generally known individually by any of such names. *United States* v. *Coca Cola Co*_____ 741

Reversing judgment C. C. A., *United States* v. *40 Barrels and 20 Kegs of Coca Cola*_____ 606

The act, section 8, provides that an article of food shall be deemed to be misbranded if it be an imitation of or offered for sale under the distinctive name of another article, or if it be labeled or branded so as to deceive or mislead the purchaser, provided that an article which does not contain any added poisonous or deleterious ingredients shall not be deemed to be misbranded in the case of mixtures or compounds known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the label or brand with a statement of the place where the article has been made or produced, and in the case of articles labeled to plainly indicate that they are compounds, imitations, or blends. A wholesale liquor dealer ordered from a dealer in another State five cases of champagne. The order was filled with cases, the outside of which were marked with designs to represent cases of champagne and contained bottles of the same shape and made to imitate an ordinary champagne bottle. The bottles were corked and dressed about the neck the same and in very close imitation of ordinary champagne bottles, having the same style of label and seal, both attached in the same manner, and on the label was the name "Special gold cabinet, superior quality", with a coat of arms on one side and the initials "H. H. S. & Co.", and on the other certain figures, but without the word "champagne." The contents of the bottles was

MISBRANDING—Continued. Page

a very cheap, ordinary, low grade of carbonated white wine. The boxes were also marked with the words "Extra Dry", when the contents were not extra dry. *Held* to constitute misbranding within the act. *United States* v. *5 Cases of Champagne*_____ 503

The first proviso of section 8 of the act that mixtures or compounds known as articles of food under their own distinctive names shall not be deemed misbranded when sold under such name, and not an imitation of or sold under the distinctive name of another article, does not apply to a case where the name used in its popular meaning is accurately descriptive of another well known food product. A food product sold under the name of "Condensed Skimmed Milk" *held* to be misbranded, where it contained 42 per cent of cane sugar, the presence of which was not indicated on the label; it being shown that condensed skimmed milk unsweetened is also made and sold. *Libby, McNeill & Libby* v. *United States*__ 540

Affirming *United States* v. *Libby, McNeill & Libby*_____ 442

The act, section 8, provides that the term "misbranded" shall apply to all articles of food the package or label of which shall bear any statement regarding the article or its ingredients which shall be false or misleading in any particular, and that an article shall be deemed to be misbranded (subdivision 4) if the package containing it or its label shall bear any statement regarding the ingredients which shall be false or misleading in any particular, provided that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the case of mixtures or compounds known as articles of food under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where the article is manufactured or produced. *Held* that such proviso was limited to the distinctive name under which a proprietary food was sold, and as so limited the proviso applied to the first paragraph of section 8, and protected distinctive names from constituting misbranding; and hence, where an article of food was sold in cartons labeled "Puddine" or "Fruit Puddine", which was its own distinctive name, accompanied by the words "Fruit Flavored", which was not part of the name, when in fact the article was not fruit flavored, the article was misbranded. *United States* v. *150 Cases of Fruit Puddine*_____ 557

The act, section 8, subdivision 4, provides that an article shall be deemed misbranded if the package containing it or its label shall bear any statement regarding ingredients which shall be false or misleading in any particular, provided that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed adulterated or misbranded in the case of mixtures or compounds known as articles of food under their own distinctive names, etc. Where a proprietary food made largely of cornstarch, labeled "Puddine", with the words "Cream Vanilla" and "Rose Vanilla" to designate the different colors, the product being flavored with vanillin or synthetic vanilla obtained from oil of cloves, *held*, that such words did not indicate that the food labeled "Cream Vanilla" was flavored with the highest quality of vegetable extract of the vanilla bean, and the food labeled "Rose Vanilla" was flavored with the highest quality of a compound of vegetable flavors of rose and vanilla, but that they were distinctive names, the use of which was protected by such proviso, and their use did not constitute misbranding. Id.

The proviso of the fourth subsection of section 8 of the act, providing that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed adulterated or misbranded in case of mixtures or compounds known as articles of food under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, etc., goes only to the branding or the name of the

MISBRANDING—Continued. Page

article, and does not furnish a refuge for one who has on the label otherwise falsely stated the nature of the contents of the package. *United States* v. *Newton Tea & Spice Co*---- 950

The proviso of the act, section 8, that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed adulterated or misbranded in certain cases, including the case of mixtures or compounds known as articles of food under their own distinctive names, and not an imitation of or offered for sale under the name of another article, etc., does not apply to a case where the charge is misbranding, and is not directed against the name, but against false statements on the label. *Newton Tea & Spice Co.* v. *United States*---- 1089

An article of food, contained in cases bearing principal labels describing the contents as a particular brand of molasses, but plainly stating in three separate places that the product was a compound of molasses and corn sirup, and also containing all the other information required by the act and the regulations thereunder, and which article was in fact a compound of molasses and commercial glucose, *held* not misbranded within the meaning of the act; it being shown that it contained nothing deleterious to health, and that under the rulings of the Department of Agriculture it was permissible to describe commercial glucose on labels or brands as made from corn sirup. *United States* v. *779 Cases of Molasses*---- 65

An article of food labeled "Compound: Pure Comb and Strained Honey and Corn Syrup", *held* not misbranded merely because the percentage of corn sirup largely excluded that of honey. *United States* v. *Boeckmann*---- 88

An indictment alleging misbranding of an article of food known as "Grant's Hygienic Crackers", *held* did not state an offense under section 8 of the act, on the ground that there was no averment that the article contained any poisonous or deleterious ingredient, and that under section 8, subdivision 4, such averment was necessary to charge an offense where the label upon the package containing an article of food states where it was manufactured or produced, and describes such article by its own distinctive name without stating the ingredients of which such article is composed. *United States* v. *Hygienic Health Food Co*---- 259

The act, section 8, declares an article of food misbranded if it be labeled or branded so as to deceive or mislead the purchaser, provided that such articles containing no poisonous or deleterious ingredients shall not be deemed to be misbranded if they are labeled or branded so as to plainly indicate that they are compounds, and the word "compound" is plainly stated on the package. The term "Compound White Pepper" does not so naturally imply to the average purchaser a mixture of white pepper with an ingredient other than pepper as to make it a proper branding, where the statement of its ingredients is so placed and in such type as not to be readily noticed by the purchaser, and as to be calculated and intended to deceive and mislead the purchaser. *Frank et al.* v. *United States*---- 329

An article labeled "Pure Pepper" and composed of a mixture of ground black pepper and long pepper, *held* misbranded, where there was evidence that "pure pepper", in the trade and according to ordinary usage meant black pepper and nothing else. *United States* v. *75 Boxes of Alleged Pepper*---- 340

An information stating that an article of food labeled "Fruit Wild Cherry Compound" consists chiefly of an imitation wild cherry essence artificially colored, *held* to state a case of misbranding under the act, since the name represents that the dominant element of the compound is genuine fruit wild cherry, and if it be shown that the dominant element of the compound is an imitation wild cherry essence and not the genuine fruit wild cherry, then the article is misbranded. *United States* v. *Weeks*---- 519

Judgment reversed, *Weeks* v. *United States*---- 646

MISBRANDING—Continued. Page

Under the act, section 8, declaring that an article of food shall be deemed "misbranded" where it is labeled so as to deceive or mislead the purchaser, and where the package or its label shall bear a false or misleading statement, provided that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be misbranded in the case of compounds known as articles of food under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, and in case of articles labeled so as to plainly indicate that they are compounds, and the word "compound" is stated plainly on the package in which it is offered for sale, an article labeled "Fruit Wild Cherry Compound", but not containing any "Fruit Wild Cherry", nor any added poisonous or deleterious ingredients, is not misbranded. *Weeks* v. *United States* ---------- 646

An article labeled "Special Lemon. Lemon Terpene and Citral"—but not a product derived from lemon, but a mixture containing alcohol and citral derived from lemon grass and an imitation of lemon oil, is not misbranded. Although the article is not within the proviso of the act, section 8, because the word "compound" is not "plainly stated on the package in which it is offered for sale", the label plainly indicates that the contents of the package, so-called "Special Lemon", consists of a compound of lemon terpene and citral. Id.

Reversing judgment in *United States* v. *Weeks*---------- 519

A bottled article labeled "Compound Ess Grape", but which contains nothing from grapes and is a mere imitation, must, within the general terms of the act, section 8, be deemed misbranded, since the label carries a false and misleading statement; and in such case the mere use of the word "compound" is not a compliance with the proviso in paragraph 4 of section 8 of the act, since it does not give notice that the article is a mere imitation but suggests the contrary. *United States* v. *Schider*---------- 875

Under the act compounds known as articles of food can be sold under their own distinctive names, so long as no deleterious matter is put into the product and the label states where it is manufactured, and it is not an imitation sold under the distinctive name of another article. Since the term "oat feed" in its ordinary acceptation does not mean the whole oat grain, either crushed or ground, but instead means that part of the grain which remains after the miller subtracts the portions useful for human food, consisting of nubbins, middlings, hulls, and oat dust, a compound substance sold in packages under the name "Corno Horse and Mule Feed", and described on the package as a "mixture of ground alfalfa, oats, corn, alfalfa, oat and hominy feeds", with the name of the manufacturer and place of manufacture, followed by an analysis of the contents, was not misbranded under the act, because it contained an excess of oat hulls in compound and not the whole ground oats. *United States* v. *One Carload of Corno Horse and Mule feed*---------- 274

The provision of the act, section 8, that an article of food shall be deemed to be misbranded "If it be an imitation of or offered for sale under the distinctive name of another article", deals, first, with imitations, that is, articles patterned after, or a copy of, or made in simulation of another article, and, as such, offered or put out as the genuine; second, articles, whatever they may be, whether imitation or not, which are put out under the distinctive name of another article. The statute condemns the use of means which being used arouse the belief that one thing is really another. *United States* v. *24⅞ Gallons of Smack*---------- 1181

An article labeled "Smack" being a manufactured, synthetic concentrate containing certain ingredients also found in natural grape juice, used as a beverage imitative of grape juice and resembling grape juice in its fluid consistency, color, and taste, *held* to be a mixture or compound known under its own distinctive name, and therefore not misbranded within the meaning of the act. Id.

MISBRANDING—Continued. Page

Where sirup made from cane sugar and flavored to represent maple sirup by the introduction of an extract from maple wood after it had been chopped down, was put up in bottles labeled "Western Reserve Ohio Blended Maple Syrup", the words "Ohio" and "Maple Syrup" being in red, and between them the word "Blended", and then below that, in smaller type, the statement, "This syrup is made from the sugar maple tree and cane sugar", *held* that the label was misleading in that purchasers would ordinarily understand that the article contained in part maple sirup made from boiled-down sap drawn from live maple trees, and the article was therefore misbranded. *United States* v. *Scanlon*---------- 28

The act, section 8, provides that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be misbranded if labeled so as to plainly indicate that it is a compound, imitation, or blend, and the word "blend" is plainly stated on the package, which term shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for coloring or flavoring only. *Held* that, where sirup consisting of refined cane sugar flavored with an extract of maple wood was labeled "Western Reserve Ohio Blended Maple Syrup", the word "blend" indicated that the article was a mixture and imitation and therefore the article was not misbranded within the meaning of the Act. *United States* v. *68 Cases of Syrup*---------- 62

The act, section 8, provides that the term "misbranded" shall apply to all articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, etc., regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular. Section 8, subdivision 4, paragraph 2, declares that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed misbranded if labeled so as to plainly indicate that they are compounds, imitations, or blends, etc., provided that the term "blend" shall be construed to mean a mixture of like substances. *Held* that the proviso was not limited to cases where the blend was claimed without disclosing the ingredients, but applied as well to cases where the component parts of the blend were disclosed, and hence vinegar described on the label as "Saratoga Brand Vinegar, a blend of pure boiled apple cider and distilled vinegar", which was in part distilled vinegar to which boiled apple cider had been added for coloring, but containing no cider vinegar, was misbranded as misleading the public to believe that it was composed of apple cider vinegar and distilled vinegar. *United States* v. *10 Barrels of Vinegar*---------- 254

In a libel proceeding for condemnation and forfeiture of a quantity of distilled spirits alleged to be misbranded, it was no defense that the brand was placed upon the packages containing such liquor by the United States gauger upon information received from the distiller in accordance with the usual practice, or that the same kind of liquor had for a number of years been so branded and sold under such brand to the knowledge of the agents and officers of the United States. *United States* v. *50 Barrels of Whisky*---------- 22

Where a misbranded drug was received by claimants in interstate commerce and correctly branded before seizure, it was not subject to forfeiture. *United States* v. *Five Boxes of Asafoetida*---------- 160

United States v. *Nine Boxes of Asafoetida*---------- 165

It is no defense to a prosecution for misbranding as to measure of the contents of cans of sirup that the shortage in measure was caused by filling the cans while the sirup was hot and its shrinkage on cooling. If the sirup was short in measure at the time it was shipped, it was misbranded. *United States* v. *Scudder Syrup Co*-- 461

That there was a custom in the trade to label packages so as to state approximately the quantity in liquid or solid measure nearest the general size of the package, such packages being known as commercial quarts, half gallons, etc., or that a seller's circular and price lists, with reference to which sales were made to re-

MISBRANDING—Continued. Page

tailers, stated that the quantities specified were "commercial measure", did not excuse violations of the act which provides, in section 8, as amended by act March 3, 1913, that drugs or food are misbranded within the meaning of the act, if the package or label bears any false or misleading statement, or if, in case of food in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count. *United States* v. *Rigney & Co* ---------- 632

That a defendant ceased the use of labels on packages of a food product which were misleading as to quantity went only to the question of mitigation for a violation of the act. Id.

A manufacturer of drugs is entitled to express his own views as to their worth and merit, and he is not chargeable with any offense for so doing if his statements are not false or fraudulent. *United States* v. *Matusow*---------- 664

United States v. *Bell & Co*---------- 828

United States v. *Long*---------- 989

A drug product shipped in interstate commerce in bottles contained in cartons, the labels and cartons bearing statements representing that it was effective in the treatment of certain ailments named, whereas it contained no ingredient which could possibly have any remedial or beneficial effect in the treatment of such ailments, as was known to the shipper, who was the manufacturer, *held* misbranded within the act, section 8, as amended. *Hall* v. *United States* ---------- 978

The Government brought a libel seeking condemnation of packages of a so-called remedy for contagious abortion in cattle on the ground that it was misbranded under the act, section 8, paragraph 3, providing that drugs shall be deemed misbranded if the package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent. The packages were so wrapped that a printed statement, "Bowman's Abortion Remedy. This package contains one 9½ pound treatment of Bowman's Abortion Remedy. Read the directions carefully before administering", and the printed directions for the use of the remedy, appeared only upon removal of the wrapping. There was uncontroverted evidence that the so-called remedy was composed of 85 percent brown sugar and 15 percent wheat, and contained no chemical or drug. Experts testifying for the Government were of the unanimous opinion that no possible combination of the two substances composing the article would have any effect upon the disease, and that all of a number of tests of the so-called remedy, made on Government-owned cattle, showed that it did not prevent the disease, or cure it after inception, or in any manner retard its effect. *Held* that the so-called remedy was misbranded within the act. *United States* v. *100 Boxes of Bowman's Abortion Remedy*---------- 1187

An article of drugs called "Lee's Save The Baby" *held* not misbranded, as charged, in that statements, on the label on the package and container and in an accompanying circular, falsely and fraudulently represented that the article was composed of ingredients or medicinal agents effective in diseases and conditions named therein, where the evidence showed that every ingredient of the article had some therapeutic value in connection with the treatment or mitigation of the ailments and diseases in which the use of the article was indicated or recommended on the label and in the circular. *United States* v. *23 7/12 Dozen Bottles, Etc., of An Article of Drugs Labeled in Part "Lee's Save The Baby"*---------- 1240

A libel averring that statements appearing on the label, etc., of an article of drugs were false and fraudulent in that they represented that the article "has cured" and "will cure" a disease specified, whereas in truth it would not cure such disease, and there was no medicinal substance or mixture of substance known that could be relied upon to effect a cure, *held*, sufficiently charged

MISBRANDING—Continued. Page

misbranding under the act, section 8, as amended by act August 23, 1912. *Seven Cases of Eckman's Alterative* v. *United States*---- 707

A libel in a proceeding to condemn bottled water as misbranded within the act, section 8, as amended August 23, 1912, which, after quoting from the label a long list of ailments for which the water was said to be beneficial, with "healing powers", and a "reliable remedy", denies that the water is capable of producing the therapeutic effects so claimed, states a case under the statute; and is sustained by sufficiently showing the false and fraudulent character of any one of the various claims recited. *Goodwin et al v. United States*---- 1130

Where a libel for condemnation of a shipment of flour alleged that the flour was misbranded in that it was labeled as patent flour, when it was not patent flour, but was a grade and quality of flour inferior to patent flour, and was therefore labeled under the distinctive name of another article, and was labeled so as to deceive and mislead the purchaser; and in that the flour was described on the label as made from first quality hard wheat, when it was made in whole or in part of inferior wheat, and therefore was sold under the distinctive name of another article; *held* that it was not necessary, in order to justify a finding that the flour was misbranded, that it be shown that the flour was misbranded in all of the respects or particulars alleged, and that it was sufficient if it be shown to be misbranded in any such respect or particular. *United States* v. *625 Sacks of Flour*---- 129

It is not necessary, in order to establish misbranding of articles of food because of false and misleading representations on the label, for the Government to prove or for the jury to find that the labels are false and misleading as a whole; it is sufficient if the jury find from the evidence that the labels are false and misleading in any particular. *United States* v. *Sherer-Gillett Co*---- 1093

In a prosecution under section 2 of the act, or in a libel proceeding for forfeiture under section 10, charging drugs misbranded under section 8, as amended by act August 23, 1912, in that the package or label bore or contained statements regarding the curative or therapeutic effect of the article which were false and fraudulent, it is not necessary for the Government to prove that all of such statements charged in the information or libel are false and fraudulent; it is sufficient to constitute misbranding if the jury find any one of such statements is false and fraudulent within the meaning of the act. *United States* v. *539 Boxes and 322 Cartons of Wm. Radam's Microbe Killer*---- 511

United States v. *Matusow*---- 664

United States v. *C. M. C. Stewart Sulphur Co*---- 669

United States v. *Eleven Gross Packages of Dr. William's Pink Pills*---- 680

United States v. *Kellett*---- 711

United States v. *Abbott Bros. Co*---- 722

United States v. *Pulmonol Chemical Co*---- 806

United States v. *Bell & Co*---- 828

United States v. *Dr. J. H. McLean Medicine Co*---- 850

United States v. *Kar-Ru Chemical Co*---- 900

United States v. *Gandara*---- 984

United States v. *Long*---- 989

United States v. *36 Bottles of Crab Orchard Mineral Water*---- 1011

United States v. *Eleven Packages of B. & M. External Remedy*---- 1059

United States v. *John Dobry Manufacturing Co*---- 1085

Goodwin et al. v. *United States*---- 1130

United States v. *9 Packages of Crisp's Tung-Tone, et al*---- 1268

United States v. *17 Bottles, Etc., of An Article of Drugs Labeled in Part "B. & M."*---- 1287

United States v. *60 Bottles of Dr. Hermance's Asthma and Hay Fever Medicine*---- 1324

In an action charging drugs misbranded in that the label and package contained false and fraudulent statements regarding its cura-

MISBRANDING—Continued. Page

tive and therapeutic effects with respect to certain diseases or ailments, it is sufficient to establish misbranding if it is sufficiently shown that such statement is false and fraudulent as to any one of such diseases or ailments. *United States* v. *539 Boxes and 322 Cartons of Wm. Radam's Microbe Killer* 511
United States v. *Matusow* 664
United States v. *C. M. C. Stewart Sulphur Co* 669
United States v. *Eleven Gross Packages of Dr. Williams' Pink Pills* 680
United States v. *Kellett* 711
United States v. *Athlophoros Co* 732
United States v. *Pulmonol Chemical Co* 806
United States v. *Dr. J. H. McLean Medicine Co* 850
United States v. *Kar-Ru Chemical Co* 900
United States v. *Gandara* 984
United States v. *Long* 989
United States v. *36 Bottles of Crab Orchard Mineral Water* 1011
United States v. *Eleven Packages of B. & M. External Remedy* 1059
United States v. *9 Packages of Crisp's Tung-Tone, et al* 1268
United States v. *17 Bottles, Etc., of An Article of Drugs Labeled in Part "B. & M."* 1287

A libel charging a misbranding of an article of food in a particular specified cannot be supported by evidence of misbranding in a different particular. *Lexington Mill & Elevator Co.* v. *United States* 443

See Adulteration; Appeal and Error; Article; Blend; Circulars, Pamphlets, Booklets, Etc.; Compound; Constitutionality of the Food and Drugs Act; Construction and Interpretation; Curative and Therapeutic Effects of Drugs; Designs and Devices; Distinctive Name; Evidence; Export Articles; False and Fraudulent; False and Misleading; Guaranty; Imitation; Indictment; Information; Knowledge and Intent; Label; Libel; Object of the Act; Purpose of the Act; Shipment; Standards; Weight, Measure, and Numerical Count.

MISLEADING:

See False and Misleading.

MIXED:

In the first and fourth subdivisions of section 7 of the act, which provide, respectively, that an article of food shall be deemed to be adulterated "if any substance has been mixed and packed with it so as to reduce, lower, or injuriously affect its quality or strength", or "if it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed", the word "mixed" is used in its common acceptation, and a substance added which produces a chemical compound is within the first, as well as one which produces a mechanical mixture. *Lexington Mill & Elevator Co.* v. *United States* 443

See Colored; Compound; Damage or Inferiority; Mixture.

MIXTURE.

See Added Poisonous and Added Deleterious Ingredients; Adulteration; Blend; Compound; Distinctive Name; Imitation; Misbranding.

MOLASSES:

Molasses labeled "Sugar Glen Compound Molasses and Corn Syrup" and "Burro Brand Molasses and Corn Syrup", with statements in three separate places indicating that the product was a compound of molasses and corn sirup, *held* not adulterated or misbranded within the meaning of the act. *United States* v. *779 Cases of Molasses* 65

Molasses containing commercial glucose, and sold as molasses under the label "No. 1 Fancy", *held* misbranded in that it was an imitation of and offered for sale under the name of another article, to wit, molasses. *United States* v. *Hobart et al* 171

See Corn Sirup (Glucose); Sirup.

MORPHINE: Page

Statement on the label of a drug product to the effect that it was a 12½ percent solution of certain specified ingredients, including morphine, and that "the proportion of any ingredient was less than 4 percent", *held* not to constitute compliance with the provision of the act, section 8, declaring drugs misbranded if the package fails to bear a statement on the label of the quantity or proportion of morphine. *United States* v. *The Richie Co*__ 286

MULFORD'S WINTERGREENS.

See Confectionery.

MOLD.

See Bacteria.

MULTIPLICITY OF SUITS.

See Injunction.

NATIONAL FORMULARY.

See Pharmacopoeia, United States.

NEWTON'S EGGNO:

An article labeled "Newton's Eggno" *held* misbranded in that the labels represented that the article was a substitute for eggs and could be used in the place of eggs for baking and cooking purposes, whereas it was not such a substitute for eggs and could not be so used. *United States* v. *Newton Tea & Spice Co*____ 950

Affirmed, *Newton Tea & Spice Co.* v. *United States*_____ 1089

NITRITES AND NITRITE-REACTING MATERIAL:

Nitrites and nitrite-reacting material present in flour as a result of bleaching by the Alsop process, *held* to be substances mixed and packed with the flour so as to reduce, lower, and injuriously affect its quality and strength, and to be added poisonous and deleterious ingredients which might render the flour injurious to health, and to constitute adulteration within the meaning of the act. *United States* v. *420 Sacks of Flour*_____ 96

United States v. *625 Sacks of Flour*_____ 129

Judgment in case last above cited, reversed, *Lexington Mill & Elevator Co.* v. *United States*_____ 443

Judgment C. C. A. affirmed, *United States* v. *Lexington Mill & Elevator Co*_____ 577

See Added Poisonous and Added Deleterious Ingredients; Flour.

NOTARIES PUBLIC.

See Affidavits; Information.

NOTICE AND OPPORTUNITY TO BE HEARD:

Held necessary in all cases where criminal prosecutions for violation of the act are instigated by officers or agents of the Department of Agriculture that it be alleged in the indictment or information and established by proof that notice and opportunity to be heard, provided in section 4, were given to defendant prior to institution of the proceeding. *United States* v. *Mohn Wine Co*__ 316

An information charging violation of section 2 of the act *held* insufficient in that it failed to allege that defendant had been given notice and opportunity to be heard by the Department of Agriculture prior to instituting the proceeding. *United States* v. *J. L. Hopkins & Co*_____ 366

An information under the act will not be dismissed on appeal for the reason that it does not appear that there had been a notice and hearing, as provided by section 4, before the Secretary of Agriculture, where no motion to dismiss for this reason was made below, and the question was not raised by any pleading or assignment of error. *Frank et al.* v. *United States*_____ 329

Where proceedings for violation of the act by adulteration or misbranding are instituted at the instance of the Department of Agriculture, whether such proceedings are in personam or for a

NOTICE AND OPPORTUNITY TO BE HEARD—Continued. Page

forfeiture of goods under section 10, it would seem that the notice of examination and opportunity to be heard provided for by section 4 are necessary conditions precedent and must be alleged and proved; but under section 5 a district attorney may institute such a proceeding upon complaint of any State health officer, upon any adequate proof, without the action of the agents of the Department. *United States* v. *74 Cases of Grape Juice*_____ 144

Affirmed, *United States* v. *74 (or 20) Cases of Grape Juice*_____ 256

The provision of the act, section 5, making it the duty of the district attorney to commence appropriate proceedings for the enforcement of penalties for violation of the act, when such violation shall be reported by the Secretary of Agriculture, contemplates that the report of the Secretary shall be the one provided for by section 4, which is only to be made after an examination of samples, and a hearing on notice to the person from whom the samples were taken; and such a notice and hearing are conditions precedent to the institution of either a criminal prosecution under section 2 or a condemnation proceeding under section 10, where they are based on a report from the Secretary. *United States* v. *74 (or 20) Cases of Grape Juice*_____ 256

Affirming *United States* v. *74 Cases of Grape Juice*_____ 144

Although an indictment under the act is not demurrable because it contains no allegation of notice from the Department of Agriculture to the defendant of the result of examination of the article, and that he was given an opportunity to be heard, as required by section 4, since such prosecutions may be maintained by the district attorney without the intervention of the Department, under section 5, such allegations and proof thereof are necessary in all cases where the prosecution is instigated by officers or agents of the Department. *United States* v. *Morgan et al*_____ 146

Judgment reversed, *United States* v. *Morgan et al*_____ 335

It is not a condition precedent to prosecutions for violation of the act that an investigation or hearing be had in the Department of Agriculture. The act, section 4, declares that when, on examination in the Department of Agriculture, an article of food is found to be adulterated, notice shall be given to the party from whom the sample was obtained, and that any party so notified shall be given opportunity to be heard. If it then appears that he has violated the statute, the Secretary of Agriculture is required to certify the facts, together with a copy of the analysis, to the proper district attorney, who, under section 5, must, without delay, institute appropriate proceedings, by indictment or libel for condemnation, or both, as the facts may warrant. But section 5 also contemplates that complaints may be made to the district attorney by State health officials. In that class of cases, no doubt because the State agents investigate without giving a hearing, the district attorney is not obliged to prosecute unless such State officers shall present satisfactory evidence of such violation; but the very fact that he must do so in that event recognizes that he may begin proceedings against a defendant who has not been given a notice and an opportunity to be heard. In providing for notice in one case, and permitting prosecutions without it in another, the statute clearly shows that there was no intent to make notice jurisdictional. *United States* v. *Morgan et al*_____ 335

Reversing *United States* v. *Morgan et al*_____ 146

Section 4 of the act does not repeal R. S. secs. 771 or 1022 making it the duty of the district attorney to prosecute all delinquents for crimes and offenses cognizable under the authority of the United States, nor does it limit him to prosecute only those offenders who have had a hearing before the Department of Agriculture. Id.

In a prosecution by indictment charging violation of section 2 of the act it is not incumbent upon the Government either to charge or to prove compliance by the administrative officers with the provisions of section 4, whether the hearing therein prescribed has or has not taken place. *United States* v. *Schraubstadter et al*____ 237

Affirmed, *Schraubstadter et al.* v. *United States*_____ 398

NOTICE AND OPPORTUNITY TO BE HEARD—Continued. Page

An indictment for shipping misbranded champagne in violation of the act was not invalid for failure to allege preliminary investigation by an officer of the Department of Agriculture, a notice to defendants of their violation of the act, or that defendants were afforded an opportunity to present evidence and be heard. *Schraubstadter et al.* v. *United States* 398
Affirming *United States* v. *Schraubstadter et al* 237
The giving of notice provided for by section 4 of the act is not a condition precedent to a criminal prosecution for misbranding of a medicine because of false and misleading statements respecting its composition or false and fraudulent statements as to its curative properties. *United States* v. *American Laboratories* 641
In a libel proceeding for condemnation under section 10 of the act, *held* that the Government was required to allege in the libel and to prove that notice had been given to the party from whom the sample was obtained and that he had been given opportunity to be heard, as provided in section 4. *United States* v. *Three Barrels of Vanilla Tonka and Compound* 201
It is a condition precedent to the maintenance of a libel for condemnation for adulteration or misbranding, under section 10 of the act, when based on a report of the Secretary of Agriculture, that such report be made after an examination and hearing as provided for in section 4. *United States* v. *Certain Cans of Syrup* 328
In a libel proceeding against allegedly unwholesome spring water, failure, before instituting the proceeding, to notify interested persons and give opportunity to show cause why the matter should not be referred for prosecution under the act, *held* to require dismissal of the libel. *United States* v. *94 Dozen, More or Less, Half-Gallon Bottles Capon Springs Water* 1216
Reversed, *United States* v. *94 Dozen, More or Less, Half-Gallon Bottles Capon Springs Water* 1278
An executive regulation requiring notice and opportunity to be heard to be given before prosecution for adulteration or misbranding is inapplicable to proceedings in rem under section 10 of the act. *United States* v. *94 Dozen, More or Less, Half-Gallon Bottles Capon Springs Water* 1278
Reversing *United States* v. *94 Dozen, More or Less, Half-Gallon Bottles Capon Springs Water* 1216
The giving of notice and affording an opportunity to he heard to the person from whom the sample of a food found to be adulterated or misbranded, by the Department of Agriculture, as provided in section 4 of the act, is not prerequisite to the duty of the district attorney, under section 5, to proceed to enforce the penalties of the act. The notice that is required to be given of the seizure of the property and of the proceedings for its condemnation affords ample opportunity to the owner to appear and defend; and if upon a final hearing the food is condemned, he is not deprived of any property without due process of law. *United States* v. *75 Barrels of Vinegar* 332
Notice and opportunity to be heard, provided in section 4 of the act, *held* not jurisdictional and not a necessary condition precedent to the institution of a libel proceeding for forfeiture of misbranded drugs, under section 10. *United States* v. *W. T. Rawleigh Co.* 1322
In forfeiture proceedings under section 10 of the act, it is unnecessary that notice be given to the person from whom the sample was obtained, or that such person be given an opportunity to be heard, in accordance with the provisions of section 4. *United States* v. *75 Barrels of Vinegar* 332
United States v. *75 Boxes of Alleged Pepper* 340
United States v. *50 Barrels of Whisky* 22
United States v. *65 Casks of Liquid Extracts* 47
United States v. *Nine Barrels of Olives* 128
United States v. *100 Barrels of Vinegar* 287
United States v. *Morgan et al* 335

NOTICE AND OPPORTUNITY TO BE HEARD—Continued. Page

United States v. *95 Dozen, More or Less, Half-Gallon Bottles Capon Springs Water* ---- 1278
National Remedy Co. v. *Hyde, Secretary of Agriculture, et al*--- 1230
United States v. *W. T. Rawleigh Co*---- 1322

The notice and opportunity to be heard, provided for in the act, section 4, is not required preliminary to proceedings in rem under section 10, nor, in view of section 5, is it always a necessary condition precedent even to criminal proceedings under sections 1 and 2. *United States* v. *94 Dozen, More or Less, Bottles Capon Springs Water*---- 1278

See Examination; Investigation; Regulations.

NUMERICAL COUNT.

See Weight, Measure, and Numerical Count.

NUTS:

Nuts labeled "Fancy Mixed Nuts", alleged to consist of bad and inferior nuts, *held* not adulterated or misbranded, upon failure of the Government to show official standards of quality for nuts. *United States* v. *25 Bags of Nuts*---- 677

OATHS.

See Affidavits; Information.

OATS:

An article shipped in interstate commerce, consisting of 77 percent of cultivated oats and 23 percent of foreign material, a percentage of which was wild oats which had been intentionally added, *held* adulterated and misbranded and subject to forfeiture under the act, notwithstanding the article had been graded by an authorized inspector of the Department of Agriculture as "sample grade oats", and was so sold, and the Grain Standards Act August 11, 1916, and Service and Regulatory Announcements No. 46, authorizing shipment of oats in their natural state containing as high as 25 percent of foreign material. *United States* v. *154 Sacks of Oats*-- 1039

OBJECT OF THE ACT:

The object of the act is to keep adulterated articles out of the channels of interstate commerce, or, if they enter such commerce, to condemn them while in transit, or in original or unbroken packages after reaching destination. *Hipolite Egg Co.* v. *United States*---- 223

The act has two clearly separate objects: (1) To keep adulterated articles completely out of the channels of interstate commerce; and, (2) if they do enter such channels, to sanction their condemnation while being transported, or even after they have reached their destination, as long as they remain unsold, or in the original unbroken packages. These objects of the act are not changed or qualified by the purpose of the owner of the article. *Philadelphia Pickling Co.* v. *United States*---- 451

The object of the act is to prevent the misuse of the facilities of interstate commerce in conveying to and placing before the consumer misbranded and adulterated articles of medicine or food, and in order that its protection may be afforded to those who are intended to receive its benefits, the brands regulated must be on the packages, intended to reach the purchaser. *McDermott et al.* v. *Wisconsin*---- 473

The object of the act is to protect purchasers and consumers of food or drugs from articles which are adulterated or misbranded. *United States* v. *Excelsior Baking Co*---- 501

The plain and manifest object of the act is to protect the purchasers and consumers of drugs and foodstuffs from fraud and imposition in the purchase or consumption of such articles under false representations, and to insure that the commodities are such as they are represented to be. *United States* v. *68 Cases of Syrup*--- 62

The act is aimed to protect the consumer against adulterated and misbranded food. *United States* v. *Shucart*---- 693

OBJECT OF THE ACT—Continued. Page

The object of the act is to enable the consumer to know what it is in the way of food or drugs that he is putting into his stomach, and to punish anybody who, whether by willful design or carelessness or inadvertence, puts forth for human consumption as food or drug that which is not what it pretends to be. *United States* v. *Lehn & Fink* ---- 411

What the act aims at is to guarantee to the consumer that when he desires to purchase a certain article and goes to a manufacturer or vendor for that article and states what he wants, he shall know that he gets what he pays for. That is the object of the law. It is to protect the consumers against adulteration and misbranding of food and drugs, so that they may be able to rely on what an article is said to contain, and that they may rely on not being misled by the label. *United States* v. *Six Cases of Honey* ---- 543

The act was designed to prevent the ordinary purchaser from being deceived and misled as to what he is buying, and therefore the test of misbranding is the effect of the label or statement on the ordinary purchaser. The object of the act is to let the purchaser know just what he is buying and to let him decide whether he wants it or not. *United States* v. *95 Barrels, More or Less, Alleged Apple Cider Vinegar* ---- 1047

The object of the act is to protect the purchaser or consumer of food products that move in interstate commerce, and to that end Congress has enacted that the quantity of the contents of any food products in package form must be plainly and conspicuously marked on the label in terms of weight, measure, or numerical count, so that the purchaser thereof may rely upon them and get what he has the right to expect. *United States* v. *Trinidad Creamery Co* ---- 1152

The object of the law is apparent; that is, that the public shall be put distinctly on notice, and cocaine, among other things mentioned in the act, if it be in a preparation of food or drink, must be stated on the label, and it is immaterial also if it is a small quantity, if it is an appreciable quantity. *United States* v. *Koca Nola Co* ---- 59

The object of the act is not only to protect the public from unwholesome food and drink, but to require that any article of food, drink, or medicine sold shall be correctly described by its label. *United States* v. *Morgan et al* ---- 146

The act is designed and intended by Congress to protect the public by prohibiting the shipment in interstate commerce of unwholesome or deleterious food, and it should be enforced by courts and juries with that object in view. *United States* v. *1,600 Cases of Canned Salmon* ---- 1105

The main objects of the act, in respect to food products, are to protect the public from articles unfit for food, and from fraud. *United States* v. *1,974 Cases of Canned Salmon* ---- 1108

The object of the act is (1) to prevent deceit and false pretenses in food and drugs; and (2) to safeguard the public health. *French Silver Dragée Co.* v. *United States* ---- 121

The object of the law was evidently (1) to insure to the purchaser that the article purchased was what it purported to be; and (2) to safeguard the public health by prohibiting the inclusion of any foreign ingredient deleterious to health. *Hall-Baker Grain Co.* v. *United States* ---- 391

Lexington Mill & Elevator Co. v. *United States* ---- 443

The object of the act is twofold: (1) To prevent people who have articles to sell from placing in them ingredients that are injurious or deleterious to health of people, and causing them to buy without knowing that fact; (2) to prevent people from so labeling an article that the purchaser will think he is buying one thing when really he is buying another. *United States* v. *McConnon & Co* ---- 496

The object of Congress in enacting the act was to prevent the sale of commodities in interstate commerce that are harmful to the health of the people, and to prevent them from being defrauded

OBJECT OF THE ACT—Continued. Page

by adulterated foods, drugs, and liquids, also to prevent the misbranding or false labeling of such articles, so that the buyer should know that the article bought by him was what it purported to be. *United States* v. *A. Skarzynski & Co*---------- 860

It is the duty of the court to give the act a fair and reasonable construction for the accomplishment of its object. That object is the exclusion from interstate commerce of food products so adulterated as to endanger health. *United States* v. *1,950 Boxes of Macaroni et al*---------- 112

The object and purpose of Congress in the enactment of the act was the preservation of the health of the people. *United States* v. *630 Baskets of Apples*---------- 1205

The object of the act as amended by act August 23, 1912, is to prevent the carrying in interstate commerce of drugs which are worthless and injurious when they are transported with false and fraudulent statements as to their curative or therapeutic effects; the object being to protect the credulous and ignorant, and the public generally, from having imposed upon them as medicines, things to be used as medicines, drugs which will not perform the functions which it is claimed they will perform, and to prevent people being injured by the use of harmful drugs. *United States* v. *Eleven Gross Packages of Dr. Williams' Pink Pills*---------- 680

United States v. *Athlophoros Co*---------- 732

See Construction and Interpretation; Purpose of the Act.

OFFENSES:

The shipment in interstate commerce of an adulterated food or drug product, which was the subject of a single sale and single shipment, although consisting of numerous packages, constitutes a single offense under the act. *United States* v. *Watson-Durand-Kasper Grocery Co*---------- 837

Where an indictment in each of three separate counts charged defendants with shipping misbranded goods in interstate commerce, and the verdict was "guilty as alleged in the indictment", *held* that the verdict was tantamount to a conviction of each of the three offenses charged by the three counts of the indictment. *Schraubstadter et al.* v. *United States*---------- 398

Under section 2 of the act declaring that any person who shall ship in interstate commerce any article adulterated or misbranded shall be guilty of a misdemeanor and for the first offense fined not exceeding $200, and upon conviction for each subsequent offense not exceeding $300, the article is clearly specified as the unit of the offense, as distinguished from the shipment, and the shipment of seven different articles, each of which was both adulterated and misbranded, constituted 14 separate, distinct violations of the act, for which separate penalties might be imposed, though the aggregate exceeded $200. *United States* v. *Direct Sales Co*---------- 866

Under section 2 of the act a second offense is not a part of the crime, nor should a person be put on trial before the jury upon the issue of whether or not he is charged with a first or second offense. That question has entirely to do with the remedy, and if the accusation of the second offense is disputed it can be summarily heard by the court, or the court may have a doubt and impose sentence within the maximum of the first offense. The second-offense provision is not a mandatory change in the nature of the crime. *United States* v. *Atlantic Macaroni Co*---------- 793

Where an information charging defendant with violation of the act was based on two interstate shipments and consisted of four counts, one as to misbranding and one as to adulteration with respect to each shipment, and the two counts as to misbranding were disposed of by pleas of guilty and the two counts as to adulteration by verdict of guilty; and where it appeared from the record of the court, and the fact was not contested, that the defendant had previously been indicted and punished in the same court on a charge of misbranding with relation to the substantially similar form of label; *held* that the case before the court constituted two

OFFENSES—Continued. Page

offenses, one relating to one of the two interstate shipments, and the other to the other, and that it is possible to impose a fine for four separate violations and that on two of these a maximum of $200 could be imposed, and as to the other two, a maximum of $300. Id.

A prosecution under section 2 of the act, which provides for no imprisonment for the first offense, but merely for a fine not exceeding $200, is a "petty offense", and the trial of such a case under waiver of jury would amount to an arbitration as to the questions of fact involved, and the court's conclusions of fact could not be reviewed. *Frank et al.* v. *United States*---------- 329

See Appeal and Error; Article; Crime, Infamous; Jury Trial; Penalties; Petty Offense; Prior Conviction; Res Judicata; Shipment.

OIL CASSIA:

A drug labeled "Oil Cassia U. S. P.", which contained rosin, *held* adulterated and misbranded. *United States* v. *Lehn & Fink*------ 411

OIL OF EDEN:

An article labeled "Oil of Eden" *held* misbranded because the package and label contained and bore statements regarding the curative or therapeutic effect which were false and fraudulent. *United States* v. *Kellett*---------- 711

OIL, COTTONSEED.

See Oil, Olive; Oil, Salad.

OIL, OLIVE:

An article contained in cans and represented on the label to be olive oil, *held* adulterated and misbranded because it contained approximately 90 percent of cottonseed oil, and further misbranded because the weight of the contents of the cans was less than that stated on label. *United States* v. *Paraskevopolus*---------- 925

An article represented on the label as olive oil produced in Sicily, when in fact it consisted in part of corn oil, and was produced in the United States, *held* misbranded. *United States* v. *Gamanos et al*---------- 927

An article shipped as pure olive oil, *held* adulterated because it was composed principally of cottonseed oil, and misbranded in that it was branded as "Olive Oil" and represented on the label as produced in Italy, when in fact it was composed largely of cottonseed oil, and was manufactured in the United States. *United States* v. *Monahos*---------- 935

An article, contained in cans, *held* misbranded because the labels represented that it was olive oil, and that each of the cans contained one-half gallon net of the article, when the article was not olive oil, but was a mixture composed in large part of cottonseed oil, and each of the cans contained less than one-half gallon net of the article. *United States* v. *Scaduto*---------- 947

An article, contained in cans, *held* misbranded because the labels represented that it was olive oil, and that it was a foreign product, to wit, an olive oil produced in Sicily in the Kingdom of Italy, and that each of the cans contained one-fourth gallon net of the article, when the article was not olive oil, but was a mixture composed in large part of cottonseed oil, and the article was a domestic product, and each of the cans contained less than one-fourth gallon net of the article. Id.

An article labeled "Prodotti Italiani, Pure Olive Oil, Lucca, Italia", and with the representation of a woman draped in the Italian flag and holding an Italian shield, *held* adulterated in that cottonseed oil had been mixed with and substituted in part for pure olive oil which the article purported to be, and misbranded because the label represented that the article was pure olive oil and was produced in Italy, when in fact it was composed in part of cottonseed oil and was produced in the United States. *United States* v. *Alban*---------- 1014

OIL, OLIVE—Continued. Page

An article contained in a barrel bearing a tag containing the words "Pure Olive Oil", and alleged to consist in part of cottonseed oil, *held* not to be adulterated or misbranded. *United States* v. *Marmarelli et al* 1122

See Oil, Salad.

OIL, SALAD:

An article labeled in large type "Olio Sopraffino Savoia Brand Salad Oil", and in small type "compound winter pressed cottonseed oil flavored with pure Italian olive oil", *held* misbranded in that the label represented the article to be superfine olive oil, when in fact it contained 95 percent of cottonseed oil and 5 percent of olive oil. *United States* v. *Italian Importing Co* 187

An article labeled "Olio per Insalata Vival Brand Sopraffino Cotton Salad Oil Extra Quality", and composed of cottonseed oil, *held* misbranded in that the label was calculated to mislead the purchaser to believe the article was Italian olive oil. *Brina* v. *United States* 104

An article labeled "Imported Salad Oil Morel Brand" *held* misbranded because it was not composed of olive oil, but sesame oil. *United States* v. *Von Bremen et al* 193

Reversed, *Von Bremen et al.* v. *United States* 338

An article contained in cans labeled "Superior Quality Oil Greek Patriot Brand Winter Pressed Cotton Salad Oil Flavored with High Grade Oil a Compound", *held* adulterated in that a substance which contained no flavor of olive oil had been substituted for a product flavored with olive oil, which the article purported to be; and misbranded because it was not a product flavored with high-grade olive oil as represented on the label, but was a product containing no flavor of olive oil, and because the contents of the cans was less than that stated on the label. *United States* v. *Germack* 1178

The term "salad oil" prima facie means "olive oil." *Brina* v. *United States* 104

United States v. *Von Bremen et al* 193

United States v. *Italian Importing Co* 187

See Oil, Olive.

OLIVE OIL.

See Oil, Olive.

OLIVES:

Olives held adulterated in that they consisted in whole or in part of a filthy and decomposed vegetable substance. *United States* v. *10 Barrels of Olives* 125

OPINION.

See Evidence.

ORANGE EXTRACT OR FLAVORING:

An article labeled "Orange Flavoring" is not shown to be misbranded by an allegation in an information to the effect that it contained "only about 20 percent of the amount of orange oil that should be present in orange extract." If there is a trade meaning to the words "orange flavoring" and "orange extract" which is that they should be identical in strength, such trade meaning should be pleaded. *United States* v. *Union Pacific Tea Co* 196

See Lemon Extract or Flavor; Vanilla Extract or Flavor.

ORANGE PIE FILLING.

See Pie Filling.

ORANGES:

An interstate shipment of oranges, frozen before shipment, which were undergoing decomposition because of the freezing and would ultimately become unfit for food, are adulterated within the meaning of the act, and may be condemned, even though the oranges were not harmful, if eaten. *United States* v. *462 Boxes of Oranges* 816

ORANGES—Continued. Page

In a proceeding to forfeit a shipment of oranges as adulterated because of their decomposed condition resulting from damage by frost, evidence *held* insufficient to show that the consignment as a whole was so defective as to subject it to forfeiture. *United States* v. *315 Boxes of Oranges*---------- 1208

See Filthy, Decomposed, and Putrid.

ORIGINAL PACKAGE:

The doctrine of original packages was not intended to limit the right of Congress, when it chose to assert it, as it has done in the Food and Drugs Act, to keep the channels of interstate commerce free from the carriage of injurious or fraudulently branded articles and to choose appropriate means to that end. Legislative means provided in the Federal statute for its own enforcement may not be thwarted by State legislation having a direct effect to impair the effectual exercise of such means. *McDermott et al.* v. *Wisconsin*---------- 473

While the Government can seize only the original packages, yet it may open the package, and, if it finds anything wrong on the inside of the package which does not appear on the outside, that is, any misbranding or false statement, it has just as much right to proceed as it has when the label is on the outside of the package seized; but, if it does not seize the original package before it is opened, then it has no right whatever to do anything more than to prosecute any party who may deliver the goods or receive the goods, in a criminal case. *United States* v. *300 Cases of Mapleine*- 39

Where an adulterated or misbranded drug had been transported in interstate commerce and received by the consignee who was the owner, and the packages were opened and samples taken that the strength, quality, and purity might be tested, *held* that such opening for the purpose of testing did not constitute a breaking of the original package. *United States* v. *Five Boxes of Asafoetida*------ 160

United States v. *Nine Boxes of Asafoetida*---------- 165

Change of the original package might not constitute a change of identity of a food or drug guaranteed by the manufacturer under section 9 of the Act. *United States* v. *Mayfield et al*---------- 90

See Interstate Commerce; Jurisdiction; Original Unbroken Package; Package.

ORIGINAL UNBROKEN PACKAGE:

The words "original unbroken package", as used in the act, relate to the package in the form in which it is received by the vendee or consignee. *United States* v. *Dr. J. L. Stephens Co*---------- 305

Affirmed, *Dr. J. L. Stephens Co.* v. *United States*---------- 471

Where a product in casks is shipped in interstate commerce in carload lots, the cask and not the car is the "original package" within the meaning of section 10 of the act, which authorizes the seizure and forfeiture for adulteration or misbranding of articles so shipped while remaining in the "original unbroken packages." *United States* v. *65 Casks of Liquid Extracts*---------- 47

Under section 10 of the act, providing for seizure and condemnation of adulterated articles of food which have been transported from one State to another and remain unloaded, unsold, or in the original unbroken packages the jurisdiction of the Federal Government over interstate shipments of adulterated food continues while the food remains in the original unbroken packages at the point of destination even though mingled with the goods of the State. *United States* v. *Two Barrels of Desiccated Eggs*-- 232

Hipolite Egg Co. v. *United States*---------- 223

By the Food and Drugs Act adulterated articles are, while in interstate commerce, made culpable as well as their shipper; while in original unbroken packages they can be seized and they carry their own identification as contraband of law; they are subject to the power of Congress to regulate interstate commerce, and they are not beyond the jurisdiction of the National Government because within the borders of a State. *Hipolite Egg Co.* v. *United States*- 223

ORIGINAL UNBROKEN PACKAGE—Continued. Page

While the act prohibits shipping or delivering for shipment in interstate or foreign commerce any article of food which is adulterated or misbranded, it does not restrict the offense of shipping or delivering for shipment to articles in original unbroken packages; the restriction to original unbroken packages applying only to those who receive in interstate commerce and, having received, deliver in original unbroken packages any adulterated or misbranded articles. *United States* v. *Krumm*---------- 993

The restriction of the application of the act to original unbroken packages applies only to those who receive in interstate commerce and thereafter deliver adulterated or misbranded articles, not to those who ship or deliver for shipment, so that an information charging that defendant shipped misbranded food in interstate commerce need not allege that it was shipped in original unbroken packages. Id.

See Interstate Commerce; Jurisdiction; Original Package; Package.

OYSTERS.

Canned oysters containing approximately 90 percent oysters and 10 percent liquid, and labeled "First Quality Cove Oysters", *held* not adulterated or misbranded on account of the excessive quantity of liquor present. *United States* v. *Potter*---------- 409

Oysters *held* adulterated because they contained an excessive quantity of water. *United States* v. *Golden & Co*---------- 1033

Oysters although shipped unopened as taken from the water, may come within the prohibition of the act where by reason of the condition of the waters in which they were grown they contain harmful bacteria which render them "filthy, decomposed, or putrid" and adulterated within the meaning of the act. *United States* v. *Sprague et al*---------- 508

Oysters *held* adulterated because of the presence of filth. *United States* v. *408 Bushels of Oysters*---------- 718

PACKAGE:

The words "package" and "unbroken package" are both used in the act. The word "package" is not used in the same sense as "original unbroken package." The framers of the act manifestly had in mind the definition heretofore given by the courts to the term "original package", and in the second, third, and tenth sections have used that expression or its equivalent. The word "package" as used in the act without any modifying adjective or qualifying term is to be taken in a broad sense; as thus used it means the package made up by the manufacturer for sale to the ultimate consumer which goes into the possession of the person who will use the article of food or drugs. *United States* v. *Dr. J. L. Stephens Co*---------- 305

Affirmed, *Dr. J. L. Stephens Co.* v. *United States*---------- 471

That the word "package" or its equivalent expression, as used by Congress in sections 7 and 8 of the act, in defining what shall constitute adulteration and shall constitute misbranding within the meaning of the act, clearly refers to the immediate container of the article which is intended for consumption by the public, there can be no question. Limiting the requirements of the act as to adulteration and misbranding simply to the outside wrapping or box containing the packages intended to be purchased by the consumer, so that the importer, by removing and destroying such covering, could prevent the operation of the law on the imported article yet unsold, would render the act nugatory and its provisions wholly inadequate to accomplish the purposes for which it was passed. *McDermott et al.* v. *Wisconsin*---------- 473

See Article; Circulars, Pamphlets, Booklets, Etc.; Label; Original Package; Original Unbroken Package; Offenses; Shipment.

PACKED.

See Export Articles; Mixed; Prepared or Packed.

PAMPHLETS.

See Circulars, Pamphlets, Booklets, Etc.

PARTNERSHIPS. Page

See Agents; Penalties.

PEANUTS:

In a proceeding to forfeit a shipment of numerous bags of peanuts as adulterated in that they consisted in whole or in part of a filthy, decomposed, or putrid vegetable substance by reason of the presence of moldy and wormy peanuts, *held* that 10 percent of the goods were so adulterated, on evidence that that proportion of the peanuts was moldy and wormy. *United States* v. *350 Bags of Shell Peanuts* ---------- 685

PEARS:

Pears *held* adulterated in that they contained added poisonous or added deleterious ingredients, to wit, a compound or compounds of arsenic and a compound or compounds of lead, which might have rendered them injurious to health. *United States* v. *3,192 Boxes of Apples et al*---------- 1199

Pears are food within the meaning of the act. Id.

PENALTIES:

Under the act, section 2, declaring that any person who shall ship in interstate commerce any article adulterated or misbranded shall be guilty of a misdemeanor, and for the first offense fined not exceeding $200, and upon conviction for each subsequent offense not exceeding $300, etc., the shipment of seven different articles, each of which was both adulterated and misbranded, constituted fourteen separate, distinct violations of the act, for which separate penalties might be imposed, though the aggregate exceeded $200. *United States* v. *Direct Sales Co*---------- 866

Where defendants, members of a firm, were indicted individually in separate courts for three separate violations of the act which provides $200 as the maximum fine for the first offense, and the court, after a verdict by the jury of "guilty as charged in the indictment", rendered judgment that "each of the defendants pay a fine of $100 on each count of the indictment, consisting of three counts, to wit, the sum of $300 each", *held* that the fine was not excessive, and that the statement of the aggregate thereof did not invalidate the judgment. *Schraubstadter et al.* v. *United States*---------- 398

The word "penalties" as used in section 5 of the act is enlightening as showing that the requirements of section 4 do not apply to proceedings under section 10 for condemnation and forfeiture of goods. *United States* v. *100 Barrels of Vinegar*---------- 287

See Article; Crime, Infamous; Offenses; Petty Offense; Prior Conviction.

PEPPER:

An article labeled "Perfection Mills Compound White Pepper", which consisted of 65 percent white pepper and 35 percent corn product, with the words "Composed of Ground White Pepper and Ground Cereals" in small and inconspicuous type and so placed on the label as not to be readily noticed by the purchaser, *held* adulterated and misbranded. *Frank et al.* v. *United States*---------- 329

An article composed of ground black pepper and ground long pepper, labeled "Pure Pepper", *held* misbranded. Such mixture constituted a compound or "blend" within the meaning of the act and should have been so marked. *United States* v. *75 Boxes of Alleged Pepper*_ 340

An article labeled "Pure Ground Black Pepper" *held* adulterated and misbranded on evidence of the addition to the ground natural berry, of foreign pepper shells. *United States* v. *Six Barrels of Ground Pepper*---------- 817

PEROXIDE CREAM:

An article labeled "Peroxide Cream", which contained only a very small and insignificant quantity of peroxide, *held* not misbranded within the meaning of the act, the quantity or proportion of peroxide contained in the article not being required to be stated on the label. *United States* v. *American Druggists' Syndicate*----- 250

PETTY OFFENSE: Page

A prosecution under section 2 of the act, which provides for no imprisonment for the first offense, but merely a fine not exceeding $200, is for a "petty offense", and the trial of such a case under waiver of jury would amount to an arbitration as to the questions of fact involved, and the court's conclusions of fact could not be reviewed. *Frank et al.* v. *United States* ---------- 329

See Appeal and Error; Crime, Infamous; Information; Jury Trials; Offenses.

PHARMACOPOEIA, UNITED STATES:

Congress, in providing that a drug shall be deemed to be adulterated if it fails to comply with the standard for such drug as determined by the test laid down in the United States Pharmacopoeia or National Formulary official at the time of investigation, did not delegate legislative power, but merely prescribed the method of ascertaining facts upon which the operation of the statute was to depend. *United States* v. *Lehn & Fink* ---------- 229

See Constitutionality of the Food and Drugs Act; Standards.

PHYSICIANS' PRESCRIPTIONS:

The act makes no exception in favor of the medicines or prescriptions of regularly licensed physicians, and the sending through the channels of interstate commerce of such a medicine or prescription containing morphine, without a statement on the label of the package of the proportion thereof, constitutes an offense against the act. *United States* v. *Dr. J. L. Stephens Co.* ---------- 305

Affirmed, *Dr. J. L. Stephens Co.* v. *United States* ---------- 471

PIE FILLING:

An article labeled "Lemon Pie Filling * * * contains in a concentrated form the same ingredients used by the housewife in making Lemon Pie", and an article labeled "Orange Pie Filling * * * contains in a concentrated form the same ingredients used by the housewife in making Orange Pie", *held* misbranded because the so-called "Lemon Pie Filling" was not lemon pie filling and did not contain in a concentrated form the same ingredients used by the housewife in making lemon pie, and the so-called "Orange Pie Filling" was not orange pie filling and did not contain in concentrated form the same ingredients used by the housewife in making orange pie. *United States* v. *Sherer-Gillett Co* ---------- 1093

PLEADING.

See Indictments; Information; Libel.

POISONOUS.

See Added Poisonous and Added Deleterious Ingredients; Confectionery; Dangerous to Health; Deleterious; Injurious to Health.

POLICE COURT, DISTRICT OF COLUMBIA:

The police court of the District of Columbia is a "proper court of the United States" within the meaning of section 5 of the act, which requires United States attorneys to whom violations of the act are reported "to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States" for the enforcement of the penalties provided by the act. *Huyler's* v. *Houston, Secretary of Agriculture* ---------- 507

Affirmed, *Huyler's* v. *Houston, Secretary of Agriculture* ---------- 572

POLICE POWERS OF STATES.

See Constitutionality of the Food and Drugs Act; Constitutionality of State Laws.

POLICE REGULATION:

The act is a police regulation. *United States* v. *Piso Co* ---------- 319

Dade v. *United States* ---------- 465

United States v. *Pulmonol Chemical Co* ---------- 806

POLICE REGULATION—Continued. Page

The Act is not a police regulation, but a proper act for the regulation of interstate commerce. *Shawnee Milling Co.* v. *Temple, U. S. Dist. Atty., et al* 106

See Constitutionality of the Food and Drugs Act; Constitutionality of State Laws; Interstate Commerce.

POMEGRANATE.

See Sirup, Grenadine.

PORK AND BEANS.

Canned pork and beans *held* adulterated in that it consisted in whole or in part of a filthy or decomposed vegetable substance. *United States* v. *1,367 Cases of Pork and Beans* 766

PREPARED OR PACKED:

The words "prepared or packed", as used in the provision of the act, section 2, that "no article shall be deemed misbranded or adulterated within the provisions of this act when intended for export to any foreign country and prepared and packed according to the specifications or directions of the foreign purchaser, etc.", mean any condition or grade of the merchandise, including any deteriorated state of the goods, considering the class to which they belong. *United States* v. *Catz American Co., Inc* 1282

See Export Articles.

PRESERVED WHOLE EGG.

See Eggs and Egg Products.

PRESUMPTION OF INNOCENCE.

See Burden of Proof; Criminal Cases; Reasonable Doubt.

PRIOR CONVICTION:

An indictment charging the defendant with violation of the act contained allegations to the effect that the same defendant had, upon its plea of nolo contendere to a criminal information, been convicted and fined the sum of $50 and costs for a violation of the same act. Upon demurrer to the indictment that such allegations of prior conviction were impertinent, irrelevant, and had no relationship to, or connection with, the offense charged in the instant indictment, *held* that under the provisions of the act that for a first offense thereunder the punishment shall on conviction be a certain minimum in the act set forth, but that on conviction for a second or subsequent offense thereunder the punishment shall be increased in a certain definite manner prescribed, the fact of the former conviction was properly pleaded in the indictment, so that the court would have the formal charge thereof before it when fixing punishment, and because the question of the identity of the defendant upon trial with the person formerly convicted might well arise and become an issue. *United States* v. *St. Louis Dairy Co* 962

In a prosecution for offense under the act, *held* that the fact of a previous conviction of defendant for violation of the act goes only to the question of penalty if defendant is convicted, and must not in any way influence the verdict of the jury. *United States* v. *Trinidad Creamery Co* 1152

See Indictment; Offenses; Penalties; Res Judicata.

PROOF.

See Burden of Proof; Evidence.

PUDDINE.

See Fruit Puddine.

PURCHASER:

The word "purchaser" as used in section 8 of the act is without limitation or qualifying terms. If it is broad enough to include wholesale and retail purchases, it is also broad enough to include

PURCHASER—Continued.

Page

the ultimate consumer as a purchaser, and the labeling or branding of the particular package, box, bottle, or other container inclosing the article which he buys must be such as not to deceive or mislead him. It is the purchasing public, the ultimate consumer, whom the provisions of the statute are primarily designed to protect. *United States* v. *Dr. J. L. Stephens Co*---- 305
Dr. J. L. Stephens Co. v. *United States*---- 471
United States v. *90 Boxes of Macaroni*---- 561

By the words "the purchaser" used in the act is meant not only the wholesale dealer who might buy, or the retailer who might purchase, the article, but includes also the ultimate consumer who might purchase it for use. *United States* v. *Wedell*---- 771

See Label; Object of the Act; Package; Purpose of the Act.

PURITY.

See Standards.

PURPOSE OF THE ACT:

The purpose of the act is to keep adulterated or misbranded articles of food or drugs out of the channels of interstate commerce, or, if they enter such commerce, to condemn them while being transported or when they have reached their destination, provided they remain unloaded, unsold, or in original unbroken packages. *Hipolite Egg Co.* v. *United States*---- 223
Savage v. *Jones*---- 376

The act is intended to prevent adulterated and misbranded foods from being sold in interstate commerce. *United States* v. *Charles L. Heinle Specialty Co*---- 82

The act was passed for the purpose of preventing the transportation in interstate commerce of articles of food, or of drugs, which are adulterated or misbranded. *United States* v. *Eleven Gross Packages of Dr. Williams' Pink Pills*---- 680

The statute was enacted to remedy the great mischief resulting from the unrestricted sale of adulterated drugs and food, and ought to be given, where possible, a construction that will effect the general legislative intention. *United States* v. *Antikamnia Chemical Co*---- 260

The Food and Drugs Act was passed by Congress under its authority to exclude from interstate commerce impure and adulterated food and drugs and to prevent the facilities of such commerce being used to enable such articles to be transported throughout the country from their place of manufacture to the people who consume and use them, and it is in the light of the purpose and of the power exerted in its passage by Congress that this act must be considered and construed. *McDermott et al.* v. *State of Wisconsin*---- 473

The purpose of the act is to prevent the shipment in interstate commerce of food or drugs that have been adulterated or misbranded with the idea of protecting the public from being deceived or misled as to such articles. *United States* v. *Bethesda Mineral Spring Co*---- 841

One of the purposes of the enactment of the act was to keep adulterated drugs out of interstate commerce and to insure to the purchaser and user of the drug shipped in interstate commerce an article that was up to, and which complied with, the standard prescribed by law. *United States* v. *G. F. Harvey Co*---- 754

The purpose of the act was to protect consumers against impure and adulterated foods and drugs, and also against the use of foods or drugs which do not show what they contain by the brands on the package. *United States* v. *Mayfield et al*---- 90

The one purpose of the act was to prevent the sale of adulterated articles; the other purpose was to enable a purchaser to obtain what he called for and was willing to pay for. The statute was to protect consumers, and not producers. *United States* v. *100 Cases of Tepee Apples et al*---- 20

The purpose of the act is to secure the purity of food and drugs and to inform purchasers of what they are buying. Its provisions are

PURPOSE OF THE ACT—Continued. Page

directed to that purpose and must be construed to effect it. *United States* v. *Antikamnia Chemical Co* 552
United States v. *Schider* 875
United States v. *95 Barrels, More or Less, Alleged Apple Cider Vinegar* 1047
United States v. *95 Barrels, More or Less, Alleged Apple Cider Vinegar* 1118

The law requires the manufacturer to be honest in his statement of the contents of the package; it requires him to be honest in stating the truth upon the label put upon it. That is what the act is intended to accomplish, and, if properly enforced, it will accomplish. *United States* v. *Edward Westen Tea & Spice Co* 69

It is the purpose of the act to promote honest dealing between those who sell and those who buy, through the medium of interstate commerce, articles within the purview of the act. *United States* v. *22 Bottles of Crab Orchard Concentrated Mineral Water* 1055

Congress by the enactment of the statute intended to promote honesty and fair dealing in trade and to secure to the public pure and wholesome food and drugs. *United States* v. *Buffalo Cold Storage Co* 103

The act is for the purpose of enabling the consumer to get what he orders and to receive what he desires to receive. *United States* v. *Hall-Baker Grain Co* 291

The general purpose of the act is to prevent the sale under misleading terms of food and drugs. *United States* v. *Dunham Manufacturing Co* 440

The purpose of the act, section 8, is to protect the public from deception by misbranding. *United States* v. *267 Boxes of Macaroni* 630

The purpose of the act is to protect the people against impure food, where the quality or value of a food is so adulterated as to reduce the strength or the food value. The whole purpose of the law is to have the quality of an article as well as the quantity, just as described upon the label. *United States* v. *Potter* 409

The primary purpose of Congress in enacting the statute was to prevent injury to the public health by the sale and transportation in interstate commerce of misbranded and adulterated food. *United States* v. *Lexington Mill & Elevator Co* 577
United States v. *Coca Cola Co* 741
Ninety-five Barrels, More or Less, Apple Cider Vinegar v. *United States* 1079
United States v. *Ten Cases, More or Less, Bred Spred, Etc., et al* 1262

The statute, as against misbranding, was intended to make it possible that the consumer should know that an article of food purchased was what it purported to be; that it might be bought for what it really was and not upon misrepresentations as to character and quality. As against adulteration, the statute was intended to protect the public health from possible injury by adding to articles of food consumption poisonous or deleterious substances which might render such articles injurious to health of consumers. *United States* v. *Lexington Mill & Elevator Co* 577
United States v. *Coca Cola Co* 741
United States v. *Ten Cases, More or Less, Bred Spred, Etc., et al* 1262

The statute, as against misbranding, was intended to make it possible that the consumer should know that an article purchased was what it purported to be; that it might be purchased for what it really was and not upon misrepresentations as to character and quality. *United States* v. *Lexington Mill & Elevator Co* 577
United States v. *Coca Cola Co* 741
United States v. *Schider* 875
United States v. *95 Barrels, More or Less, Alleged Apple Cider Vinegar* 1047
United States v. *Ten Cases, More or Less, Bred Spred, Etc., et al* 1262

The aim of the act in forbidding misbranding is to prevent deception resulting from indirection and ambiguity as well as from statements which are false. Statements which are ambiguous and

PURPOSE OF THE ACT—Continued. Page

liable to mislead should be read favorably to the accomplishment of the purpose of the act. *United States* v. *95 Barrels, More or Less, Alleged Apple Cider Vinegar*---- 1118

The purpose of the act was to prevent deceit and false pretenses in the sale of food or drugs, and to protect the customer or buyer in his right to receive what he orders, what he buys, and what he desires to receive. It was also for the prevention of fraud and deception to the end that the purchaser should get the thing that he had a right to suppose he was getting. *United States* v. *W. B. Wood Manufacturing Co*---- 1002

The purpose of the act is to prevent deceit and false pretenses in the sale of food and drugs and to protect the public. It is aimed at imitations, shams, frauds, and pretenses of every character as regards food and drugs. Its purpose is to apprise people who buy and use drugs as to what they buy and use, and to check the use of drugs which lead to destructive habits. *United States* v. *Dr. J. L. Stephens Co*---- 305

The purpose of the act is the ever insistent consideration in its interpretation. The purpose of the act is to prevent the surreptitious sale of certain noxious drugs or their derivatives, the latter supposedly partaking of the quality of the parent article and as effective of evil consequences. *United States* v. *Antikamnia Chemical Co*---- 552

The act was passed for the protection of the people. It was intended that through the instrumentality of the act food and drugs that pass in interstate commerce should be as represented, and should be branded truthfully. The act was passed so as to prevent people from taking cocaine when they did not know there was cocaine in it, or chloroform when they did not know there was chloroform in it, or some other deleterious substance mentioned in the act. *United States* v. *Piso Co*---- 319

The purpose of the act is to insure the truthful and proper labeling of drugs; it is to prevent the false and fraudulent labeling of drugs; it is to protect the public against being misled as to the curative properties of drugs. *United States* v. *36 Bottles of Crab Orchard Mineral Water*---- 1011

The purpose of the act of August 23, 1912, amending the Food and Drugs Act, was, in the branding of drugs, to punish false and fraudulent statements regarding the curative or therapeutic effects of such drug or any of its ingredients. *Eleven Gross Packages, More or Less, of Dr. Williams' Pink Pills* v. *United States*---- 752

The act as amended by act of August 23, 1912, is intended to protect the people from the transportation and sale of misbranded medicines, experience having shown that men and women afflicted with disease are disposed to try a professed remedy, no difference how useless or even harmful it may be if it is strongly recommended; and it is to protect the sick and afflicted and people who are easily imposed upon from fraudulent practices of the unprincipled and avaricious. *United States* v. *Simpson*---- 700

The act, as indicated in its title, is an act to prevent not only the manufacture and sale, but the transportation of adulterated or misbranded foods and drugs. Transportation, as well as sale or manufacture, is, therefore, within the Congressional purpose in passing this enactment. *United States* v. *Philadelphia Pickling Co*---- 414

The purpose of the act is very manifest; it is to protect the public from the sale of impure food. Transportation with a view of putting into the hand of customers an adulterated article is within the beneficent purpose, and within the terms of this enactment. Id.

The purpose of the act is to protect the public from the manufacture, sale, or transportation of adulterated or misbranded foods and drugs or those below a certain standard. *United States* v. *Koshland*---- 777

The act is intended to protect the public against adulterated drugs transported from one State to another. *United States* v. *One Bale of Aletris Root*---- 1212

PURPOSE OF THE ACT—Continued. Page

The purpose of the act is to benefit, or help, the public. In the case of foods, the act is intended to do two things; one, to enable persons to get exactly what they think they are getting; and the other, to prevent their getting something that may do them harm or may defraud them by making them pay an additional price, or will cause them to be cheated in the various ways that are defined in the statute, by covering up the sale of one thing in place of that which the article purported to be. *United States* v. *Russian Monopol Co*---------- 784

The statute was enacted for the purpose of benefiting and protecting the consumer. *United States* v. *625 Sacks of Flour*---------- 129

The act was passed for the protection of consumers and purchasers. *United States* v. *Mohn Wine Co*---------- 316

The purpose of the act was to protect the public. *United States* v. *Paraskevopolus*---------- 925

The purpose of Congress in the enactment of the act was the better protection of the people of the United States from adulterated or deleterious foods, drugs, medicines, and liquors. *Wm. M. Galt & Co.* v. *United States*---------- 422

The act was designed to protect the public from the adulterations of foods and drugs, and from being deceived by misbranding of such articles or their labeling differently from what they are in fact. *United States* v. *S. Gumpert et al*---------- 182

The purpose of the act is to protect the public against deception in the purchase of drugs and food, by punishing adulteration and misbranding as therein defined. *United States* v. *American Druggists' Syndicate*---------- 250

The act is for the protection of the consumer, the public, in respect to both food products and drugs, for humans and animals, and is to be so regarded. *United States* v. *Joslin-Schmidt Co*---------- 881

The act is designed to protect the public against fraud, such as the sale and shipment of a mixture of cottonseed oil with olive oil as pure olive oil. *United States* v. *Marmarelli et al*---------- 1122

The act was passed not to protect experts especially, not to protect scientific men who know the meaning and the value of drugs, but for the purpose of protecting ordinary citizens. *United States* v. *Harper*---------- 11

The purpose of the act is not to protect experts or scientific men alone who know the nature and value of food products, but to protect ordinary people—people without scientific knowledge or experience. The real purpose of the act is to protect the public against imposition. *United States* v. *300 Cases of Mapleine*---------- 39

The act was not framed to protect only wholesalers and retailers and not the common people. Its primary purpose is the protection of the ultimate consumer. It is the purchasing public, the ultimate consumer, whom the provisions of the statute are primarily intended to protect. *United States* v. *Dr. J. L. Stephens Co*---------- 305

The act was enacted for the protection of the public, not private rights. The public, through Congress, has been given the benefit of this protective statute in order that they shall not have foisted upon them, under misleading labels and put up in misleading form, articles of food which are not what they are purported to be. *United States* v. *Alban*---------- 1014

The primary purpose of the act is to protect the purchasing public and the ultimate consumer. It was the purpose of Congress in enacting the act to put a stop to the transportation and sale in interstate commerce of adulterated and misbranded articles of food, drink, and drugs. It was intended to reach all forms of misrepresentations by misbranding by the use of words or by the use of designs or devices, pictures, etc., calculated to mislead or deceive, cheat, or defraud the purchasers. *United States* v. *5 Cases of Champagne*---------- 503

United States v. *90 Boxes of Macaroni*---------- 561

The general purpose and intent of the act is to prevent fraud and deception, so that the purchaser can obtain the thing he supposes

PURPOSE OF THE ACT—Continued. Page

he is obtaining, rather than the protection of the public health to the extent of preventing a purchaser from deliberately and intentionally buying a particular food which is what it purports to be, even though a jury may think it deleterious. *United States* v. *40 Barrels and 20 Kegs of Coca Cola* 606

A description of the purpose of the statute would be inadequate which failed to take account of the design to protect the public from lurking dangers caused by the introduction of harmful ingredients, or which assumed that this end was sought to be achieved by simply requiring certain disclosures. Congress in executing the purpose of the act has limited its prohibitions and has specifically defined what shall constitute adulteration or misbranding, but in determining the scope of specific provisions the purpose to protect the public health, as an important aim of the statute, must not be ignored. *United States* v. *Coca Cola Co* 741

The purpose of the act is to prevent deceit and false pretenses in the sale of foods and drugs, and to safeguard the public health. *United States* v. *Bettman-Johnson Co* 299

The act is intended to safeguard the people in their daily lives, and to the end that their health may be conserved. *United States* v. *Gidden* 360

The prohibition of misbranding in the act is designed to prevent deceiving or misleading the purchasing public, even though the article sold is in itself equally good or not injurious to health. *United States* v. *95 Barrels, More or Less, Alleged Apple Cider Vinegar* 1047

The title of the act and the act itself, when carefully read and considered, demonstrates the fact that the sole purpose of its enactment was (1) to protect purchasers from injurious deceits by the sale of inferior for superior articles; and (2) to protect the health of the people by preventing the sale of normally wholesome articles to which have been added substances poisonous or detrimental to health. *Hall-Baker Grain Co.* v. *United States* 391

United States v. *150 Cases of Fruit Puddine* 557

United States v. *Tetz et al* 917

The provisions of the act regarding misbranding of food are to prevent fraud on the public; but the provision that food shall be deemed to be adulterated if it consist in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, etc., was not to prevent fraud; it was to protect the public in the matter of its comfort and health. *United States* v. *1,459 Cases Canned Salmon* 995

The act, broadly speaking, deals with two general propositions. One is to safeguard the health of the public; the other is to prevent deception, where it might very well be that the article to be sold is in no manner deleterious. *United States* v. *350 Bags of Shell Peanuts* 685

The primary purpose of Congress in enacting the act was to prevent injury to the public health by the sale and transportation in interstate commerce of misbranded and adulterated food, and while the test of misbranding of a food product under section 8 of the act is whether it is true to name, there should not be overexactness in applying this test in a case where the public health cannot possibly be jeopardized. *Ninety-five Barrels, More or Less, Apple Cider Vinegar* 1079

The act is a police regulation enacted to conserve the public health. *Dade* v. *United States* 465

The underlying purpose of the act was to protect the public health against imposition upon the users of food, drugs, and medicines which are adulterated, misbranded, poisonous, or deleterious. *United States* v. *Johnson* 85

The purpose of the act is to conserve the public health by preventing interstate commerce in poisonous or deleterious foods and drugs, and, in order that this may be effected, it is not only made a misdemeanor under the act, but the article of food or drug adulterated

PURPOSE OF THE ACT—Continued. Page

or misbranded is declared to be forfeited as an offending thing which threatens the health of the citizen. *United States* v. *Five Boxes of Asafoetida* 160

The purpose of the act is to conserve the public health by preventing interstate commerce in food containing an added poison which may render the food injurious to health, and in order that this may be effected the offending food is subject to seizure. Congress acting upon the theory that the evil of adulterated food was of national concern enacted the statute to protect the public health and keep purchasers from being defrauded. *United States* v. *3,192 Boxes of Apples, et al* 1199

See Construction and Interpretation; Knowedge and Intent; Object of the Act.

QUALITY.

See Standards.

QUANTITY OF CONTENTS OF PACKAGE.

See Weight, Measure, and Numerical Count.

RADAM'S MICROBE KILLER:

A drug preparation labeled "Wm. Radam's Microbe Killer" *held* misbranded in that the package and label contained statements regarding its curative or therapeutic effect which were false and fraudulent. *United States* v. *539 Boxes and 322 Cartons of Wm. Radam's Microbe Killer* 511

RADIO-SULPHO AND RADIO-SULPHO BREW:

Drug products labeled "Radio-Sulpho" and "Radio-Sulpho Brew" *held* misbranded in that the labels contained statements regarding their curative or therapeutic effects which were false and misleading. *United States* v. *Schuch* 209

REASONABLE DOUBT:

In order to convict a defendant for violation of section 1 or 2 of the act the jury must be convinced of his guilt beyond a reasonable doubt. *United States* v. *Harper* 11

Prosecutions for violations of section 2 of the act are subject to the same rules of evidence as proceedings in other criminal cases, and, in order to convict, the jury must be satisfied of the guilt of the accused beyond a reasonable doubt. *United States* v. *Harper* 11

United States v. *Griebler* 29
United States v. *Edward Westen Tea & Spice Co* 69
United States v. *John A. Tolman & Co* 78
United States v. *Mayfield et al* 90
United States v. *Hobart et al* 171
United States v. *S. Gumpert et al* 182
United States v. *Italian Importing Co* 187
United States v. *F. E. Rosebrock & Co* 190
United States v. *Schuch* 209
United States v. *Hall-Baker Grain Co* 291
United States v. *Bettman-Johnson Co* 299
United States v. *Piso Co* 319
United States v. *Heide* 325
Von Bremen et al. v. *United States* 338
United States v. *Gidden* 360
United States v. *J. L. Hopkins & Co* 366
United States v. *J. L. Hopkins & Co* 401
United States v. *C. F. Blanke Tea & Coffee Co* 439
United States v. *F. B. Washburn & Co* 434
United States v. *Huyler's* 455
United States v. *German American Specialty Co* 459
United States v. *Scudder Syrup Co* 461
United States v. *Hudson Manufacturing Co* 462
United States v. *Weeks* 485
United States v. *McConnon & Co* 496
United States v. *Excelsior Baking Co* 501

REASONABLE DOUBT—Continued. Page

United States v. *Weeks* 528
United States v. *Finlayson et al* 535
United States v. *Hopkins* 585
United States v. *Glaser, Kohn & Co* 601
United States v. *Lowenthal* 626
United States v. *American Laboratories* 641
United States v. *Matusow* 664
United States v. *C. M. C. Stewart Sulphur Co* 669
United States v. *Shucart* 693
United States v. *Simpson* 700
United States v. *Kellett* 711
United States v. *Swift & Co* 717
United States v. *Abbott Bros. Co* 722
United States v. *Athlophoros Co* 732
United States v. *G. F. Harvey Co* 754
United States v. *Bowers* 763
United States v. *Wedell* 771
United States v. *Koshland* 777
United States v. *Russian Monopol Co* 784
United States v. *Atlantic Macaroni Co* 793
United States v. *Pulmonol Chemical Co* 806
United States v. *Bell & Co* 828
United States v. *Natura Co* 836
United States v. *Taylor* 839
United States v. *Heimann* 840
United States v. *Bethesda Mineral Spring Co* 841
United States v. *Johnson et al* 847
United States v. *Dr. J. H. McLean Medicine Co* 850
United States v. *A. Skarzynski & Co* 860
United States v. *Joslin-Schmidt Co* 881
United States v. *Kar-Ru Chemical Co* 900
United States v. *Tetz et al* 917
United States v. *Italian Importing Co* 922
United States v. *Paraskevopolus* 925
United States v. *Gamanos et al* 927
United States v. *Monahos* 935
United States v. *Scaduto* 947
United States v. *Gandara* 984
United States v. *Newton Tea & Spice Co* 950
United States v. *Long* 989
United States v. *Wilson & Co* 999
United States v. *W. B. Wood Manufacturing Co* 1002
United States v. *Alban* 1014
United States v. *Golden & Co* 1033
United States. v. *Blazek* 1074
United States v. *John Dobry Manufacturing Co* 1085
United States v. *Marmarelli et al* 1122
United States v. *South Hero Creamery Association* 1142
United States v. *Monotti-Larimer* 1144
United States v. *South Peacham Creamery Co* 1147
United States v. *Barnet Creamery Association* 1149
United States v. *Trinidad Creamery Co* 1152
United States v. *Gorman & Co* 1171
United States v. *Smith* 1173
United States v. *Germack* 1178
United States v. *Morehouse* 1210

See Burden of Proof; Criminal Cases.

RED KIDNEY BEANS.

See Beans.

REGULATIONS:

Regulation 17 of the rules and regulations for the enforcement of the act *held* to have the force and effect of law. *United States* v. *779 Cases of Molasses* 65

REGULATIONS—Continued. Page

Regulations authorized by the act are binding on parties who deal in food products in interstate commerce. *United States* v. *37 One-Pound Packages of Colors* 1165

Regulation 19 (c) cited and upheld by the court. *United States* v. *Thomson & Taylor Spice Co* 390

Regulation 19 (c) *held* to have the force and effect of law. *United States* v. *Finlayson et al* 535

An article labeled "Genuine Hollands Geneva Gin Distilled by London Wine & Spirit Co. New York", *held* to comply with the regulation 19 (c) providing that "the use of a geographical name in connection with a food or drug product will not be deemed a misbranding when by reason of long usage it has come to represent a generic term, and is used to indicate the style, type, or brand, but in all such cases the State or Territory where any such article is manufactured or produced shall be stated upon the principal label", and not misbranded under the act. Id.

An article labeled "Holland Gin", which was manufactured in the United States, and the name of the manufacturer and the place of manufacture were stated on the label, *held* properly branded under regulation 19 (c). *United States* v. *Five Cases of Hurdle Brand Holland Gin* 549

So much of regulation 28, promulgated by the three Secretaries under section 3 of the act, as names the several derivatives of the drugs enumerated in section 8, and the several preparations containing them respectively, is valid, but that part of the regulation which requires a preparation containing a derivative of any such enumerated drug to be so labeled or branded as to show not only the quantity or proportion of the named derivative contained in the preparation as required by that section, but also the name of the drug from which the derivative is obtained, is invalid as an amendment of, or an addition to, the act itself. *United States* v. *Antikamnia Chemical Co* 260

Reversed, *United States* v. *Antikamnia Chemical Co* 552

The power given by section 3 of the act to the specified heads of departments to make rules and regulations for carrying out the provisions of the act is an administrative power and not one to alter, or add to, the act, and the extent of the power must be determined by the purpose of the act and the difficulties its execution might encounter. Regulation 28 requiring the labels of drugs containing any derivative or preparation of any of the substances enumerated in section 8 of the act, in stating the quantity or proportion of such derivative or preparation, but also the name of such specified substance from which such derivative is derived or from which it is a preparation, fulfills the purpose of the act, and does not alter, or add to, the act, and is within the delegated power of the act. *United States* v. *Antikamnia Chemical Co* 552

Regulation 28 (c) and (d) *held* not to be controlling on the court by way of construing the act, but as being a reasonable construction which the court might adopt if it saw proper. *United States* v. *Piso Co* 319

Congress did not, under the act, intend to confer upon executive officers the power to prescribe the constituent elements that shall enter into coloring materials used as the component parts of foods and drinks. *United States* v. *W. B. Wood Manufacturing Co* 1002

Certain rules by executive officers, prescribing the constituents of coloring materials used in food and drinks, offered as evidence by the Government, *held* inadmissible. Id.

Where the amount of morphine contained in a drug varies it is not sufficient compliance with regulation 28 (d) to state the maximum amount present in all the bottles "as less than 4 percent", since the variance might be too great in some bottles. *United States* v. *The Richie Co* 286

The regulations authorized by Congress for carrying out the act cannot add to or detract from the statute, but may aid in its enforcement and understanding. In a prosecution charging misbrand-

REGULATIONS—Continued. Page

ing of butter as to the weight of the contents of the package, *held*, that, under the provision of the act, section 8, that reasonable variations shall be permitted, and tolerances shall be established by rules and regulations made in accordance with section 3 of the act, the regulation that "Discrepancies due exclusively to errors in weighing, etc., which occur in packing conducted in compliance with good commercial practice", was applicable to the case. *United States* v. *Trinidad Creamery Co*---------- 1152

In the act, section 8, paragraph 3, as amended by act March 3, 1913, which provides that food shall be deemed misbranded if the quantity of the contents of the package be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count, and which further provides that reasonable variations shall be permitted and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with the act, the provision respecting variations, tolerances, and exemptions is merely direction as to exercise of administrative power and is not a part of the definition of the offense. *United States* v. *Centralia Dairy Co*---------- 1336

Regulation 5 (a) requiring notice and opportunity to be heard preliminary to criminal proceedings under sections 1 and 2 of the act, does not apply to proceedings in rem under section 10. *United States* v. *94 Dozen, More or Less, Half-Gallon Bottles Capon Springs Water*---------- 1278

See Constitutionality of the Food and Drugs Act; Executive Officers; Standards.

RELEASE:

Motion of claimant of food products seized on libel to condemn as misbranded, for release of the products, under bond pursuant to section 10 of the act, would, under the discretion conferred by the permissive language of that section, be denied, where, although the articles seized were not deleterious, they had a much lower market value than the articles which the false labels described, the misbranding was fraudulent and injurious to competitors in the trade, and claimant had been convicted of a similar offense before, and had numerous other proceedings pending against him. *United States* v. *Two Cans of Oil of Sweet Birch, Etc.*---------- 963

In an action for destruction of butter shipped in interstate commerce, which contained impurities, and a portion of which had become rancid, the claimant will be allowed, under bond, to attempt to cleanse it by renovating but not by ladling. *United States* v. *Nine Barrels of Butter*---------- 826

See Bond; Costs; Libel.

REMEDY.

See Curative and Therapeutic Effects of Drugs.

RES JUDICATA:

A prosecution charging misbranding of defendant's drug product, within the meaning and intendment of the Sherley amendment of the act, *held* not barred by a previous decree in a condemnation proceeding in a United States court, condemning a quantity of such product as misbranded in certain other respects under the act, and requiring the defendant to remove certain statements from the label. *United States* v. *A. Skarzynski & Co*---------- 860

The Government brought a libel for condemnation of a drug product charging misbranding under the act as amended by act August 23, 1912, in that the label stating the curative or therapeutic effect of the product was false and fraudulent. Respondent, who was the proprietor of the product, in his answer claiming the goods, pleaded res judicata by reason of a verdict and judgment of "not guilty" in a criminal prosecution previously instituted by the Government against him as defendant and tried, and involving such product and on such a charge. Said plea of former judgment denied, since an

RES JUDICATA—Continued. Page

essential element of the offense under the act in the respect involved—fraudulent intent as to representations regarding curative or therapeutic effect of drugs—is a state of mind, a factor necessarily subject to constant change; and to contend that a prosecution or proceeding that turned not as most offenses do on the commission of the overt act, but on the state of mind of the defendant, would constitute a bar to a proceeding based upon his state of mind at a later date, is essentially unsound. *United States* v. *141 Bottles of Drug Products* 931

Dismissal of successive informations for shipping drugs misbranded in violation of the act, as amended, section 8, paragraph 3, *held* not res judicata in subsequent proceedings to condemn other misbranded bottles of drugs; the record showing no trial on merits and acquittal. *United States* v. *23 7/12 Dozen Bottles, Etc., of An Article of Drugs Labeled in Part " Lee's Save The Baby"* 1240

A judgment adverse to the Government in a proceeding to condemn a quantity of a drug product as misbranded by false and fraudulent statements regarding its curative or therapeutic effect, *held* not a bar to the maintenance of a subsequent similar condemnation proceeding against a quantity of such product, brought and tried more than 10 years after the earlier case arose, since, by reason of developments and happenings in the course of that period, the issue of fraud or good faith on the part of the manufacturer with reference to the curative or therapeutic statements involved in the later proceeding, and the facts and circumstances relating to that issue, may differ vastly from those in the earlier proceeding. *United States* v. *17 Bottles, Etc., of An Article of Drugs Labeled in Part "B. & M."* 1287

See Injunction; Prior Conviction.

REVIEW.

See Appeal and Error.

ROBINSON SPRING WATER:

Bottled water labeled "Robinson Spring Water", *held* misbranded in that the labels falsely and fraudulently represented its curative or therapeutic effect in the treatment of certain diseases. *United States* v. *275 Cases of Mineral Water* 920

Affirmed, *Bradley* v. *United States* 964

ROSE VANILLA.

See Fruit Puddine.

RULES AND REGULATIONS.

See Regulations.

RUSK:

Application to file an information alleging that an article labeled "Genuine Dutch Tea Rusk Made in Holland, Mich.", with the word "Holland" in type much larger than the word "Mich.", was misbranded because it purported to be a foreign product when not so, denied on the ground that the information presented a doubtful case of misbranding under the act. *United States* v. *Schurman et al* 95

SALE:

The sale and shipment of a misbranded drug from Ohio to the District of Columbia was interstate commerce and constituted an offense under section 2 of the act, whether the sale was made before or after shipment. *United States* v. *Tucker* 248

Libel for forfeiture of certain bags of sugar, under section 10 of the act, *held* fatally defective for failure to charge that the sugar seized had been transported in interstate commerce *for sale*, though the libel contained an averment that the sugar was owned by or in the possession of one "for the purpose of being used and manufactured, sold, and consumed as food." *United States* v. *46 Packages and Bags of Sugar* 168

SALE—Continued.

Page

Libel for condemnation of drugs for misbranding, under section 10 of the act, *held* insufficient on the ground that it did not charge that the packages had been transported in interstate commerce *for sale*. *United States* v. *8 Packages and Casks of Drugs*---------- 149

Shipments of a drug preparation in bulk to the owner from its manufacturing agent in another State *held* not subject to seizure and forfeiture for misbranding under section 10 of the act, where before being offered for sale by the owner it was bottled and properly labeled. *United States* v. *65 Casks of Liquid Extracts*---------- 47

Affirmed, *United States* v. *Knowlton Danderine Co*---------- 89

An article of food libeled and seized in a proceeding under section 10 of the act, shipped for the purpose of being used in the manufacture of another food product, and held for that purpose, *held* not to be subject to condemnation because it was not transported for sale. *United States* v. *Three Barrels of Vanilla Tonka and Compound*---------- 201

Where a libel alleged that certain frozen eggs had been transported in interstate commerce and were, at the time of service of the libel, in whole or in part filthy, putrid, or decomposed, and remained unsold in original unbroken packages in a warehouse in New York City, the libel was not fatally defective for failure to charge that the eggs had been transported for sale. *United States* v. *300 Cans of Frozen Eggs*---------- 283

Where adulterated vinegar, which had been shipped in interstate commerce, was seized while stored in the original unbroken packages, *held*, not material that the evidence did not show that it had been shipped in interstate commerce for sale in the original unbroken packages. *United States* v. *100 Barrels of Vinegar*---------- 287

Adulterated eggs which had been shipped from one State to the owners in another solely for use in their bakery business, and not for sale, *held* to be subject to condemnation under section 10 of the act. *United States* v. *50 Cans of Preserved Whole Eggs*---------- 74

Affirmed, *Hipolite Egg Co.* v. *United States*---------- 223

The object of the act is to keep adulterated articles out of the channels of interstate commerce or if they enter such commerce to condemn them while in transit, or in the original unbroken packages after reaching destination; and the provisions of section 10 apply not only to articles for sale, but also to articles to be used as raw material in the manufacture of some other product. In construing the act, all articles, compound or single, not intended for consumption by the producer, are regarded as designed for sale, and for that reason it is the concern of the law to have them pure. *Hipolite Egg Co.* v. *United States*---------- 223

Affirming *United States* v. *50 Cans of Preserved Whole Eggs*---- 74

A libel in a proceeding to forfeit adulterated eggs was not defective for failure to allege that the eggs had been transported for sale; nor was it material that the consignee did not intend to sell the eggs, but to use them for manufacturing purposes. *United States* v. *Two Barrels of Desiccated Eggs*---------- 232

Where decomposed canned eggs, which had not been denatured and therefore could have been used either for food or tanning purposes, were shipped in interstate commerce from one warehouse of the owner to another, they were "an adulterated article of food" within the definition and meaning of sections 2, 6, and 10 of the act, and it was no defense to a proceeding to condemn them that the owner intended them for sale for use in tanning and not for use or consumption as food. *United States* v. *13 Crates of Frozen Eggs*---------- 531

Affirmed, *United States* v. *13 Crates of Frozen Eggs*---------- 605

Misbranded hog feed, which had been reshipped to the manufacturer by a customer in another state, *held* to be subject to seizure and forfeiture under section 10 of the act, though the purpose of such transportation was not *for sale*. *United States* v. *426 Bags of Economy Special Hog Feed*---------- 1001

SALE—Continued. Page

Where a creamery corporation made shipments of butter in regular course of business to a corporation in another state, and such shipments received by the consignee were by it commingled with shipments from other sources and sold upon the market, and payment by the consignee to the consignor for such shipments was made weekly and at schedule price, and, on the part of the consignee to the consignor, there was no accounting for any particular consignment and no report of sales or of receipts therefrom, and, on the part of the consignor to the consignee, there was no return of or accounting for any moneys received from the consignee; *held* that such a shipment was not by a principal to a mere agent, or by a mere agent to a principal, but constituted a *sale*. *United States* v. *Boise Valley Cooperative Creamery Co*---- 1203

The Government brought a proceeding to condemn a shipment of apples as adulterated by addition of arsenate of lead, a poison, as the result of spraying the trees with a solution of arsenate of lead. Claimant contended that the apples as shipped were not ready for sale or use as food, but were shipped by him to his own warehouse and there to have all possible arsenate of lead removed therefrom before being marketed. *Held:* that the apples were not subject to condemnation if, though there was sufficient poisonous material thereon that they might become deleterious to human health when eaten, claimant in good faith intended that they were not ready for marketing and that they should not go on the market in such condition. *United States* v. *630 Baskets of Apples*-- 1205

Where a physician furnished a drug as part of the treatment of a patient, shipping said drug in interstate commerce, and made no separate charge for the drug, *held* that the sale of the physician's services included a *sale* of the drug. *United States* v. *Dr. J. L. Stephens Co*---- 305

Affirmed, *Dr. J. L. Stephens Co.* v. *United States*---- 471

See Interstate Commerce; Knowledge and Intent; Libel; Original Unbroken Package; Seizure; Shipment.

SALMON, CANNED:

Shipments of canned salmon alleged to be adulterated under the provision of the act declaring food adulterated if it consists in whole or in part of a filthy, decomposed, or putrid animal substance, *held* not subject to condemnation and forfeiture, on the ground that it was not shown that the contents of all of the cans in the shipments were so adulterated. *United States* v. *1,459 Cases of Canned Salmon*---- 995

United States v. *200 Cases, More or Less, of Canned Salmon*---- 1095

United States v. *1,974 Cases of Canned Salmon*---- 1037

A shipment of canned salmon *held* to consist in part of a filthy, decomposed, and putrid animal substance to such a percentage of the cans in excess of reasonable and salutary requirements as to constitute the whole shipment adulterated within the prohibition of the act. *United States* v. *430 Cases of Canned Salmon*---- 1035

Canned salmon *held* adulterated in that it consisted in whole or in part of a filthy, decomposed, or putrid animal substance. *United States* v. *1,195 Cases of Canned Salmon*---- 1099

United States v. *1,600 Cases of Canned Salmon*---- 1105

United States v. *1,974 Cases of Canned Salmon*---- 1108

A. O. Anderson & Co. v. *United States*---- 1053

United States v. *2,995 Cases of Canned Salmon*---- 1136

United States v. *2,205 Cases of Canned Salmon*---- 1133

United States v. *Gorman & Co*---- 1171

Canned salmon *held* misbranded because it was labeled as "sockeye" salmon, when it was not. *United States* v. *1,459 Cases of Canned Salmon*---- 995

Canned salmon, labeled "select" and "fresh fish", when the pack was of inferior quality and not fresh, as the term is used in the trade, *held* misbranded. *United States* v. *200 Cases, More or Less, of Canned Salmon*---- 1095

SALMON, CANNED—Continued. Page

Canned salmon, labeled, "Select Pink" and "Alaska Salmon", when it was not select pink Alaska salmon, but was a poor pack of pink salmon of inferior and not of select grade, *held* misbranded. Id.

Canned salmon, labeled "Fresh Salmon", when it was not fresh fish in the sense of the term as used in the canning trade, *held* misbranded. *United States* v. *2,205 Cases of Canned Salmon*_____ 1133

See Article; Filthy, Decomposed, and Putrid; Samples.

SAMPLES:

In a prosecution for alleged misbranding of a shipment of syrup contained in a number of receptacles packed in two boxes, *held* that the jury was authorized to infer from proof as to the contents of the specific receptacles examined and analyzed that all of the other receptacles in the two boxes contained the same ingredients as the contents of the receptacles specifically examined and analyzed and were the same commodity. *United States* v. *John A. Tolman & Co*_____ 78

Where only a few sacks of flour, taken from different parts of a lot of several hundred sacks, were examined and found adulterated, *held* to be proper to assume, in the absence of evidence to the contrary, that other samples would show the same condition of adulteration as the samples examined, and that the samples examined were fairly representative of the whole number of sacks. *United States* v. *350 Sacks of "Princess" Flour and 50 Sacks of "Fancy Melba" Flour*_____ 351

Judgment affirmed, *Wm. M. Galt & Co.* v. *United States*_____ 422

A sample is that which is taken out of a large quantity as fairly representative of the whole. Whether a sample is so representative of the whole is a preliminary question for the trial court, whose ruling thereon will not be reviewed on appeal in the absence of evidence upon which it was based, and then only when error clearly appears. A finding of the trial court in a proceeding to condemn flour for violation of the act, that 2 sacks taken by the Government from each of two lots containing 350 sacks and 50 sacks, respectively, were fairly representative of the remaining, will not be disturbed on appeal where the evidence upon which it was based is not before the appellate court, and it appears that no evidence to the contrary was introduced in the lower court. *Wm. M. Galt & Co.* v. *United States*_____ 422

Affirming judgment in *United States* v. *350 Sacks of "Princess" Flour and 50 Sacks of "Fancy Melba" Flour*_____ 351

In a proceeding to condemn several hundred bushels of oysters on the ground that they contained filth, where the oysters actually examined were very few as compared with the whole quantity involved, *held* that if the jury find that the oysters actually examined were filthy to a substantial degree, then they should be condemned, and if the jury find from the proof that the oysters examined and found filthy to a substantial degree were fair samples of the rest, then the whole quantity of oysters involved should be condemned. *United States* v. *408 Bushels of Oysters*_____ 718

In a prosecution charging adulteration of oysters on the ground that they contained an excessive amount of water, *held* that the jury should determine whether the samples taken by the Government's agents were fair and representative, and that evidence as to the manner in which the samples were taken should be considered in determining the question. *United States* v. *Golden & Co*_____ 1033

Where the entire product is not inspected or tested, the proof must go far enough to satisfy the court or jury that the adulteration extends to the whole product sought to be condemned; and while a small percentage of adulteration, found only in a small percentage of the product, might not ordinarily satisfy the court or jury that the whole product is adulterated, yet in a case where a jury might properly infer or find that approximately one-fifth of the entire product was adulterated and that the adulteration extended to the entire product, no such question can arise. *A. O. Andersen & Co.* v. *United States*_____ 1053

SAMPLES—Continued. Page

While proof that the contents of 20 percent of cans in a shipment of salmon were adulterated, with nothing more, might authorize the inference that the whole product was bad, and therefore support a condemnation of the lot, where the same proof which establishes the adulteration of one-fifth establishes the lack of adulteration of the balance, the Government must fail, except as to the cans particularly identified as adulterated. *United States* v. *200 Cases, More or Less, of Canned Salmon*---------- 1095

A shipment of several hundred cases of canned salmon *held* adulterated where only a comparatively small number of cans from the shipment were examined, and, although it appeared that in the entire shipment there was a very large proportion of cans that were free from objection on the ground of decomposition or unfitness for food, there was an excessive percentage of cans in the shipment which were not within that exception. *United States* v. *430 Cases of Canned Salmon*---------- 1035

In a proceeding to condemn for adulteration a parcel of food, such as canned salmon, where the entire parcel is not tested, *held* essential to a verdict for the Government that a fair preponderance of the evidence show that the adulteration extended to the whole parcel. *United States* v. *1,974 Cases of Canned Salmon*---------- 1037

United States v. *2,995 Cases of Canned Salmon*---------- 1136

An inspection law of Kentucky properly provides for the taking of so much of an article covered by the law as is necessary for analysis in order to determine the true nature of the article. *Savage* v. *Scovell*---------- 18

Where packages of an article of food had been deposited in the mail for shipment in interstate commerce, the act of an inspector of the Department of Agriculture in opening the same and taking therefrom samples for testing, without a search warrant, though with the consent of the postmaster, was without the authority of law and in violation of the Fourth Amendment of the Constitution. *United States* v. *Myers*---------- 1159

A motion for an order directing the marshal to release samples of a product seized under the act, to claimant for examination, granted upon certain conditions, in the view that the Government is not required to submit such samples to claimant's counsel or experts for such purpose, such action being a privilege accorded the claimant by the United States attorney. *United States v. 1,500 Cases of Tomato Pulp*---------- 892

Where the Government had seized certain medicine under the act for adulteration and misbranding, and the goods were in the custody of the court in a condemnation action, the taking of samples by the Government for the purpose of making tests of the effect of the medicine on animals *held* not objectionable as compelling claimant to incriminate itself or subjecting it to unreasonable search and seizure, or as depriving claimant of property without due process. *United States* v. *B. & M. External Remedy*---------- 1235

The Government in a suit to condemn a medicine seized for adulteration and misbranding, should, on seeking to take small samples for the purpose of making actual tests, be required to pay the value of the samples in case the goods are not condemned, and to give claimant samples from the same containers, and he should be permitted to be present at the tests. Id.

See Analysis; Article; Examination; Search Warrant; Tests.

SARDINES, CANNED:

Canned sardines *held* adulterated in that they consisted in whole or in part of a filthy, decomposed, or putrid animal substance. *United States* v. *1,000 Cases of Sardines*---------- 1113

SEARCH WARRANT:

On motion to quash libel proceedings under the act, *held* that the court could not pass upon the question of the lawfulness of the issuance and return of a search warrant issued under a State law

SEARCH WARRANT—Continued. Page

by a justice of the peace and for the purpose of enabling representatives of the Department of Agriculture to get samples of claimant's goods in order to found such libel proceedings. The question of the admissibility of evidence unlawfully obtained may be determined when raised in the proper way and at the proper time in such libel proceedings. *United States* v. *94 Dozen, More or Less, Half-Gallon Bottles of Capon Spring Water* ---------- 1216

See Samples.

SECRETARY OF AGRICULTURE.

See Examination; Executive Officers; Importation; Injunction; Investigation; Mandamus; Notice and Opportunity to be Heard; Regulations; Standards.

SECRETARY OF COMMERCE.

See Executive Officers; Injunction; Regulations.

SECRETARY OF THE TREASURY.

See Executive Officers; Importation; Injunction; Regulations.

SEIZURE:

A drug is subject to forfeiture under section 10 of the act only when it is adulterated or misbranded at the time of seizure; it is not sufficient that it was adulterated or misbranded when it was being transported from one State to another and liable to forfeiture at that time, if it was not then seized. Where asafoetida below the prescribed test was received by claimants in interstate commerce and tested and correctly branded before seizure, it was not subject to forfeiture. *United States* v. *Five Boxes of Asafoetida* ---------- 160

United States v. *Nine Boxes of Asafoetida* ---------- 165

Sugar alleged to be adulterated and misbranded was not subject to forfeiture under the clause of section 10 of the act, declaring that any article of food adulterated or misbranded, which is being transported from one State, etc., to another for sale, shall be liable to seizure, condemnation, etc., where the goods were not seized while in transportation. *United States* v. *46 Packages and Bags of Sugar* ---------- 168

Seizure of alleged misbranded drugs is jurisdictional and must precede the filing of the libel for forfeiture under section 10 of the act, and be alleged in the libel. *United States* v. *8 Packages and Casks of Drugs* ---------- 149

Prior executive seizure of an article *held* to be unnecessary to confer jurisdiction of a libel proceeding for condemnation under section 10 of the act. The language of the act indicates that the procedure by libel should be commenced in the district courts before the property is seized. *United States* v. *Two Barrels of Desiccated Eggs* ---------- 232

United States v. *George Spraul & Co* ---------- 217

United States v. *100 Barrels of Vinegar* ---------- 287

United States v. *Seven Cases of Buffalo Lithia Water* ---------- 573

Under the act neither the marshal nor any other person is authorized to seize an article claimed to be subject to forfeiture prior to the commencement of proceedings for a forfeiture in court.

United States v. *George Spraul & Co* ---------- 217

United States v. *Two Barrels of Dessicated Eggs* ---------- 232

On a warrant for the seizure of 65 casks of a drug product a less number thereof may be taken. *United States* v. *65 Casks of Liquid Extracts* ---------- 47

In order to justify a verdict for the Government in a condemnation proceeding, it is necessary for the Government to show that the goods described in the libel and to which the proof adduced by the Government related were the goods actually seized under the libel. *United States* v. *539 Boxes and 322 Cartons of Wm. Radam's Microbe Killer* ---------- 511

SEIZURE—Continued. Page

The action of officials of the Department of Agriculture authorized to administer the act in certifying for seizure an article of food or drugs found by them to be adulterated or misbranded is not limited to one or any other number of shipments thereof, but, on the contrary, they are required and directed to make certification to the proper United States attorney of any and all shipments of any article found in interstate commerce, which after investigation they find to be adulterated or misbranded, and any such article or shipment thereof is liable to be proceeded against and seized whereever found, whether in single or multiple consignments. *National Remedy Co.* v. *Hyde, Secretary of Agriculture, et al*_____ 1230

Judgment reversed, *National Remedy Co.* v. *Hyde, Secretary of Agriculture, et al*_____ 1272

Action of the Department of Agriculture in causing libels to be brought against plaintiff's remedy and seizures thereof to be made under the act in numerous widely separated parts of the country, *held* to constitute an arbitrary exercise of power and denial of due process of law, and to be within the jurisdiction of a court of equity to restrain by injunction the institution of a multiplicity of suits under such circumstances. *National Remedy Co.* v. *Hyde, Secretary of Agriculture, et al*_____ 1272

Reversing judgment in *National Remedy Co.* v. *Hyde, Secretary of Agriculture, et al*_____ 1230

See Bond; Injunction; Jurisdiction; Libel; Notice and Opportunity to be Heard; Release; Search Warrant.

SENNA, ALEXANDRIA:

A drug product labeled "Alex. Senna Broken U. S. P." *held* not adulterated or misbranded by reason of containing stalks, seeds, pebbles, and other substances foreign to senna leaves, and through failure to comply with the standard prescribed for senna leaves in the United States Pharmacopoea. *United States* v. *J. L. Hopkins & Co*_____ 366

SHELLAC.

See Grain Alcohol Varnish.

SHERLEY AMENDMENT:

See Circulars, Pamphlets, Booklets, Etc.; Constitutionality of the Food and Drugs Act; Curative and Therapeutic Effects of Drugs; False and Fraudulent; Knowledge and Intent; Misbranding.

SHIPMENT:

Shipment in interstate commerce of an adulterated food or drug product, which was the subject of a single sale and single shipment, although consisting of numerous packages, constituted a single offense under the act. *United States* v. *Watson-Durand-Kasper Grocery Co*_____ 837

Under section 2 of the act, declaring that any person who shall ship from any State to another any adulterated or misbranded article of food or drugs shall be guilty of a misdemeanor, the offender is guilty by the act of shipment, for the whole statute depends for validity on the interstate commerce clause of the Constitution. If he is not guilty when the shipment takes place and by reason of the shipment, he is not guilty at all. *United States* v. *Lehn & Fink*_ 229

In a prosecution charging shipment in interstate commerce of an adulterated drug in violation of section 2 of the act, *held* no conviction could be had unless it was shown by competent evidence that the drug was adulterated within the meaning of the act when it was shipped. Id.

It is not the misbranding itself of an article of food, but the shipment or delivery for shipment from one State to another of the misbranded article, that the act makes unlawful. *Weeks* v. *United States*_____ 867

In a prosecution charging defendant with shipping an adulterated drug product, *held*, that the jury, in order to convict, must be satisfied beyond a reasonable doubt that the product was adulterated before it was shipped. *United States* v. *Lorick & Lowrance*_____ 202

SHIPMENT—Continued.

Page

In a prosecution for shipping in interstate commerce sirup alleged to be misbranded as to the measure of the contents of the containers, *held* that the only question for determination was whether the sirup was short in measure at the time it was shipped. *United States* v. *Scudder Syrup Co*---- 461

In prosecutions charging defendants with shipping in interstate commerce decomposed and adulterated eggs, *held* that the jury, in order to convict, must find that the eggs were so decomposed at the time they were shipped. *United States* v. *Wilson & Co*---- 999

United States v. *Blazek*---- 1074

United States v. *Smith*---- 1173

On trial of an information charging defendant with shipping in interstate commerce milk adulterated in that it consisted in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, *held* that the jury, in order to convict, must find that the milk was adulterated as alleged, at the time it was delivered at the railway depot for shipment. *United States* v. *Hopkins*---- 585

In a prosecution charging shipping in interstate commerce butter containing less than 80 percent of butterfat, *held* that the jury, in order to convict, must be satisfied beyond a reasonable doubt that the butter was in such condition at the time it was delivered for shipment and while in transit to destination. *United States* v. *South Hero Creamery Association*---- 1142

In a prosecution charging shipment of butter alleged to be adulterated and misbranded, *held* that the jury, in order to convict, must be satisfied beyond a reasonable doubt that the butter was so adulterated or misbranded when it was shipped. *United States* v. *Barnet Creamery Association*---- 1149

In a prosecution charging defendant with violation of the act in shipping from one State into another butter containing less than 80 percent of milk fat, *held* that the jury, in order to convict, must find that the butter contained less than 80 percent of milk fat at the time it was shipped. *United States* v. *South Peacham Creamery Co*---- 1266

In a libel proceeding against apples and pears shipped in interstate commerce and seized as adulterated because they contained an added poisonous or other added deletrious ingredient which might render them injurious to health, *held* that under the act the time the apples and pears were adulterated, if so, was when they were introduced into interstate commerce, and that treatment of the growing fruit was immaterial. *United States* v. *3,192 Boxes of Apples et al*---- 1199

In a prosecution charging tomato paste shipped in interstate commerce was adulterated in that it consisted in whole or in part of a filthy, decomposed, or putrid vegetable substance, *held* that whether the process of nature in the tomato between the time it was ready for canning and the time it was actually put into the can may have been such as to cause the alleged condition of the product, was immaterial; the question was whether the product was in the alleged condition at the time of shipment. *United States* v. *Gidden*---- 360

In a prosecution for shipping in interstate commerce a product called "digester tankage" labeled to represent that it contained protein to the amount of 60 to 70 percent, where the evidence in support of the Government's charge that the product contained much less than said percentages of protein was the uncontradicted testimony of Government witnesses based on their analyses of samples of the product shipped, made 6 months after the shipment, *held* that the jury, in order to convict, must find that the amount of the protein found in the product on such analyses was fairly representative of the amount therein at the time the product was shipped. *United States* v. *Swift & Co*---- 717

In a proceeding against a quantity of aletris root transported in interstate commerce, and allegedly adulterated, *held* that the jury, in order to return a verdict for the Government, must find that the whole quantity of the article so transported was adul-

SHIPMENT—Continued. Page

terated, as alleged, at the time it was shipped and while in the course of transportation. *United States* v. *One Bale of Aletris Root* ---- 1212

In a condemnation proceeding against bottled spring water, *held*, that the issue of unwholesomeness under the act, section 7, clause 6, was restricted to the particular shipment and to the condition of the water at the time of shipment. *United States* v. *94 Dozen, More or Less, Half-Gallon Bottles of Capon Springs Water*---- 1216

That a shipper customarily stored bottled spring water to test its wholesomeness would not clear him of a charge of shipping unwholesome water, if at the time of shipment it was unwholesome, though the unwholesomeness were afterwards removed. Id.

The fact that frozen eggs, against which a libel for condemnation was instituted, had been shipped from one State to another and consigned by the shipper to itself, did not indicate that they had not been transported in interstate commerce. *United States* v. *300 Cans of Frozen Eggs*---- 283

The prohibition in the act against the interstate shipment of adulterated or misbranded food or drugs applies to shipments by warehousemen as well as manufacturers or dealers. *United States* v. *Buffalo Cold Storage Co*---- 103

The "shipment" referred to in the act, section 2, should not be construed to mean "shipment for sale." Its meaning in this connection covers any shipment for any purpose in the course of interstate commerce. *Philadelphia Pickling Co.* v. *United States*-- 451

It is not a defense to a prosecution under the act, section 2, for shipping adulterated tomato paste from one State to another that defendant shipped such article from its place of business to itself to its other place of business in another State for the purpose of testing before being sold. Such transaction is interstate commerce and constitutes an offense within said section. *United States* v. *Philadelphia Pickling Co*---- 414

Affirmed, *Philadelphia Pickling Co.* v. *United States*---- 451

It is not a defense to a prosecution under the act, section 2, for shipping an adulterated article of food from one State to another that the article was not shipped for sale, where the shipment was for a business purpose which constituted interstate commerce. Where defendant shipped adulterated tomato paste from its place of business to itself at its other place of business in another state for the purpose of having it there tested with a view to its export to a foreign country if it conformed to the standard of such country, which would have been lawful under the proviso of section 2 of the act, and where the article failed to meet the test and was destroyed, not being used or sold, *held* that its shipment was in interstate commerce and constituted an offense under said section. *Philadelphia Pickling Co.* v. *United States*---- 451

Affirming *United States* v. *Philadelphia Pickling Co*---- 414

Where a drug preparation was shipped in casks by car lots to the owner from its manufacturing agent in another State and the article when received was bottled and properly labeled before being offered for sale, *held* that the casks after receipt were not subject to forfeiture under the act, section 10, because the product was not shipped "for sale." *United States* v. *65 Casks of Liquid Extracts* ---- 47

Affirmed, *United States* v. *Knowlton Danderine Co*---- 89

Libel proceeding under section 10 of the act, for condemnation of a shipment of an article of food for adulteration and misbranding, dismissed on the ground that the evidence showed that the article was not shipped for sale but for use in the manufacture of another article of food. *United States* v. *Three Barrels of Vanilla Tonka and Compound*---- 201

Libel for forfeiture of certain bags of sugar, under section 10 of the act, *held* fatally defective for failure to allege that the sugar seized had been transported for sale. *United States* v. *46 Packages and Bags of Sugar*---- 168

SHIPMENT—Continued.

Page

Libel filed under section 10 of the act, against certain frozen eggs in a warehouse in the original unbroken packages after having been transported in interstate commerce, *held* not fatally defective for failure to charge that the eggs had been transported for sale. *United States* v. *300 Cans of Frozen Eggs*---------- 283

Where adulterated vinegar was proceeded against under the act, and it appeared that it had been the subject of interstate commerce and was seized in the original unbroken packages, it was not material that the evidence showed that it had not been shipped in interstate commerce for sale in such unbroken packages. *United States* v. *100 Barrels of Vinegar*---------- 287

Adulterated eggs which had been shipped from one State to the owners in another, *held* to be subject to seizure and condemnation under section 10 of the act, where the eggs were shipped solely for use by the owners in their bakery business, and not for sale as eggs. *United States* v. *50 Cans of Preserved Whole Eggs*---------- 74

Affirmed, *Hipolite Egg Co.* v. *United States*---------- 223

The provisions of section 10 of the act apply not only to articles of food which have been shipped for sale but also to such article which has been shipped for use as raw material in the manufacture of some other product. *Hipolite Egg Co.* v. *United States*-- 223

Affirming *United States* v. *50 Cans of Preserved Whole Eggs*-- 74

Adulterated eggs transported from one State to another are subject to seizure and condemnation under section 10 of the act, though the article was shipped, not for sale as eggs, but solely for use as raw material in the manufacture of some other product. *United States* v. *Two Barrels of Desiccated Eggs*---------- 232

Where decomposed canned eggs not denatured were shipped in interstate commerce from one warehouse of the owner to another, they constituted "an adulterated food" within sections 2, 6, and 10 of the act, and it was no defense to a proceeding to condemn them that the intention of the owner in so transporting them was to sell or dispose of them for tanning purposes only. *United States* v. *13 Crates of Frozen Eggs*---------- 531

Affirmed, *United States* v. *13 Crates of Frozen Eggs*---------- 605

Where misbranded hog feed was reshipped to the manufacturer by its customer in another State, for the purpose of being remanufactured or remixed and thus being made to conform with statements on the labels, *held* that the feed was subject to seizure and condemnation, though the shipment and transportation of the feed was not "for sale." *United States* v. *426 Bags of Economy Special Hog Feed*---------- 1001

The shipment in interstate commerce of an adulterated food or drug product, which was the subject of a single sale and single shipment, though consisting of numerous packages, constitutes a single offense under section 2 of the act. *United States* v. *Watson-Durand-Kasper Grocery Co*---------- 837

In a proceeding to condemn several shipments of canned salmon as being adulterated in that it consisted in whole or in part of decomposed salmon, each shipment consisting of numerous cases and each case containing 48 cans, *held* that the word "article" in section 7 of the act, relating to adulteration, referred to each lot or shipment, and not to the single separate can, or to the single, separate case. *United States* v. *2,205 Cases of Canned Salmon*---- 1133

The depositing in the mails at a point in Ohio for transmission to Washington, D. C., of a medicine containing cocaine without a label indicating its presence, was interstate commerce and constituted a shipment and delivery of such article for shipment within the act, section 2. The mere fact that the negotiations were carried on by mail and that the sale of the article was completed before it was placed in the mail did not give the transaction an intrastate character. *United States* v. *Tucker*---------- 248

On trial of an information charging defendant with shipping into another State misbranded drugs, *held* essential to a conviction

SHIPMENT—Continued. Page

that the Government establish that defendant shipped the drugs in interstate commerce; and that the sending or shipping of such article by mail from one State to another constitutes an interstate shipment. *United States* v. *Gandara*---------- 984

See Adulteration; Article; Entrapment; Export Articles; Interstate Commerce; Jurisdiction; Knowledge and Intent; Misbranding; Offenses; Original Package; Original Unbroken Package; Package; Penalties; Sale.

SHRED COCOANUT:

An article labeled and sold as "Shred Cocoanut" *held* misbranded by reason of its containing glycerine and sugar, the presence of which substances was not declared on the label. *United States* v. *Dunham Manufacturing Co*---------- 440

SILVER DRAGÉES.

See Confectionery.

SILVER, METALLIC.

See Confectionery.

SIMPSON'S CEREBRO-SPINAL NERVE COMPOUND:

A medicinal preparation labeled "Dr. C. M. Simpson's Cerebro-Spinal Nerve Compound" *held* misbranded in that statements regarding the curative or therapeutic effect of the preparation, appearing on cartons enclosing the bottles containing the article and in circulars enclosed in the cartons with the bottles, were false and fraudulent. *United States* v. *Simpson*---------- 700

Affirmed, *Simpson* v. *United States*---------- 832

SIN IGUAL:

A medicinal preparation labeled "Sin Igual" *held* misbranded in that the labels falsely and fraudulently represented the curative or therapeutic effect of the article with respect to certain diseases. *United States* v. *Gandara*---------- 984

SIRUP:

Food sirup is a saccharine solution of a superior quality, frequently called molasses, and it may be made of any of the various sugars of commerce, such as cane, beet, or maple. *United States* v. *68 Cases of Sirup*---------- 62

Sirup containing 90 percent of white sugar and not more than 10 percent of maple sugar, and labeled "Gold Leaf Syrup", with a design of a maple leaf and sugarcane stalks, and the words "Composed of Maple and White Sugar", together with the name of the maker, held not misbranded. *In re Wilson*---------- 33

Where sirup made from cane sugar and flavored to represent maple sirup by the introduction of an extract from maple wood after it had been chopped down, was labeled "Western Reserve Ohio Blended Maple Syrup", the words "Ohio" and "Maple Syrup" being in red, and between them the word "Blended", and below that, in smaller type, the statement, "This syrup is made from the sugar maple tree and cane sugar", *held* that the label was misleading and the sirup misbranded. *United States* v. *Scanlon*---------- 28

Where certain cases of sirup were labeled "Western Reserve Ohio Blended Maple Syrup. Guaranteed absolutely pure Shipped by Western Reserve Syrup Company, Cleveland, Ohio", and the bottles of sirup contained in the cases were labeled "Western Reserve Ohio Blended Syrup Western Reserve Syrup Company, Cleveland, Ohio, Blenders of Fancy Maple Syrup and Maple Sugar", *held* that, construing all of the words of the bottle label together, the same meaning was intended in the bottle labels as in the labels on the cases, namely, that the bottles and boxes contained blended maple sirup, and that the article was not misbranded although it was composed of cane sirup flavored with an extract made from maple wood. *United States* v. *68 Cases of Sirup*---------- 62

SIRUP—Continued. Page

A sirup consisting of refined cane sirup flavored with an extract of maple wood and described on the label as "Western Reserve Blended Maple Syrup", *held* to be within the provision of the act that an article which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded if labeled so as to plainly indicate that it is a compound, imitation, or blend, and the word "blend" is plainly stated on the package, which term shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring or flavoring only; and that there was therefore no violation of the act. Id.

An article labeled "Topmost Cane and Maple Sirup. This sirup is composed of the following ingredients, and none other: Cane Sirup 60 percent; Maple Sirup 40 percent", *held* misbranded because it contained little, if any, maple sirup. *United States* v. *John A. Tolman & Co* ---------- 78

Sirup which contained no maple sirup and the label of which had the word "Maple" in large letters, and the word "Etta" in smaller letters and underneath and to the right of the word "Maple" and without a hyphen, and the word "Syrup" in letters a little larger than the letters in the word "Maple", and below and in much smaller letters the words "Produced by the delicate blending of refined sugar syrup, cane and maple etta syrups", and farther below and in still smaller characters the words and figures "Over 90% pure", *held* misbranded. *United States* v. *Johnson et al* ---------- 847

A product contained in cans shipped in a case labeled "Two Doz. Purity Quarts Scudder's Canada Syrup, * * * Full Measure", *held* misbranded because each of the cans contained less than one quart of the product. *United States* v. *Scudder Syrup Co* ---------- 461

See Blend; Corn Sirup (Glucose); Maple Sirup; Molasses; Sugar.

SIRUP, GRENADINE:

The term "Grenadine Syrup" in the common acceptation does not necessarily mean a sirup actually made from pomegranates. A sirup labeled "Grenadine Syrup", composed of sugar, citric and tartaric acids, and the juices of certain fruits, *held* not misbranded. *United States* v. *30 Cases Purporting to be Grenadine Syrup* ---------- 394

SMACK:

A manufactured, synthetic concentrate intended for use as a base for a beverage imitative of grape juice, and resembling grape juice in consistency, color, and taste, but not shown to contain any natural grape juice, and labeled, "Smack", held to be an article sold under its own distinctive name and not misbranded. *United States* v. *24⅞ Gallons of Smack* ---------- 1181

SPARKLING WHITE SEAL.

See Champagne.

SPECIMENS.

See Samples.

STANDARDS:

The act is not void for uncertainty and indefiniteness in that no standard of grade, quality, or purity is prescribed, but the determination of standards is left to the courts. While the act is necessarily broad in its terms, the courts can well protect the rights of parties in each particular case by requiring specific and properly drawn pleadings. *United States* v. *420 Sacks of Flour* ---------- 96

There is no merit in the objection that so much of section 7 of the act as relates to food is void because no standard is fixed as to foods. *Shawnee Milling Co.* v. *Temple et al* ---------- 106

Section 8 of the act, prohibiting the misbranding of articles of food or drink so as to deceive or mislead the purchaser, is not invalid,

STANDARDS—Continued. Page

so far as domestic wine was concerned, for failure to establish a standard, as applied to a mixture of wine and fermented solution of dextrose represented to be Hochheimer Typo Rhine wine. *United States* v. *Sweet Valley Wine Co*_____ 468

Congress has the right in the interests of the general public and in the exercise of its control over interstate commerce to prescribe standards with which drugs when shipped in interstate commerce must comply, and has exercised this right in the provision of the Food and Drugs Act declaring that a drug shall be deemed to be adulterated if, when sold under or by a name recognized in the United States Pharmacopoeia or National Formulary, it differs from the standard of strength, quality, or purity as determined by the test laid down in the United States Pharmacopoeia or National Formulary official at the time of investigation. *United States* v. *G. F. Harvey Co*_____ 754

Circular no. 19 issued by the Secretary of Agriculture under authority of act of March 3, 1903, establishing standards of purity for food products and what are regarded as adulterations therein, cannot be considered in determining what constitutes the offense of adulteration in violation of the Food and Drugs Act of June 30, 1906. *United States* v. *St. Louis Coffee & Spice Mills*_____ 44

The standards for purity of food products established by the Secretary of Agriculture in circular no. 19 of the Department, issued by authority of act of March 3, 1903, governs in determining what constitutes adulterations of such products under the Food and Drugs Act of June 30, 1906. *United States* v. *Frank et al*_____ 205

In a libel proceeding for condemnation of vinegar for adulteration, *held* that the Government was not limited to tests for genuine vinegar mentioned in bulletin 65, or to the standards for vinegar established in circular 19 of the Department of Agriculture, or even to methods of analysis adopted under regulation no. 4, but may make use of any accurate test. *United States* v. *100 Barrels of Vinegar*_____ 287

There is no legal standard for 50 as the number of *B. coli* in oysters as determining the presence of filth in sufficient amount to constitute adulteration under the act, and the Department of Agriculture has no right or authority to accept such standard. *United States* v. *408 Bushels of Oysters*_____ 718

Where the quantity of salt in coloring material varied with each manufacturer, and even somewhat in the product of a single manufacturer, and it had the effect of increasing the quantity of coloring material, and, regardless of the percentage used, required great dilution by the user, the Secretary of Agriculture had no authority under the act to establish an arbitrary percentage beyond which manufacturers could not go without violating section 7, and in the absence of any deceptive labeling a coloring material containing a larger percentage of salt did not violate that section. *W. B. Wood Manufacturing Co.* v. *United States*__ 1070

On the issue of whether ice cream is adulterated because it contained only 7.09 percent of butterfat, *held* that, in the absence of any established standard under the act, with respect to ice cream, evidence of the custom or use of the trade was insufficient to warrant the fixing of 14 percent as the minimum amount of butterfat required in ice cream. *United States* v. *Rinchini*_____ 318

In the absence of a standard under the act, for lithia water, where the Government established by the testimony of chemists, pharmacologists, physicians, and druggists that natural lithia water is ordinarily understood to mean a water containing a sufficient amount of lithium to give a therapeutic effect when the water is consumed in reasonable quantities, water containing only 1 grain of lithium in 10,000 gallons of water, and labeled "lithia water", *held* misbranded. *United States* v. *Seven Cases of Buffalo Lithia Water*_____ 573

Affirmed, *Goode* v. *United States*_____ 698

STANDARDS—Continued. Page

In a proceeding to condemn nuts on the ground that they were branded as "fancy mixed nuts" in violation of the act, *held* that, in the absence of a standard of quality for nuts to be so branded, established under authority of the act, the testimony of Government witnesses as to such a standard as understood in the trade was not competent. *United States* v. *25 Bags of Nuts*---------- 677

The standard set by the act as a test of adulteration of a food product is not what is customarily done by manufacturers, but what is properly done. *W. B. Wood Manufacturing Co.* v. *United States*-- 1098

It would be difficult, if not impossible, to fix any arbitrary standard for determining when a food product has reached such a stage of decomposition as to render it "filthy, decomposed, or putrid" within the meaning of the Act. In the absence of such a standard, each case must be determined on its own merits. Where it appears that an article of food is so far decomposed as to be unfit for food, it comes within the letter and spirit of the law. *United States* v. *200 Cases of Adulterated Tomato Catsup*---------- 583

The act has not established a precise standard whereby adulteration can be determined under the act, section 7, paragraph 6, providing that an article of food shall be deemed to be adulterated if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, and therefore the courts have uniformly permitted each case to be judged upon its own special facts. *United States* v. *384 Cases of Canned Cherries*---------- 1176

Provisions of the act prohibiting sale or shipment in interstate commerce of food defined as adulterated if it contain a "decomposed substance", *held* not invalid because the act fails to definitely specify the extent to which the decomposition must have progressed to bring an article within the prohibition. *A. O. Andersen & Co.* v. *United States*---------- 1053

On trial of an information charging shipment of milk adulterated in that it consisted in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, *held* that the jury, in determining whether or not the milk was old and impure at the time it was delivered for shipment, might use the standard prescribed in a statute of the State in which the trial was held providing that "milk containing more than 1,000,000 bacteria per cubic centimeter shall be considered impure milk." *United States* v. *Hopkins*---------- 585

It was no defense to a prosecution for selling adulterated milk in the District of Columbia that there is no standard fixing the limits between pure and impure milk. The dividing line in each instance is a question of fact. *Dade* v. *United States*---------- 465

In the absence of a fixed standard as to the percentage of the flour content of the wheat in flour that may be properly termed patent flour, flour containing 90 percent of the flour content of the wheat, *held* not to be adulterated or misbranded when labeled "Patent Flour." *Lexington Mill & Elevator Co.* v. *United States*---------- 443

An information alleging adulteration and misbranding of a shipment of butter because it was deficient in milk fat, did not charge a violation of the act, where at the time of the shipment there was no law, and no authority under law to make a regulation, prescribing the amount of milk fat in butter. *United States* v. *Swift & Co*---------- 1146

The court, in construing the phrase "added poisonous or added deleterious ingredient", in the act, section 7, declaring that an article of food shall be deemed to be adulterated if it contains any added poisonous or other added deleterious ingredient, must consider section 8, providing that an article of food which does not contain any added poisonous or deleterious ingredient shall not be deemed to be adulterated or misbranded, in specified cases, and, when so construed, the act requires a standard before there can be any added ingredient or adulteration. *United States* v. *40 Barrels and 20 Kegs of Coca Cola*---------- 606

STANDARDS—Continued. Page

The fact that a formula has been made up and followed and a distinctive name therefor adopted does not suffice to take an article from section 7, subdivision 5, of the act. In such a case the standard by which the combination is to be judged is not necessarily the combination itself. A poisonous or deleterious ingredient with the injurious effect stated by the statute may be an added ingredient in the statutory sense although it is covered by the formula and made a constituent of the article sold. *United States* v. *Coca Cola Co*---------- 741

A statement describing a drug as "antiseptic" is not a profession of standard of strength for the article, within the definition of adulteration in the act, section 7. *United States* v. *17 Bottles, Etc., of An Article of Drugs Labeled in Part "B. & M."*---------- 1287

See Added Poisonous and Added Deleterious Ingredients; Adulteration; Constitutionality of the Food and Drugs Act; Executive Officers; Filthy, Decomposed, and Putrid; Misbranding; Pharmacopoeia, United States; Regulations; Samples; Tests.

STARCH.

See Confectionery.

STATE HEALTH OR FOOD OFFICERS:

Section 5 of the act authorizes prosecutions upon the complaint of any State health officer, and the district attorney can institute such a prosecution, upon any adequate proof, without action of agents of the Department of Agriculture. *United States* v. *74 Cases of Grape Juice*---------- 144

Section 5 of the act makes it the duty of the district attorney upon the presentation of "satisfactory evidence" of a violation of the act, by any State health or food officer, to cause appropriate proceedings to be instituted and prosecuted. A preliminary investigation including notice and hearing, provided for in section 4, applies only when the district attorney acts upon report of the Secretary of Agriculture; it is not required when he acts upon evidence furnished by any State health or food officer, or upon his own initiative. *United States* v. *74 (or 20) Cases of Grape Juice*---------- 256

United States v. *Morgan et al*---------- 335

See Examination; Investigation; Notice and Opportunity to be Heard.

STRENGTH.

See Standards.

SUBSEQUENT OFFENSE.

See Indictment; Information; Offenses; Penalties; Prior Conviction; Res Judicata.

SUBSTITUTION:

In a prosecution for adulteration of an article of food by substitution it is unnecessary for the Government to prove that the substituted substance is poisonous or deleterious or injurious to health. It is sufficient within the meaning of the act if any substance not a component part of the original substance has been substituted. *United States* v. *Libby, McNeill & Libby*---------- 442

On a charge of adulteration of an article of food by substitution of another substance, the question whether the substitution of the substance injuriously affects, or makes any difference in, the article of food is immaterial; it is sufficient to constitute adulteration of the article if the substance was substituted in whole or in part therefor. *United States* v. *Bowers*---------- 763

See Adulteration; Injurious to Health.

SUGAR:

All sugars are "like substances" and a mixture of two or more of them produce a "blend" within the meaning of the act. *United States* v. *68 Cases of Syrup*---------- 62

SUGAR—Continued. Page

The introduction of sugar into a frozen egg product did not constitute adulteration thereof within the meaning of the act, where the frozen egg product was prepared according to the directions of the purchaser, and it or a similar article was made under a patent. *United States* v. *443 Cans of Frozen Egg Product*_____ 197

Condensed skimmed milk, containing 42 percent of cane sugar, the presence of which was not declared on the label, *held* adulterated and misbranded. *United States* v. *Libby, McNeill & Libby*_____ 442

Affirmed, *Libby, McNeill & Libby* v. *United States*_____ 540

See Sirup.

SULPHURRO:

A drug product labeled "Sulphurro" *held* misbranded in that the label and a circular or pamphlet inclosed in the package as it was transported in interstate commerce contained false and fraudulent statements regarding the curative or therapeutic effect with respect to certain diseases. *United States* v. *C. M. C. Stewart Sulphur Co*_ 669

SWEET SPIRITS OF EDEN:

An article labeled "Sweet Spirits of Eden", *held* misbranded because the packages and label bore and contained statements regarding its curative or therapeutic effect which were false and fraudulent, and because the quality of alcohol contained in the article was misstated on the packages or label. *United States* v. *Kellett*_____ 711

TALC:

Talc is a mineral compound, not an article of food, and is known as hydrated silicate of magnesia. *United States* v. *R. C. Boeckel & Co. et al*_____ 637

See Confectionery.

TANKAGE.

See Digester Tankage.

TESTIMONIALS.

See Evidence.

TESTS:

The Government is not limited to the tests and standards for vinegar mentioned in Bulletin No. 65, Bureau of Chemistry, United States Department of Agriculture, and Circular 19, United States Department of Agriculture, nor to any other prescribed method of analysis, but may make use of any accurate test. *United States* v. *100 Barrels of Vinegar*_____ 287

Evidence *held* to establish the accuracy of the gylcerin test for the determination of pure cider vinegar. Id.

The use by the Government of the lypolytic decomposition or fatty acid test instead of the organoleptic tests to determine whether dried egg yolk is adulterated, that is, whether it consisted in whole or in part of a filthy, decomposed, or putrid animal substance, *held* not arbitrary or capricious. *Knapp et al.* v. *Callaway, et al*_____ 1276

See Examination; Notice and Opportunity to be Heard; Investigation; Samples; Standards.

TEXAS WONDER:

An article labeled "A Texas Wonder" *held* misbranded in that the label and package contained statements regarding the curative or therapeutic effect of the article with respect to certain diseases and ailments, which were false and fraudulent. *United States* v. *60 Dozen Bottles of "A Texas Wonder"*_____ 888

United States v. *One Gross Packages of "A Texas Wonder"*_____ 910

United States v. *141 Bottles of Drug Products*_____ 931

Judgment in case last cited affirmed, *Hall* v. *United States*_____ 978

THERAPEUTIC.

See Curative and Therapeutic Effects of Drugs.

TOMATO CATSUP: Page

A libel alleging that tomato catsup labeled "Made from choice ripe tomatoes, granulated sugar, selected high-grade spices, grain vinegar was misbranded, because it was made in part from "tomato pulp screened from peelings and cores as the offal of tomato canning factories and not from choice ripe tomatoes", *held* not to set forth a prima facie case of misbranding, as it would not be assumed that, because the peelings and cores were not used in a tomato canning factory, they were not suitable for making tomato catsup. *United States* v. *650 Cases of Tomato Catsup*---------- 31

Tomato catsup, containing bacteria, yeasts, and molds in very large and unusual quantities, and shown to have been manufactured by insanitary methods, *held* adulterated in that it consisted in whole or in part of a filthy, decomposed, or putrid vegetable substance. *United States* v. *200 Cases of Adulterated Tomato Catsup*-------- 583

In a libel proceeding against certain cases of tomato catsup, of which claimant was the manufacturer, for alleged adulteration in that it consisted in whole or in part of a filthy and decomposed vegetable substance, where the Government adduced evidence tending to show that the tomatoes used in the manufacture of the catsup were partly or wholly decomposed or rotton, *held*, on the theory that in the manufacture of tomato catsup the exclusion of all decomposed tomato matter was impossible, that the burden was on the Government to show that in the selection of the tomatoes from which the catsup was manufactured such reasonable care and caution as a person of ordinary care and prudence would use were not exercised to exclude decomposed tomatoes, and that the catsup was decomposed and filthy to an unreasonable extent, or to an extent that a reasonably prudent, cautious, and diligent person engaged in the business of manufacturing such a product would not permit it to be consumed by his own family. *United States* v. *1,038 Cases of Tabasco Flavor Catsup*---------- 871

In a proceeding against a shipment of tomato catsup alleged to be adulterated in that it consisted in whole or in part of a filthy, decomposed, or putrid vegetable substance, *held*, on evidence of the presence of molds, yeasts and spores, and bacteria in the catsup, that the jury, in order to return a verdict in favor of the Government, must find that there was such a substantial presence of mold, yeasts or spores, or bacteria as to render the product filthy, decomposed, or putrid, in the common, ordinary, and practical sense of the words. *United States* v. *720 Cases of Tomato Catsup*- 877

Tomato catsup *held* adulterated in that it consisted in whole or in part of a filthy, decomposed, or putrid vegetable substance. *United States* v. *275 Cases Tomato Catsup*---------- 141

Tomato catsup *held* adulterated in that it consisted in whole or in part of a decomposed vegetable substance. *United States* v. *1,246 Cases of Tomato Catsup*---------- 943

Where pumpkin was added to tomato catsup, the fact that it was merely labeled "Compound" was not sufficient to constitute compliance with the act, which requires that such article be labeled, branded, or tagged so as to plainly indicate the substances composing the compound. *William Henning & Co.* v. *United States*---- 344

TOMATOES, CANNED:

A libel in a proceeding instituted for seizure and condemnation of canned tomatoes as adulterated and misbranded in violation of the act, representing that the article as analyzed in the Department of Agriculture was shown to be adulterated in that tomato pulp had been mixed and packed with, and substituted wholly or in part for, the article, and representing that the article as so analyzed was shown to be misbranded in that the labels contained the statement "Tomatoes" and a cut of a ripe tomato, which were false and misleading and deceived and misled the purchaser, *held* insufficient in that it did not contain allegations of substantive facts which clearly showed the right of the Government to seize and condemn the goods. *United States* v. *154 Cases of Tomatoes*- 967

TOMATOES, CANNED—Continued. Page

Canned tomatoes *held* not adulterated or misbranded by reason of alleged addition of water thereto. *United States* v. *3,998 Cases of Canned Tomatoes*---- 1213

TOMATO PASTE:

Tomato paste *held* adulterated in that it consisted in whole or in part of a filthy, decomposed, or putrid vegetable substance. *United States* v. *Gidden*---- 360

TOMATO PULP:

Tomato pulp *held* adulterated because it consisted in whole or in part of filthy or decomposed vegetable substance. *United States* v. *5,060 Cans of Tomato Pulp*---- 780

Tomato pulp *held* adulterated in that it was filthy or decomposed, on evidence that it contained mold indicating that decomposed tomatoes had entered into the manufacture of the product. *United States* v. *1,500 Cases of Tomato Pulp*---- 892

TOMATO PUREE:

In an action to condemn "tomato puree" as adulterated in that it consisted in whole or in part of a filthy or decomposed vegetable substance, *held*, on evidence of the presence of molds in the product, that the jury, in order to return a verdict for the Government, must find that there was such a substantial presence of molds as to render the product filthy or decomposed in the common and practical sense of the words. *United States* v. *1,000 Cases of Tomato Puree*---- 704

TRADE MARK:

The filing of a trade mark for an article of food or drug does not give the manufacturer the right to put a false statement upon the label of the manufactured article. The fact that the name of an article is a registered trade mark is no defense to a prosecution for misbranding by false or misleading statements on the label of the article. *United States* v. *American Chicle Co*---- 362

While it is true that the mere fact of trade mark does not take the product out of the operation of the act, nevertheless, where it appears that the product does not in any way violate any of the provisions of the statute, the rights of the owners of the trade mark must have consideration and they may not be deprived of their property rights in order to meet some untenable position taken by someone in authority to whom is delegated the power to invoke the aid of the statute. *United States* v. *23 7/12 Dozen Bottles, Etc., of An Article of Drugs Labeled "Lee's Save The Baby"*---- 1240

See Distinctive Name.

TRANSPORTATION.

See Interstate Commerce; Shipment.

TRATAMIENTO ZENDEJAS:

An article labeled "Tratamiento Zendejas" *held* misbranded in that the package and label contained statements regarding the curative or therapeutic effect of the article which were false and fraudulent. *United States* v. *186 Bottles of Tratamiento Zendejas*---- 998

TUBERCLECIDE:

In a prosecution for alleged misbranding of a medicine labeled "Tuberclecide" in that the labels falsely and fraudulently represented it as a remedy for tuberculosis, evidence *held* insufficient to show that statements appearing on the labels were false. *United States* v. *Tuberclecide Co*---- 729

TUNA FISH, CANNED:

Canned tuna, labeled "Tuna for pets. Not intended for human consumption", *held* to be subject to condemnation and forfeiture, where it appeared that the contents of practically one-third of the cans were decomposed or tainted. *United States* v. *620 Cases of Canned Tuna Fish*---- 1281

TURPENTINE, SPIRITS OF: Page

An article sold as spirits of turpentine *held* adulterated because it contained mineral oil. *United States* v. *Lorick & Lowrance*_____ 202

UNFIT FOR FOOD:

"Unfit for food", as used in the act, section 7, paragraph 6, means what is ordinarily understood by the expression. *United States* v. *1,974 Cases of Canned Salmon*_____ 1108

The expression "unfit for food", as used in the act, section 7, paragraph 6, means reasonably unfit for human food. *United States* v. *2,995 Cases of Canned Salmon*_____ 1136

It is a matter of common knowledge, in determining whether an article is fit or appropriate for human food, that it be taken into account whether the article is harmful; whether it has food value; whether it satisfies hunger; whether it builds up wasted tissues exhausted because of lack of food; and, to a certain extent, whether it pleases the taste. Id.

In a prosecution charging shipping eggs adulterated in that they coonsisted in whole or in part of a filthy, decomposed, and filthy animal substance, held, that the jury in order to convict, must find that the eggs were decomposed to such an extent that they were unfit for food at the time they were shipped. *United States* v. *Blazek*_____ 1074

In a libel proceeding to condemn a shipment of canned salmon as adulterated in that it consisted in whole or in part of a filthy, decomposed, or putrid animal substances, *held* that the jury, in order to find for the Government, must find that the salmon was so filthy, decomposed, or putrid as to make it "unfit for food" as that expression is ordinarily understood, and that such adulteration extended to the whole shipment. *United States* v. *1,974 Cases of Canned Salmon*_____ 1108

The expression "unfit for food", in the provision of the act, section 7, that an article of food shall be deemed to be adulterated "if it consists in whole or in part of a filthy, decomposed, or putrid animal substance, or any portion of an animal *unfit for food*, etc.", construed to qualify the first clause of the provision, that is, "if it consists in whole or in part of a filthy, decomposed, or putrid animal substance." Id.

United States v. *2,995 Cases of Canned Salmon*_____ 1136

In a proceeding for condemnation of canned salmon as adulterated within the provision of the act that an article of food shall be deemed adulterated if it consists in whole or in part of a filthy, decomposed, or putrid animal substance, *held* that in order to warrant condemnation the jury must find that the salmon was filthy or decomposed or putrid to an extent that rendered it reasonably unfit for human food. *United States* v. *1,974 Cases of Canned Salmon*_____ 1108

United States v. *2,995 Cases of Canned Salmon*_____ 1136

The act does not use the words "unfit for food", but when it describes an adulterated article of food as one which is "decomposed and filthy" it means undoubtedly unfit for food to the extent that it would be improper and unfit food for a person to indulge in. *United States* v. *3,000 Pounds of Frozen Eggs*_____ 198

Where it appears that an article of food is so far decomposed as to render it unfit for food, it comes within the letter and spirit of the law which condemns as adulterated foods which consist in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance. *United States* v. *200 Cases of Adulterated Tomato Catsup*_____ 583

A. O. Andersen & Co. v. *United States*_____ 1053

A libel charging that an article of food is adulterated in that it consists in whole or in part of a filthy, decomposed, or putrid vegetable substance states completely and distinctly an offense under the act, section 7, and therefore an added allegation in the libel that the article "is unfit for food" may be rejected as surplusage; and, on a trial of the libel, it was unnecessary for the

UNFIT FOR FOOD—Continued. Page

Government to prove that the article was unfit for food. The test of adulteration in such case is not to be determined by the answer to the question whether the article is or is not fit for food. *United States* v. *275 Cases Tomato Catsup*---------- 141

If an article of food consists in whole or in part of a filthy or decomposed vegetable substance, it is not necessary, in order to come within the prohibition of the act, that it be so filthy or decomposed as to be unfit for food. *United States* v. *720 Cases of Tomato Catsup*---------- 877

Under section 7 of the act an article of food is adulterated and subject to condemnation and forfeiture if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, and it is unnecessary that it be shown to be unfit for food, or deleterious, if eaten. *United States* v. *200 Cases, More or Less, of Canned Salmon*---------- 1095

In a proceeding to forfeit canned pork and beans because the product consisted in whole or in part of a decomposed vegetable substance, *held* that whether or not the product was unfit for human food, or would be deleterious to health, if eaten, was irrelevant and the Government was not required to establish the affirmative as to either. *United States* v. *1,367 Cases of Pork and Beans*-- 766

United States v. *5,060 Cans of Tomato Pulp*---------- 780

On a charge in a libel to condemn canned salmon, that it was adulterated in that it consisted in whole or in part of a decomposed animal substance, *held* that any evidence tending to show the salmon to be fit or to be unfit for food was improper for consideration by the jury and was to be disregarded. The letter of the statute prohibits the transportation and sale in interstate commerce of any article of food which is decomposed. The words are clear and free from ambiguity. There is nothing in the statute itself which would make the state of healthfulness or edibleness of the article relevant to the inquiry. It makes no difference whether the salmon was fit for food and healthful or not. *United States* v. *2,205 Cases of Canned Salmon*---------- 1133

The condition of a product in the hands of a consumer is the place and time to test its fitness for food. *United States* v. *443 Cans of Frozen Egg Product*---------- 345

See Adulteration; Dangerous to Health; Filthy, Decomposed, and Putrid; Injurious to Health; Misbranding.

VANILLA EXTRACT OR FLAVOR:

An information charging that defendant shipped in interstate commerce a liquid labeled "Flavor of Vanilla", and that it did not contain any extract of vanilla, does not state a case of adulteration or misbranding of vanilla extract in violation of the act, the words "extract" and "flavor" not being synonymous terms. *United States* v. *St. Louis Coffee & Spice Mills*---------- 44

An article labeled "Prime Vanilla Extract, made from the extractive matter of prime vanilla beans, sweetened with cane sugar", which contained only 2 grains of the vanilla bean to each 100 cc of the extract, and which was artificially colored with caramel, and contained added vanillin, *held* adulterated and misbranded. *United States* v. *Hudson Manufacturing Co*---------- 462

A flavoring substance composed of vanillin, coumarin, and burnt sugar, labeled, "Extract of Vanillin and Coumarin, Burnt Sugar Color", *held* adulterated in that it was colored in a manner whereby its inferiority was concealed; and *held* misbranded in that it was an imitation of vanilla extract and was not labeled as an imitation; and further misbranded in that it was a compound, and was not labeled so as to plainly indicate that it was a compound, and the word "compound" was not stated on the label. *United States* v. *McConnon & Co*---------- 496

A product shipped in interstate commerce as vanilla extract, *held* adulterated and misbranded in that it was not in fact vanilla extract, but was a solution of coumarin artificially colored with caramel. *United States* v. *Lowenthal*---------- 626

VANILLA EXTRACT OR FLAVOR—Continued. Page

Articles labeled "Extract of Vanilla" and "Ext. Vanilla" *held* misbranded because they were not true extract of vanilla, but were compounds of vanillin and coumarin artificially flavored and colored. *United States* v. *S. Gumpert et al*---------- 182

See Hudson's Extract; Lemon Extract or Flavor; Orange Extract or Flavoring.

VANILLIN:

Vanillin added to vanilla extract as such constitutes adulteration, and the resultant product is misbranded if labeled "Prime Vanilla Extract, made from the extractive matter of prime vanilla beans." *United States* v. *Hudson Manufacturing Co*---------- 462

See Vanilla Extract or Flavor.

VAPEX:

An article designated "Vapex", used as an inhalant for the treatment of head colds, *held* to be a "drug" within the meaning of the act, and not exempt from the provision of the act defining drugs as misbranded if the packages fail to bear a statement on the label of the quantity or proportion of alcohol. *United States* v. *11 Cartons of Drug Labeled in Part "Vapex"*---------- 1332

VENUE.

See Affidavits; Jurisdiction.

VINEGAR:

Vinegar is a food product, as defined in the act, section 6. *United States* v. *95 Barrels, More or Less, Alleged Apple Cider Vinegar*-- 1047

Apple cider, as defined in the dictionaries and as commonly and popularly understood, is the expressed juice of fresh apples, and apple vinegar is commonly and popularly understood to be produced by the alcoholic and acetic fermentation of that kind of cider. Id.

It is a matter of common knowledge that cider vinegar is far superior to distilled vinegar. *United States* v. *10 Barrels of Vinegar*- 254

Distilled vinegar and boiled apple cider are unlike substances and a mixture of the two do not constitute a blend within the meaning of the act. *Held* that a substance labeled "Saratoga Brand Vinegar, A Blend of Pure Boiled Apple Cider and Distilled Vinegar", which was composed of distilled vinegar and a small quantity of pure boiled apple cider, and containing no cider vinegar, was misbranded, as leading the public to believe that the article was composed of pure boiled apple cider cinegar and distilled vinegar. Id.

Vinegar labeled "Apple Cider Vinegar Made from Selected Apples", which was manufactured from evaporated apples by adding before pressing an amount of water substantially equal to that removed by evaporation, and being similar in taste, composition, and chemical test to vinegar made from the expressed juice of fresh apples, *held* misbranded in that the label bore statements regarding the article and the ingredients or substances contained therein which were false and misleading, and in that it was offered for sale under the distinctive name of another article. *United States* v. *95 Barrels, More or Less, Alleged Apple Cider Vinegar*-- 1047

Reversed, *Ninety-five Barrels, More or Less, Apple Cider Vinegar* v. *United States*---------- 1079

Judgment C. C. A. reversed, *United States* v. *95 Barrels, More or Less, Alleged Apple Cider Vinegar*---------- 1118

Claimant manufactured vinegar from sound and mature apples, free from rot and ferment, from which, for the purpose of preservation 80 percent of the water had been evaporated and an equal amount of pure water added before pressing. The liquid obtained by the pressing was identical in taste, substance, and chemical test to cider pressed from unevaporated apples. If any constituent element of the apple was removed by the evaporating process it was

VINEGAR—Continued. Page

so small that its absence was not shown by chemical test. Vinegar so made had been extensively sold in the market for many years as "apple cider vinegar." *Held* that such name was not a misbrand. *Ninety-five Barrels, More or Less, Apple Cider Vinegar* v. *United States*---- 1079

Reversing judgment in *United States* v. *95 Barrels, More or Less, Alleged Apple Cider Vinegar*---- 1047

Vinegar made from dried apples by adding water equivalent to that removed in the drying and fermenting the resulting solution, even though it be similar to vinegar produced directly from fresh apple cider and equally wholesome, is not the same thing; and a label describing it as "Apple Cider Vinegar Made from Selected Apples" is misleading to the public, and a misbranding within the meaning of the act. *United States* v. *95 Barrels, More or Less, Alleged Apple Cider Vinegar*---- 1118

Reversing judgment C. C. A. in *Ninety-five Barrels, More or Less, Apple Cider Vinegar* v. *United States*---- 1079

In a libel proceeding for condemnation and forfeiture of vinegar alleged to be adulterated the Government, in its proof, is not limited to the standards mentioned in bulletin no. 65 and circular no. 19 of the Department of Agriculture, nor to the methods of analysis adopted under regulation 4, but may make use of any accurate test. *United States* v. *100 Barrels of Vinegar*---- 287

Where samples of alleged pure cider vinegar showed only from 0.11 to 0.16 glycerin, it was held not to be pure cider vinegar, but an adulterated article. Evidence *held* to establish the accuracy of the glycerin test for the determination of pure cider vinger. Id.

Evidence *held* insufficient to warrant condemnation of an article labeled "Pure Apple Cider Vinegar" as adulterated and misbranded. *United States* v. *1,300 Cases of Vinegar*---- 899

See Cider; Standards; Tests.

VODKA:

An article labeled "Vodka for Passover" *held* misbranded because statements on the label in the Russian and Hebrew languages represented that the article was imported vodka produced in the Empire of Russia, when in fact it was a domestic product and had been manufactured in the United States. *United States* v. *Russian Monopol Co*---- 784

WAREHOUSEMEN:

The act, prohibiting shipment, etc., of adulterated food and drugs, applies to warehousemen shipping such goods, as well as to manufacturers or dealers. *United States* v. *Buffalo Cold Storage Co*---- 103

WATER.

See Bethesda Natural Mineral Spring Water; Buffalo Lithia Water; Capon Springs Water; Crab Orchard Concentrated Mineral Water; Crab Orchard Mineral Water; Imperial Spring Water; Robinson Spring Water.

WATER-GROUND MEAL:

The term "water-ground" means ground by a mill using water as a motive force applied directly to a water wheel, and does not allude to meal ground by electric power generated originally by water. *United States.* v. *58 Sacks and 70 Sacks Corn Meal*---- 322

See Corn Meal.

WEIGHT, MEASURE, AND NUMERICAL COUNT:

The provision of the act, section 8, paragraph 3, as amended by act March 3, 1913, that an article of food shall be deemed misbranded if in package form, the quantity of the contents be not plainly and conspicuously marked on the outside thereof in terms of weight, measure, or numerical count, with the proviso that "reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations

WEIGHT, MEASURE, AND NUMERICAL COUNT—Continued. Page

made in accordance with section 3 of the act", *held* unconstitutional as too indefinite, not setting up any ascertainable standard of guilt. *United States* v. *Shreveport Grain & Elevator Co*_____ 1239

Reversed, *United States* v. *Shreveport Grain & Elevator Co*____ 1339

The provision of the act, section 8, paragraph 3, as amended by act March 3, 1913, declaring food misbranded if in package form, the quantity of the contents thereof is not plainly and conspicuously marked on the outside thereof in terms of weight, measure, or numerical count, with the proviso that "reasonable variations shall be permitted, etc., by rules and regulations made in accordance with section 3 of the act", *held* unconstitutional in that the provision, and particularly the proviso as to "reasonable variations", constituted a fixing by Congress of an unascertainable standard of guilt, and was inadequate to inform persons accused of violations thereof, of the nature and cause of the accusation against them. *United States* v. *American Maid Flour Mills*_____ 1286

The act, section 8, paragraph 3, as amended by act March 3, 1913, declaring food misbranded if the quantity of the contents of the package be not plainly and conspicuously marked thereon in terms of weight, measure, or numerical count, and providing that "reasonable variations" shall be permitted, *held* not unconstitutional for uncertainty in describing the offense. *United States* v. *The Merchants Biscuit Co*_____ 1129

The provision of the act, section 8, subdivision 3, as amended by act March 3, 1913, declaring food misbranded if the quantity of the contents is not plainly marked on the outside of the package, provided that reasonable variations shall be permitted, etc., is very specific and there can be no doubt as to what is required of the producers or manufacturers in order to comply therewith. The provision is not made uncertain because a "reasonable variation" shall be permitted. It does not mean that such persons do not have to ascertain accurately and affix to the package a statement of the weight, measure, or numerical count of the contents at the time the product is put in the package, but it does mean that if, due to causes over which they have no control, an unavoidable variation occurs after the goods leave their possession, then the law is not violated, if the variation is a reasonable one. Id.

The act, section 8, as amended by the act of March 3, 1913, provides that food is misbranded if the quantity of the contents is not plainly marked on the outside of the package in terms of weight, measure, or numerical count, and further provides that reasonable variations shall be permitted and tolerances and also exemptions as to small packages shall be established by rules and regulations in accordance with the provisions of section 3. *Held* that the provision requiring quantity of contents to be plainly marked on the outside of the package describes the offense with reasonable certainty and is not invalid, and that the provision respecting variations, tolerances, and exemptions is no part of the definition of the offense, but is a direction as to the exercise of administrative power. *United States* v. *Centralia Dairy Co*_____ 1336

The act, section 8, declaring that an article of food in package form shall be deemed to be misbranded if the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count, with the proviso "That reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with section three", is not, by reason of said proviso, open to the constitutional objection of uncertainty in defining the offense; nor is said proviso an unconstitutional delegation of legislative power. *United States* v. *Shreveport Grain & Elevator Co*_____ 1339

Reversing *United States* v. *Shreveport Grain & Elevator Co*____ 1239

It is no defense to a prosecution for misbranding as to the measure of the contents of cans of sirup that the short measure was caused by filling the cans while the sirup was hot and that the shortage

WEIGHT, MEASURE, AND NUMERICAL COUNT—Continued. Page

was due to shrinkage which occurred when the sirup cooled. If the sirup was short in measure when shipped, it was misbranded. *United States* v. *Scudder Syrup Co.*---- 461

That there was a custom in the trade to label packages so as to state approximately the quantity in liquid or solid measure nearest the general size of the package, such package being known as commercial quarts, half gallons, etc., or that a seller's circulars and price lists, with reference to which sales were made to retailers, stated that the quantities specified were "commercial measure", did not excuse violations of the act, which provides in section 8, as amended by act March 3, 1913, that food or drugs are misbranded if the package or label bears any false or misleading statement, or if, in case of food in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count. *United States* v. *Rigney & Co*---- 632

Since butter varies in its moisture content which cannot be absolutely controlled, and is liable to dry out and thereby lose weight after manufacture, and this fact is known to the trade, a company engaged in the manufacture and shipping of butter in interstate commerce is presumed conclusively to have full knowledge of that fact and the necessary results that follow therefrom, and in manufacturing and shipping its product in interstate commerce it must make reasonable allowance for this variation and see that each package contains, when shipped, the amount of butter stated thereon, with such reasonable variations permitted and such tolerances allowed as are established by regulations made in accordance with section 3 of the act. *United States* v. *Trinidad Creamery Co*---- 1152

In a prosecution on a charge of misbranding shipments of an article of food on the ground that the packages contained less than the quantity stated thereon, *held* that, in order to convict, the jury must be satisfied beyond a reasonable doubt that the packages did not contain the quantity stated thereon, at the time they were shipped. *United States* v. *Barnet Creamery Association*---- 1149

See Constitutionality of the Food and Drugs Act; Knowledge and Intent; Regulations.

WHEAT:

An article sold as "No. 2 Red Wheat" *held* adulterated because wheat of inferior grades and kinds had been substituted for the article and had been mixed and packed with it so as to reduce, lower, or injuriously affect its quality; and *held* misbranded in that said article was labeled and branded so as to deceive and mislead the purchaser, and in that it was sold under the distinctive name of another article, to wit, No. 2 Red Wheat. *United States* v. *Hall-Baker Grain Co*---- 291

Reversed, *Hall-Baker Grain Co.* v. *United States*---- 391

WHEAT MIDDLINGS:

Where it appeared that "wheat middlings with mill-run ground screenings not exceeding 8%" was generally known as any one of the byproducts of the milling of wheat flour, exclusive of bran, which resulted after the major flour-recovering processes, and consisted of wheat offal which would pass through a screen having 18 or more meshes per linear inch, to which was added ground mill-run screenings not exceeding 8 percent, an article labeled "Wheat Middlings with Mill-Run Ground Screenings", manufactured as described, but with the difference that the mixture of wheat offal passing through a screen having 18 meshes per linear inch, and the added mill-run screenings not exceeding 8 percent, was pulverized by passing it through a grinder, *held* not adulterated within the meaning of section 7 of the act, declaring any article of food adulterated if mixed or powdered in a manner whereby inferiority is concealed. *United States* v. *200 Sacks of Wheat Middlings*---- 1189

WHISKY: Page

The word "whisky", in its general acceptation, means a distillate made from grain. The term "Bourbon whisky", as generally understood, is confined to a distillate of a fermented mixture of grain of which corn forms the greater part, and to such liquor distilled in certain localities, particularly Kentucky. A product distilled at New Orleans, La., and from a mixture of molasses, sulphuric acid, and water, and labeled "Bourbon Whisky", *held* misbranded. *United States* v. *50 Barrels of Whisky*---------- 22

WILLIAMS' PINK PILLS:

An article labeled "Dr. Williams' Pink Pills" *held* misbranded in that the labels and packages bore and contained statements regarding the curative or therapeutic effect of the article with respect to specified diseases, which were false and fraudulent. *United States* v. *Eleven Gross Packages of Dr. Williams' Pink Pills* ---------- 680

Affirmed, *Eleven Gross Packages of Dr. Williams' Pink Pills* v. *United States*---------- 752

WINE:

The word "wine" is, by general acceptance and standard definition, understood to mean the fermented juice of the undried grape. *United States* v. *Sweet Valley Wine Co*---------- 468

Wine labeled "Ohio Claret Wine", but consisting wholly or partly of pomace wine, *held* adulterated and misbranded. *United States* v. *60 Barrels of Wine*---------- 658

See Champagne.

WITNESSES.

See Depositions and Interrogatories; Evidence.

WORLD'S GREATEST KIDNEY AND BLADDER REMEDY:

An article labeled "World's Greatest Kidney and Bladder Remedy", *held* misbranded in that the label contained representations as to the curative or therapeutic effect of the article with respect to certain diseases, which were false and fraudulent. *United States* v. *Long*---------- 989

WRIGHT'S CONDENSED SMOKE:

An article made by distilling wood, and sold for curing meat, *held* not misbranded by the label "Wright's Condensed Smoke. A Liquid Smoke", such name being a fanciful or descriptive name and not implying to the purchaser that the article was actually smoke in condensed liquid form. *United States* v. *Wright et al*-- 482

WRIT OF ERROR.

See Appeal and Error.

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